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.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The Secretary of the Interior is charged by the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, and other public land law statutes with management of grazing on the public rangelands. Among other things, those statutes direct the Secretary to "make such rules and regulations * * *, and do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. 315a. The Secretary issued final amended public rangeland management regulations in February 1995, following a lengthy rulemaking in which petitioners participated, along with state and local officials, ranchers, and other public land users. The questions presented are:

1. Whether the Secretary acted within his authority in issuing amended rules that (a) use the term "grazing preference" to denote the preference to be accorded qualified applicants for grazing permits, and (b) use the term "permitted use" to denote the extent of use of rangelands allowed under a grazing permit.

2. Whether the Secretary acted within his authority in issuing a rule that vests title in the United States to new permanent improvements on rangelands owned by the United States.

3. Whether the Secretary acted within his authority in issuing an amended rule identifying the "mandatory qualifications" for applicants for grazing permits on public rangelands.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 167 F.3d 1287. The original opinion of the court of appeals is reported at 154 F.3d 1160. The opinion of the district court (Pet. App. 75a-100a) is reported at 929 F. Supp. 1436.

JURISDICTION

The order on rehearing and amended judgment of the court of appeals (Pet. App. 71a-72a) was entered on February 8, 1999. On April 23, 1999, Justice Breyer extended the time for filing a petition for a writ of certiorari to June 9, 1999, and the petition was filed on that date. The petition was granted on October 12, 1999. 119 S. Ct. 320. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent provisions of the Taylor Grazing Act, Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. 315 *et seq.*, and the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744, 43 U.S.C. 1701 *et seq.*, are *reprinted in* Pet. App. 101a-115a. Pertinent provisions of the Public

Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803, 43 U.S.C. 1901 *et seq.*, are reprinted in App., *infra*, 1a-8a. Portions of 43 C.F.R. Part 4100 (1994) and 43 C.F.R. Part 4100 (1995) are reprinted at Pet. Br. App. 1a-58a.

STATEMENT

1. From the United States' acquisition of the vast lands of the West in the nineteenth century until the 1930s, Congress generally maintained a policy of disposal of those lands. See generally Paul W. Gates, *History of Public Land Law Development* 1-32, 463-494 (1968); Philip O. Foss, *Politics and Grass: The Administration of Grazing on the Public Domain* 8-38 (1960). What this Court said with respect to public forestry lands was equally true of the public rangelands: "a sort of implied license [was recognized] that these lands * * * might be used so long as the Government did not cancel its tacit consent." *Light* v. *United States*, 220 U.S. 523, 535 (1911). That tacit consent of the United States to "suffer[] its public domain to be used for [grazing] purposes," however, "did not confer any vested right" to use the public lands. *Ibid.* By the 1930s, over-grazing through the unrestricted access to public lands had caused substantial injury to those lands. See Gates, *supra*, at 607. The situation was "a source of grave national concern, both to Government officials interested in the conservation of the natural resources of the public domain and stockmen whose operations are dependent upon grazing." H.R. Rep. No. 903, 73d Cong., 2d Sess. 2 (1934).[1]

[1] On the first anniversary of the law bearing his name, Representative Taylor explained the need for the law: "a very large part of the public lands had become badly overgrazed, eroded, and entirely barren; * * * roving itinerant sheepmen came into competition with the many thousands of resident ranchmen throughout the West who owned their lands and homes near the public domain. * * * In the absence of Federal legislation many of the States were compelled to assume jurisdiction over the public domain to keep the peace and prevent bloodshed and ruthless destruction of property." 79 Cong. Rec. 10,394 (1935).

a. *The Taylor Grazing Act of 1934 (TGA).* The TGA, 43 U.S.C. 315 *et seq.*, was passed during an ongoing debate over whether the policy of disposal and largely unregulated use of federal lands should continue, or be replaced by a policy of retention and management by the federal government. See generally Foss, *supra*, at 39-58; George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 Envtl. L. 1, 40-48 (1982). The TGA represented the first step by Congress to impose administrative control over federal rangelands.

Section 1 of the TGA authorizes the Secretary of the Interior to establish "grazing districts" on those portions of the public domain "which in his opinion are chiefly valuable for grazing and raising forage crops." 43 U.S.C. 315.[2] Section 2 directs the Secretary to "make such rules and regulations * * *, and do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. 315a.

Under Section 3 of the TGA, the Secretary may issue "permits to graze livestock on such grazing districts." 43 U.S.C. 315b. Those qualified to receive grazing permits are "such bona fide settlers, residents, and other stock owners as under [the Secretary's] rules and regulations are entitled to participate in the use of the range." *Ibid.* Within that larger class of qualified applicants, "[p]reference shall be given in

[2] The Act initially provided for the creation of grazing districts with an aggregate area of not more than 80 million acres. 43 U.S.C. 315 (1934). Congress raised that limitation to 142 million acres in 1936 (Act of June 26, 1936, § 1, 49 Stat. 1976) and deleted the limitation altogether in 1954 (Act of May 28, 1954, § 2, 68 Stat. 151).

the issuance of grazing permits" to "those within or near a district 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 lands, water or water rights owned, occupied, or leased by them." *Ibid.* Section 3 further provides that permits shall be for a period of not more than ten years and that the Secretary "shall specify from time to time numbers of stock and seasons of use." *Ibid.* Finally, Section 3 states that "[s]o far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded," but that the issuance of a permit "shall not create any right, title, interest, or estate in or to the [public] lands." *Ibid.*

Nothing in the Act requires the Secretary, in deciding whether to issue, renew, or modify permits, to allow livestock grazing to the exclusion of other interests. To the contrary, Congress amended the TGA in 1936 to provide that "[t]he Secretary of the Interior is authorized * * * to examine and classify any lands * * * within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, *or more valuable or suitable for any other use* than for the use provided under this subchapter." Act of June 26, 1936, Tit. I, § 2, 49 Stat. 1976, 43 U.S.C. 315f (emphasis added). See *LaRue* v. *Udall*, 324 F.2d 428, 430 (D.C. Cir. 1963) ("[T]he Taylor Grazing Act is a multiple purpose act."), cert. denied, 376 U.S. 907 (1964).

Notwithstanding the broad authority conferred on the Secretary, the Division of Grazing (whose functions subsequently were assumed by the Bureau of Land Management (BLM)) was chronically short-staffed, with each field employee responsible for administering, on average, 4.2 million acres. See Wesley Calef, *Private Grazing and Public Lands* 59 (1960). Consequently, the Secretary relied heavily on the ranchers themselves, through grazing advisory boards, to

implement the TGA and regulations. See generally Hugh E. Kingery, *The Public Grazing Lands*, 43 Denver L.J. 329, 337 (1966). Although a principal purpose of the TGA was "to stop injury to the public grazing lands by preventing overgrazing," 48 Stat. 1269 (preamble), "in virtually all cases, the number of livestock licensed under temporary permits [issued shortly after the TGA's enactment] was greater than the range could properly support." Calef, *supra*, at 61.

Some ranchers remained focused on the same kinds of short-term economic interests that had caused the devastating deterioration of the range prior to the TGA, and thus were ineffective stewards "to preserve the land and its resources from destruction or unnecessary injury." 43 U.S.C. 315a. Over-grazing of BLM lands continued into the 1960s, even as the Secretary was decreasing the number of livestock permitted to graze on federal rangeland. By 1970, the following general administrative practices were considered established:

> Downward adjustments in permitted use because of range conditions are provided for in most agency permits and, when range becomes badly deteriorated, the practice is to make such adjustments rather than to refuse to renew permits. Additionally, allocation of the available forage to another use, such as wildlife, may be made.
>
> Permits may also be terminated for failure to comply with the terms of the permit. Most disturbing to permittees, however, is the fact that permits may be cancelled at any time if the land covered passes from the administrative control of the particular agency issuing the permit, as by withdrawal or exchange.
>
> Permittees are not usually entitled to compensation for reduction of use or permit termination. There are limited exceptions to this. When the land is directed to use for defense projects, the loss of the permit may be

> compensated. Also, when a permit is terminated, in some instances the permittee may be compensated for loss of improvements he has placed on the land.

Public Land Law Review Commission, *One-Third of the Nation's Land* 109 (1970) (footnotes omitted).

b. *Federal Land Policy and Management Act of 1976 (FLPMA).* By 1976, a growing concern with the management of federal lands led Congress to enact the FLPMA, 43 U.S.C. 1701 *et seq.*, "the first comprehensive, statutory statement of purposes, goals, and authority for the use and management of about 448 million acres of federally-owned lands administered by the Secretary of the Interior through the Bureau of Land Management." S. Rep. No. 583, 94th Cong., 1st Sess. 24 (1975). The Senate Report on the FLPMA, 43 U.S.C. 1701 *et seq.*, explained: "While the Nation has come to regard the national resource lands as a permanent national asset which, for the most part, should be retained and managed on a multiple use, sustained yield basis," the public land-use laws then in effect had been enacted when "the Federal Government was regarded only as a temporary custodian of those lands," and thus "these laws [were] often conflicting, on occasion truly contradictory, and, to a serious extent, incomplete and inadequate." The FLPMA "would consolidate these laws, remove conflicts, and provide missing authority." *Ibid.* See 43 U.S.C. 1701(a). The FLPMA therefore mandated a policy of managing public lands "on the basis of multiple use and sustained yield." 43 U.S.C. 1701(a)(7); see also 43 U.S.C. 1702(c) (defining "multiple use").

The FLPMA prescribed the comprehensive use of "land use plans" to determine the proper multiple-use mix of all public lands, including grazing lands. 43 U.S.C. 1701(a)(2), 1712; see also H.R. Rep. No. 1163, 94th Cong., 2d Sess. 2 (1976). That Act provides that grazing permits issued under the TGA shall be "subject to such terms and conditions as

the Secretary concerned deems appropriate," including the authority "to cancel, suspend, or modify a grazing permit." 43 U.S.C. 1752(a); see also *Perkins* v. *Bergland*, 608 F.2d 803, 806 (9th Cir. 1979). The FLPMA also provides that the holder of an expiring grazing permit shall be given first priority for a new permit if: (1) the lands "remain available" for grazing "in accordance with land use plans prepared pursuant to section 1712"; (2) the permittee is in compliance with applicable regulations and conditions in the existing permit; and (3) the permittee "accepts the terms and conditions to be included by the Secretary concerned in the new permit." 43 U.S.C. 1752(c).

c. *Public Rangelands Improvement Act of 1978 (PRIA).* In the PRIA, 43 U.S.C. 1901 *et seq.*, Congress found that "vast segments of the public rangelands are * * * in an unsatisfactory condition." 43 U.S.C. 1901(a)(1). Congress further found that those unsatisfactory conditions "present a high risk of soil loss, desertification, and a resultant unproductivity for large acreages"; "contribute significantly to unacceptable waterways"; "negatively impact the quality and availability of scarce western water supplies"; "threaten important and frequently critical fish and wildlife habitat"; "prevent expansion of the forage resource and resulting benefits to livestock and wildlife production"; "increase surface runoff and flood danger"; and "reduce the value of such lands for recreation and esthetic purposes." 43 U.S.C. 1901(a)(3). See also S. Rep. No. 1237, 95th Cong., 2d Sess. 6 (1978). Accordingly, the PRIA reaffirmed a policy to "manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values in accordance with the management objectives and land use planning process established pursuant to section 1702 of [the FLPMA, 43 U.S.C. 1712]." 43 U.S.C. 1901(b)(2).

2. Between 1936 and 1995, the Secretary adopted various grazing rules to implement the TGA, FLPMA, and PRIA. Three of those rules are at issue here.

a. *Mandatory qualifications for a grazing permit.* The Secretary's first set of rules, promulgated in 1936, identified the mandatory qualifications of applicants for grazing privileges: "An applicant for a grazing license is qualified if he owns livestock" and meets specified citizenship qualifications. See Division of Grazing, Dep't of the Interior, *Rules for Administration of Grazing Privileges* 1 (Mar. 2, 1936) (1936 Rules). That provision remained essentially unchanged through the next three iterations of the Secretary's rules.[3] In 1942, the qualifications rule was altered to provide that "[a]n applicant for a grazing license or permit is qualified if engaged in the livestock business." *The Federal Range Code §* 3(a) (Sept. 23, 1942). That requirement remained in effect until 1995.[4] In that year, the Secretary removed the requirement that the applicant already be "engaged in the livestock business," 43 C.F.R. 4110.1 (1995), explaining that that phrase appears in Section 3 of the TGA as a basis for "preference * * * in the issuance of grazing permits," and not as a mandatory qualification for a permit applicant, 43 U.S.C. 315b. See 60 Fed. Reg. 9894, 9926 (1995).

b. *Preference in the issuance of permits, and the extent of use of the range conferred by a permit.* The Secretary's

[3] See *Rules for Administration of Grazing Privileges* (June 14, 1937); *The Federal Range Code* (Mar. 16, 1938); *The Federal Range Code* (Aug. 31, 1938).

[4] See, *e.g.*, *The Federal Range Code* § 3 (Jan. 13, 1945); *The Federal Range Code*, codified at 43 C.F.R. 161.3(a) (1949); 43 C.F.R. 161.3(a) (1953); 43 C.F.R. 161.3(a) (1956); 43 C.F.R. 161.3(a) (1962); recodified at 43 C.F.R. 4111.1-1 (1964); 43 C.F.R. 4111.1-1 (1965); 43 C.F.R. 4111.1-1(a) (1966); 43 C.F.R. 4111.1-1(a) (1969); 43 C.F.R. 4111.1-1(a) (1971); 43 C.F.R. 4110.1 (1978); 43 C.F.R. 4110.1 (1980); 43 C.F.R. 4110.1 (1981); 43 C.F.R. 4110.1 (1982); 43 C.F.R. 4110.1 (1984); 43 C.F.R. 4110.1 (1986); 43 C.F.R. 4110.1 (1988).

early public rangeland rules governing "preference" tracked the Act's use of that term in Section 3 of the TGA (quoted at page 4, *supra*). *Rules for Administration of Grazing Privileges* 1 (June 14, 1937). With respect to how much of the range forage qualified preferred applicants would be entitled to use, the 1937 Rules separately provided that (1) "[q]ualified preferred applicants will be given licenses to graze the public range insofar as available and necessary to permit a proper use of the lands, water, or water rights owned, occupied or leased by them," *id.* at 2; and (2) that "[l]icenses will be issued" according to a defined order of applicants "until the carrying capacity of the public range shall be attained," *id.* at 3. In addition, the rules provided for "non-use licenses" for conservation and other purposes. *Ibid.* Through numerous subsequent changes, the rules also maintained a distinction between how much a permittee could actually graze and how much grazing use was "suspended" in order to allow for restoration of the range. See *The Federal Range Code §§* 1, 6 (Mar. 16, 1938)[5]; *The Fed-*

[5] Section 1(a) of the March 1938 Range Code set out the "Basic Policy and Plan of Administration," which was that "[g]razing districts will be administered for the conservation of the public domain and as far as compatible therewith to promote the proper use of the privately controlled lands and waters dependent on it."

The 1938 Range Code provided a set of definitions for certain terms, including: (1) "*Animal-unit month* means that amount of natural, cultivated, or complementary feed necessary for the complete subsistence of one cow for a period of one month"; (2) "*Carrying capacity* means the amount of natural or cultivated feed grown or produced on a given area of forage lands in one year, measured in animal unit months"; and (3) "*Nonuse license or permit* means a license or permit issued to an applicant who is otherwise eligible for a regular license or permit but who either elects or is required, for conservation purposes, not to have livestock on the Federal range for a designated time." Mar. 1938 Range Code § 2(i), (j), (q). The 1938 Rules also expressly provided for "reductions" of grazing on the federal range "[i]f necessary to reach the carrying capacity of the Federal range either at the time of issuing licenses or permits or thereafter." *Id.* § 6(c).

eral Range Code (Sept. 23, 1942); *The Federal Range Code* reised October 1, 1949 (codified at 43 C.F.R. Pt. 161); *Federal Range Code for Grazing Districts*, 43 C.F.R. 161.6(e)(13) (1956).

In 1962, the Federal Range Code for the first time defined "adjudication," a term that does not appear in the TGA. Specifically, the 1962 Code defined "adjudication of grazing privileges" to mean "the determination of the qualifications for grazing privileges of the base properties * * * offered in support of applications for grazing licenses or permits in a range unit or area, and the subsequent equitable apportionment among the applicants of the forage production within the proper grazing season and capacity of the particular unit or area." 43 C.F.R. 161.2(r) (1962). "Preference," however, remained as previously defined, without any linkage to the extent of use of the federal rangelands allowed under a grazing permit. See *id.* § 161.1(b); see also *id.* § 161.6(e)(11) (1962) (provision for non-use permit); *id.* § 161.6(f)(5) (1962) (provision for suspended-use permit). The 1962 rules also provided for the temporary closure of a grazing district or any portion thereof "[w]here conservation of the Federal range and forage thereon requires it." *Id.* § 161.12 (5) (1962). See also 43 C.F.R. 4111.4-1 (providing for increases in grazing privileges), 4111.4-2 (1964) (decreases "[i]f necessary to reach the grazing capacity of any area of the Federal range after licenses or permits have been issued").

After enactment of the FLPMA, the Secretary promulgated new rules intended to address several problems, including the failure of the then-existing regulations "to recognize the multiple use values of the land and the need for management flexibility to achieve multiple use and environmental objectives." 42 Fed. Reg. 35,334 (1977). The Secretary described the rules as "requiring grazing management to be consistent with land use plans" and "bas[ing] grazing allocation and management on land use plans incorporating environmental and other resource values." *Ibid.* The 1978

rules thus made substantial changes to the prior rules.[6] In addition, the rules for the first time linked the statutory term "preference" to the extent of use of rangelands allowed by a permittee: they introduced a new regulatory term, "grazing preference," to include "the total number of animal unit months [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 C.F.R. 4100.0-5(o) (1978). See also *id.* § 4110.2-2(a) (1988).

In 1995, the Secretary returned to the Act's (and the pre-1978 rules') use of the term "preference" to denote an applicant's relative priority among applicants in the issuance of grazing permits, and not to the number of AUMs of livestock grazing on public lands that are apportioned to an applicant's base property. 43 C.F.R. 4100.0-5 (1995). The 1995 rules use the term "permitted use" to denote the latter limitation. *Id.* § 4100.0-5 (1995).

c. *Ownership of range improvements.* Prior to 1978, the rules did not directly address ownership of range improvements.[7] The 1978 rules provided that the United States would have title to range improvements authorized under cooperative agreements between the United States and a

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[6] See, *e.g.*, 43 C.F.R. 4100.0-5(g), 4113.3-2(b), 4120.2-1(c), 4120.2-1(d), 4130.2(d)(3) (1978) (cancellation of grazing privileges); *id.* §§ 4100.0-5(t), 4120.2-1(c), 4120.2-1(d), 4130.2(d)(3), 4130.2(d)(4) (1978) (modification); *id.* §§ 4100.0-5(cc), 4110.3-2(a), 4120.2-1(c), 4120.2-1(d), 4130.2(d)(3) (1978) (suspension); *id.* § 4120.3 (1978) (full or partial closure of allotments to grazing).

[7] Before 1978, the rules set out procedures for (1) permit applicants either to construct improvements or to use improvements constructed and owned by a prior occupant, without defining (or limiting) which improvements were subject to ownership by a prior occupant; and (2) payment to prior occupants for the reasonable value of the improvements constructed and owned by them. See, *e.g.*, 1937 Rules; Mar. 1938 Range Code; Aug. 1938 Range Code; Sept. 1942 Range Code; Jan. 1945 Range Code; 43 C.F.R. 161.14(a) (1953); *id.* § 161.15 (1956); *id.* § 161.15 (1962); recodified at 43 C.F.R. 4115.2-5 (1964); *id.* § 4115.2-5 (1965); *id.* § 4115.2-5 (1966); *id.* § 4115.2-5 (1969); *id.* § 4115.2-5 (1971); *id.* § 4120.6-3 (1977).

permittee, 43 C.F.R. 4120.6-2 (1978), and that the permittee would have title to range improvements authorized by permit, *id.* § 4120.6-3 (1978). In 1981, however, the Secretary changed the rules to limit permittees to ownership of authorized *removable* range improvements. See *id.* § 4120.6-3(b) (1981). The 1984 rules further modified ownership of improvements made pursuant to cooperative agreements, providing title in the United States to nonstructural and nonremovable improvements, and shared title between the permittee and the United States to structural and removable improvements in proportion to their respective contributions. *Id.* § 4120.3-2 (1984). The 1995 rules modified the ownership arrangement once again by: (1) providing, with respect to improvements made in the future under cooperative agreements, that the United States would retain title both for "permanent range improvements such as fences, wells, and pipelines," which would only be constructed pursuant to cooperative agreements, *id.* § 4120.3-2(b) (1995), and for "nonstructural range improvements such as seeding, spraying, and chaining," *id.* § 4120.3-2(c) (1995); and (2) providing that "[t]he permittee may hold title" to authorized removable range improvements "used as livestock handling facilities such as corrals, creep feeders, and loading chutes, and to temporary structural improvements such as troughs for hauled water," *id.* § 4120.3-3(d) (1995).

3. The three 1995 rules discussed above were part of a package of final rules that were published on February 22, 1995, with an effective date of August 21, 1995. 60 Fed. Reg. 9894. See Br. in Opp. 5-7 & n.2 (describing developments leading to 1995 rules). In July 1995, petitioners filed a complaint challenging ten of the amended rules on their face. 1 C.A. App. 1, 77. The district court held four of the amended rules to be invalid and enjoined their enforcement, reasoning that they exceeded the Secretary's statutory authority or lacked a reasoned basis. Pet. App. 75a-100a. Those four regulations were the 1995 rules discussed above and a rule

permitting the issuance of grazing permits for conservation use.

4. The court of appeals reversed in substantial part. Pet. App. 1a-70a. The court unanimously reversed the portion of the district court's order invalidating the mandatory qualifications rule and, over Judge Tacha's dissent, reversed the district court's order invalidating the grazing "preference" and "permitted use" rules and the rule governing title to future permanent range improvements, *id.* at 50a-70a. The court unanimously affirmed the portion of the district court's order invalidating the conservation use rule. *Id.* at 49a. The court of appeals denied petitioners' suggestion of rehearing en banc by an equally divided vote. *Id.* at 73a-74a.

SUMMARY OF ARGUMENT

The Secretary's 1995 rules are entitled to deference against petitioners' facial challenge because they were issued pursuant to express rulemaking authority, conform to the text of the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Public Rangelands Improvement Act, and are supported by reasoned bases. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The gravamen of petitioner's complaint is the unremarkable fact that some of the challenged rules differ in some respects from prior rules. Petitioners mischaracterize the regulatory changes as radical, misstate the history of the regulations, and misconstrue the governing land-use statutes.

I. The 1995 grazing "preference" rule returns to a prior administrative construction of "preference" that reflects Congress' use of that term in the TGA to refer to priority among potential applicants for grazing privileges. The 1995 "permitted use" rule implements statutory mandates imposed upon the Secretary in the TGA and FLPMA to consider multiple uses and to make decisions about grazing usage in the context of land use plans. Petitioners' argument

that the latter rule is beyond the Secretary's authority is inconsistent with the plain language of the TGA and the FLPMA. The TGA broadly authorizes the Secretary "to make such rules and regulations" as necessary and to "specify from time to time numbers of stock and seasons of use." 43 U.S.C. 315a, 315b. The FLPMA authorizes the Secretary to determine whether land should "remain available" for grazing, to "cancel, suspend, or modify a permit," and to prescribe terms and conditions for renewal of permits. 43 U.S.C. 1752(a) and (c).

Petitioners' reliance on language in 43 U.S.C. 315b that grazing privileges shall be "adequately safeguarded" is misplaced, because that provision confers broad discretion on the Secretary in determining how "privileges" shall be "recognized and acknowledged," and it expressly states that the issuance of a permit "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b. Petitioners' notion of an indefinite right to graze a previously-determined amount of forage thus cannot be squared with the plain language of the TGA and the FLPMA, the history behind those laws, and the rules and practices of the Secretary since those laws were enacted.

II. The 1995 mandatory qualifications rule conforms to the text of the TGA and returns to the standard adopted by the Secretary contemporaneously with the TGA's passage. The first sentence of Section 3 of the TGA gives the Secretary broad authority to 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. The 1995 rule removed an additional requirement that applicants already be "engaged in the livestock business." That requirement appears in a subsequent sentence of Section 3 that governs the relative "preference" or priority of qualified applicants in obtaining a grazing permit. The 1995 change enables new entrants to obtain permits to graze livestock, whereas prior

to 1995 a prospective permittee would be denied that opportunity if not already engaged in the livestock business.

III. The 1995 rule governing title to permanent range improvements dates back to rules issued in 1978, following the enactment of the FLPMA. The rule provides that a permanent range improvement may be constructed only pursuant to a "cooperative agreement" entered into between the United States and the permittee, and that a condition of such an agreement is that title shall be retained by the United States. Nothing in the TGA prohibits such a rule, which is in accord with common law principles involving agreements between lessors and lessees with respect to permanent improvements. The Secretary provided a reasoned basis for the change, explaining that it conforms BLM's practices to those of the Forest Service and that it affords BLM greater flexibility in addressing a variety of land use needs.

ARGUMENT

Petitioners brought this suit as a facial challenge to rules issued by the Secretary of the Interior pursuant to statutes that he is expressly charged with administering. A facial challenge is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the rule would be valid." *Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)); see also *Reno* v. *Flores*, 507 U.S. 292, 301 (1993). Petitioners' challenge falls far short of meeting that test.

This Court properly accords deference to rules, like those challenged here, that have been issued pursuant to express rulemaking authority, and upholds the rules so long as they are a permissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources-Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Petitioners have not shown that any of the challenged regulations conflicts with any provision in the TGA, FLPMA, or PRIA.

This Court has made it clear, moreover, that an executive agency must be free to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-864. See also *Rust* v. *Sullivan*, 500 U.S. 173, 186 (1991). It is especially evident that Congress intended the Secretary to have such flexibility under the TGA, which broadly authorizes him to "make such rules and regulations * * * and do any and all things necessary to accomplish the purposes of [the Act]," 43 U.S.C. 315a, to provide for "renewal" of permits in his "discretion" (albeit subject to established preferences when permits *are* renewed), 43 U.S.C. 315b, and to "specify *from time to time* numbers of stock and seasons of use," *ibid.* (emphasis added); and also under the FLPMA, which authorizes the Secretary to "cancel, suspend, or modify a permit," 43 U.S.C. 1752(a). The Secretary's "wide discretion" (79 Cong. Rec. 10,394 (1935) (Rep. Taylor)) is also underscored by the TGA's declaration that a grazing permit "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b. See *United States* v. *Fuller*, 409 U.S. 488, 493-494 (1973).[8]

I. THE COURT OF APPEALS PROPERLY UPHELD THE 1995 "PREFERENCE" AND "PERMITTED USE" RULES

The 1995 rules use the term "preference" to mean the relative priority among qualified applicants in the issuance of grazing permits and the term "permitted use" to mean the extent to which a permittee's livestock may graze on a specified allotment of the public rangelands. Pet. App. 14a-33a. The court of appeals correctly concluded that "the permitted use rule neither conflicts with an unambiguous statutory command nor eliminates any long-recognized right accorded permittees to graze predictable numbers of stock." *Id.* at 14a-15a.

[8] See also *Diamond Ring Ranch* v. *Morton*, 531 F.2d 1397, 1401 (10th Cir. 1976) (Secretary has "broad power to administer the public lands included within the 'grazing districts'"); *Barton* v. *United States*, 609 F.2d 977, 979 (10th Cir. 1979) (finding broad discretion in Section 315a's direction to "the Secretary of the Interior to adopt such rules and regulations as were deemed necessary").

A. The Two Rules Reasonably Implement The TGA

1. The Secretary reasonably construed "preference" to mean priority among applicants for permits

The third sentence of Section 3 of the TGA provides:

> Preference shall be given in the issuance of grazing permits to those within or near a district 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 lands, water or water rights owned, occupied, or leased by them * * *.

43 U.S.C. 315b. The 1995 rules implement that sentence by defining "grazing preference or preference" to mean "a superior or priority position against others for the purpose of receiving a grazing permit or lease. That priority is attached to base property owned or controlled by the permittee or lessee." 43 C.F.R. 4100.0-5 (1995).

As the Secretary explained, the 1995 rules revert to the original administrative construction of "preference" in the TGA, *i.e.*, relative priority in the issuance of grazing permits, thereby enabling specific categories of applicants for grazing permits (including permittees seeking renewal) to be favored over others. 60 Fed. Reg. at 9922.[9] Although "preference" is

[9] See Mar. 1938 Range Code § 1b ("Preference in the granting of grazing privileges will be given to those applicants within or near a district."); *McNeil* v. *Seaton*, 281 F.2d 931, 936-937 (D.C. Cir. 1960) (construing "preference" in its "ordinary sense" as priority over another prospective permittee); *Red Canyon Sheep Co.* v. *Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) ("those who * * * bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to per-

not defined in the TGA, the Secretary's amended rules conform to common usage, in which "preference" is the "act of preferring or the state of being preferred: choice or estimation above another." *Webster's Third New International Dictionary* 1787 (1986).[10] Petitioners have identified no provision of the TGA, FLPMA, or PRIA with which the 1995 rules' definition of "preference" is in conflict, and there is none. See 60 Fed. Reg. at 9922 (explaining rule change).[11]

2. The "permitted use" rule reasonably implements statutory provisions authorizing the Secretary to regulate use of public rangelands

a. The rules in effect between 1978 and 1994 used the term "grazing preference" to encompass both who had priority in obtaining a grazing permit and the maximum amount of forage the permittee could graze. See 43 C.F.R. 4100.0-5 (1994). The amended rules now separate those concepts and define "permitted use" to mean "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." See *id.* § 4100.0-5 (1995). Nothing in the TGA requires the Secretary to determine how much grazing will be allowed as part of the same decisional process

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mits *as against others* who do not possess the same facilities for economic and beneficial use of the range") (emphasis added).

[10] Virtually all of the definitions of "prefer," in turn, denote priority: "1 a *archaic*: to promote or advance to a rank or position * * * 2: to have a preference for: CHOOSE: like better: value more highly * * * 3: to give (a creditor) priority * * * 4: *archaic*: to put or set forward before someone: OFFER, PRESENT, RECOMMEND, INTRODUCE." *Webster's Third New International Dictionary* 1787 (1986).

[11] The Complaint did not allege that this rule was in conflict with any statutory provision; it merely asserted that the Secretary lacked a reasoned basis for making the change. See Compl. ¶¶ 85-88, 150-152, 198-201 (1 C.A. App. 37-39, 57, 71). When petitioners substituted a petition for review for their complaint, they merely incorporated the allegations of their complaint into their petition. See 1 C.A. App. 78.

in which he decides the priority of an applicant in obtaining a permit for grazing.

In the first place, the determinations stem from different statutory provisions. Decisions concerning priorities among applicants are based on the "preference" sentence of Section 3 of the TGA and the permit-renewal provision in the FLPMA, 43 U.S.C. 1752(a). The term "permitted use" implements the distinct statutory obligations of the Secretary: under Section 2 of the TGA to regulate the "occupancy and use" of the public lands, "to preserve the land and its resources from destruction or unnecessary injury," and "to provide for the orderly use, improvement, and development of the range," 43 U.S.C. 315a; under Section 3 of the TGA to "specify from time to time numbers of stock and seasons of use" on the range, 43 U.S.C. 315b; and under the various provisions of the FLPMA and the PRIA to manage the land for conservation, improvement, and multiple uses of the range.

The two determinations also are entirely different in analytical and practical terms. As between two ranchers who own lands adjoining federal rangelands, for example, BLM might reasonably determine that *if* the federal lands are made available for grazing, rancher *A* has a "preference" over rancher *B* because of such considerations as whether rancher *A*'s property was the base for the grazing on federal rangelands before enactment of the TGA, the length of time rancher *A* has had a federal permit, and the dependency of rancher *A* on federal land for his livestock feed. Thus, regardless of the ecological state of the pertinent rangelands—which might not allow *any* grazing because of range fires, drought conditions, or the dedication of the particular lands to non-grazing uses—rancher *A* would retain a "preference" over rancher *B if* the Secretary permits *any* grazing on that land.

"Permitted use," on the other hand, concerns how much grazing should be allowed on the rangelands, irrespective of

who the permittee is. That determination involves long-term maintenance of the lands for grazing and other potential uses and numerous other considerations the Secretary is obliged to recognize. Assuming the land is to be devoted to grazing to some extent, the permitted use determination involves an assessment of such factors as forage growth, weather conditions, available water, past grazing practices (including over-grazing), and priorities for and progress toward conservation and rangeland improvement. On the basis of those factors, the Secretary may reasonably determine that to permit more than a certain amount of grazing (measured in AUMs) during a specified time period would cause destruction to the public rangelands. That determination would not affect—and typically would not be affected by —*who* has priority as among all prospective permittees, but it would affect how much forage the permittees (whoever they might be) are authorized to use during the relevant time period. The carrying capacity of an allotment may thus appropriately be determined as part of a process (*e.g.*, land-use planning) that is distinct from an adjudicatory proceeding to decide who has priority to whatever number of AUMs might be allowed on the allotment. Cf. *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 227-229 (1991).

b. The rangeland management rules in effect between 1978 and 1994 defined the term "grazing preference" to mean "the total number of animal unit months [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 C.F.R. 4100.0-5(o) (1978); *id.* § 4100.0-5 (1994). It was clear throughout that period, however, that such an apportionment did not prevent the Secretary from allocating land to purposes other than grazing or decreasing the grazing allowed on lands that continued to be used for that purpose. Thus, the 1978 regulations provided that "[g]razing preference shall be allocated to qualified applicants following the

allocation of the vegetation resources among livestock grazing, wild free-roaming horses and burros, wildlife, and other uses in the land use plans." 43 C.F.R. 4110.2-2(a). Similarly, permits could be canceled, on an equitably apportioned basis, if there was a decrease in acreage available for grazing within an allotment, *id.* § 4110.4-2 (1978), if authorized grazing exceeded available forage, or if "reduced grazing is necessary to facilitate achieving the objectives in the land use plans," *id.* § 4110.3-2(b) (1978); see also *id.* § 4120.2-1(a) and (b), 4130.2(d)(3) and (e) (1978). Similar provisions for allocation among grazing and non-grazing uses and for cancellation or suspension of permits, in whole or in part, were contained in subsequent regulations.[12] And in 1988, the regulations specifically provided for periodic review of the grazing preference specified in a permit and authorized "changes in the grazing preference status" when such changes were based on rangeland studies, "specified in an applicable land use plan," or "necessary to manage, maintain, or improve rangeland productivity." 43 C.F.R. 4110.3; see 53 Fed. Reg. 10,227-10,228, 10,233 (1988).

Consistent with the foregoing authorities, BLM routinely restricted actual grazing well below the maximum amount identified in a permit to avoid causing significant damage to the public range. Decades ago the Secretary devised the concepts of "active use" and "suspended use" to differentiate between how much actual forage a rancher could use in any given permit period and how much of the total AUMs listed in the permit a rancher would not be permitted to use. See 43 C.F.R. 161.6(f)(5) (1962); *id.* § 4111.4-2(e) (1964); *id.* §§ 4100.0-5, 4110.2-2(a) (1994). The ratios of "active use" to "suspended use" could and did change frequently, and the historical trend has consistently shown a steady decline in

[12] See, *e.g.*, 43 C.F.R. 4110.2-2(a), 4110.3-2(b), 4110.4-2(a), 4120.2-1, 4130.2(d)(3) and (e) (1980); *id.* §§ 4110.2-2(a), 4110.3-2, 4110.4-2(a), 4130.6-3 (1984); *id.* §§ 4100.0-8 (land use plans), 4110.3-2, 4110.4-2, 4130.2(d) (1994).

actual grazing usage (as expressed in AUMs) that long predated the 1995 rules. See App., *infra*, 9a.

The amended rules move the reference to AUMs to the new regulatory term "permitted use," which is defined as "the forage [expressed in AUMs] allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease." 43 C.F.R. 4100.0-5 (1995). Like "grazing preference" in the prior rule, however, "permitted use" in the amended rules "shall encompass *all* authorized use *including* * * * suspended use." *Id.* § 4110.2-2(a) (1995) (emphasis added). Indeed, in the 1995 rulemaking process, after proposing a rule that would eliminate suspended use, the Secretary expressly accommodated ranchers' objections by deciding not to alter the active use/suspended use formula in grazing permits.

> The present suspended use would continue to be recognized and have a priority for additional grazing use within the allotment. Suspended use provides an important accounting of past grazing use for the ranching community and is an insignificant administrative workload to the agency.

BLM & Forest Service, Dep'ts of the Interior & Agriculture, *Rangeland Reform '94: Final Environmental Impact Statement* 144 (1994) (FEIS).[13] The provisions for increasing permitted use under the amended rules (43 C.F.R. 4110.3-1 (1995)) are essentially the same as the provisions for increasing active use under the prior rules (*id.* § 4110.3-1 (1994)). Petitioners thus mischaracterize the extent of the change in real-world terms. See also 60 Fed. Reg. at 9922.

[13] Like "grazing preference" in the prior rules, "permitted use" is (1) specified in permits as a designated amount of forage expressed in AUMs (43 C.F.R. 4110.2-2(a) (1995)); (2) attached to base property (*id.* § 4110.2-2(c) (1995)); and (3) transferable with the base property, in whole or part, upon application and approval (*id.* § 4110.2-3 (1995)). See 60 Fed. Reg. at 9921.

3. The FLPMA subjects grazing to the land use planning process

a. Petitioners concede (Br. 32) that the Secretary at least has the authority, if not a statutory duty, to terminate or reduce grazing on public lands for a variety of reasons. Petitioners challenge (*ibid.*), however, the Secretary's implementation of that conceded authority through the land-use planning process. Petitioners also assert (*id.* at 22) that, due to the change in terminology from "grazing preference" to "preference" and "permitted use," the livestock industry is destabilized by the institution of a supposedly new connection between grazing-use determinations and the land-use planning process.

Those objections not only lack any grounding whatsoever in the text of the TGA, they also ignore the fact that since 1976 the Secretary has been *required* by the FLPMA to employ land use plans for BLM grazing lands. The FLPMA requires the Secretary to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. 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.*" 43 U.S.C. 1712(a) (emphasis added). Congress further required the Secretary to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title." 43 U.S.C. 1732(a)."[14]

[14] In 1978 and 1979, the Secretary promulgated regulations pursuant to the FLPMA that implemented those land-use planning and multiple-use directives. See 43 C.F.R. 4110.2-2(a) (1978); 43 C.F.R. Pt. 1600 (1980). See *Delmer McLean* v. *BLM*, 133 Interior Bd. Land App. 225, 233 (1995) ("As a comparison of the post-1978 regulations with the previously existing Federal Range Code makes clear, the entire basis upon which grazing preferences was determined was drastically altered.").

Petitioners' single-minded focus on the TGA also ignores other, subsequently-enacted considerations Congress has imposed on the Secretary when determining how the public lands should be used. For example, in connection with permitting grazing as one of the potential multiple uses of the land, the Secretary must: make a formal environmental impact assessment, see National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; factor in multiple-use and sustained-yield considerations under the FLPMA, 43 U.S.C. 1701 *et seq.*; ensure the protection of endangered and threatened species, Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and wild and free-roaming horses and burros, see Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 *et seq.*; preserve the free-flowing condition of rivers designated as wild, scenic, or recreational, see Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*; and protect historic properties, see 16 U.S.C. 470 *et seq.*, caves and their environs, see Federal Cave Resources Protection Act of 1988, 16 U.S.C. 4301 *et seq.*, and archaeological areas, see Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa *et seq.* Those statutes supplement and reinforce the TGA's requirements that the Secretary "preserve the land and its resources from destruction or unnecessary injury, [and] provide for the orderly use, improvement, and development of the range." 43 U.S.C. 315a. The FLPMA makes clear that the required consideration of multiple uses includes, *inter alia*, those resource-based, recreational, and scenic values. See 43 U.S.C. 1702(c).

b. Petitioners do not directly challenge the land-use planning rules first promulgated in 1978 and 1979 and carried forward as amended to the present time. Petitioners' principal concern nevertheless appears to be that the land-use planning process insufficiently protects their interests in grazing on public lands. Pet. Br. 34-36. As we have just demonstrated, the FLPMA mandates that such plans be implemented for all BLM lands. That process merely provides the administrative framework for making decisions about whether grazing will be permitted on particular rangelands and, if so, to what extent—decisions that the Secretary has had to make since the TGA was enacted. The land-use planning process does not change the discretion of the Secretary to decide whether or not to issue a grazing permit, 43 U.S.C. 315b, to renew a permit, *ibid.*, to "specify from time to time numbers of stock and seasons of use," *ibid.*, or to withdraw from grazing use land that is "more valuable or suitable for any other use," 43 U.S.C. 315f. As the graph appended to this brief clearly establishes, see App., *infra*, 9a, actual grazing usage on BLM lands has steadily decreased from approximately 18 million AUMs in 1953 to approximately 10 million AUMs in 1995. Thus, withdrawals of public rangelands from grazing and decreases in permitted grazing predate promulgation of the 1995 rules, and were occurring "during the 20-years-plus it took to adjudicate all grazing privileges on the public range" (Pet. Br. 30), as well as the "20-years-plus" that land-use planning has been mandated by Congress.

Petitioners' burden in this facial challenge is to show that the land-use planning process is incapable of protecting their interests. Cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 734 (1998) (persons objecting to a land use plan "will have ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain"). They have wholly failed to provide that showing. And, in fact, the grazing and land-use planning rules amply protect petitioners' interests. The FLPMA specifically requires that, in developing and revising land use plans, the Secretary shall "consider present and potential uses of the public lands." 43 U.S.C. 1712(c)(5). The definition of "multiple use" in the land-use planning regulations specifically refers to the "long term needs of future generations for renewable and non-renewable resources, including, but not limited to, * * * range." 43 C.F.R. 1601.0-5(f) (1998). The regulations

further provide that "the impact on local economies and uses of adjacent or nearby non-Federal lands * * * shall be considered," *id.* § 1601.0-8 (1998), and that public participation in the planning process shall be ensured, *id.* § 1610.2 (1998).

As of December 1998, all BLM lands in the lower 48 States are covered by land use plans. Betsy A. Cody et al., Congressional Research Service, *Federal Land Management Agencies: Background on Land and Resources Management* 28 (Dec. 18, 1998). As a result, all grazing permits in those States have now been issued or renewed in accordance with such plans, or must now conform to them. Petitioners thus have had nearly two decades since plans were first issued under the FLPMA to accumulate empirical support for their assertion that the interests of permittees are not sufficiently taken into account in the FLPMA land-use planning process. Yet they cite nothing in the administrative record (or elsewhere) to support their assertion.

Indeed, contrary to petitioners' contentions (Br. 22), the utilization of land use plans in determining grazing privileges will likely result in greater, not lesser, stability for grazing permittees. As the Secretary explained when the 1995 rules were issued, absent a major change in the overall situation on the range, "changes in permitted use through BLM initiative are unlikely" where land use plan objectives are being met. 60 Fed. Reg. at 9923. As even the dissent below recognized, under the prior rules, "[p]ermittees knew and understood that there would be year-to-year fluctuations in available forage and changes in the overall conditions of the range, and the Secretary had full authority under the TGA to make individual adjustments in active use." Pet. App. 54a. One purpose of the 1995 rules was to arrest those potentially de-stabilizing year-to-year differences by requiring, *inter alia*, more extensive data collection that would provide a more realistic forecast of the range's actual capacity to provide forage for livestock. See 60 Fed. Reg. at 9928; Pet. App. 32a-33a & n.10.[15]

B. Petitioners' Remaining Objections To The "Preference" and "Permitted Use" Rules Are Unpersuasive

1. No concept of "adjudicated forage" confers a permanent right to graze livestock at a particular level

Petitioners contend that the statutory "preference" in Section 3 of the TGA, 43 U.S.C. 315b, provides permittees with fixed rights in numbers of stock to be grazed on the public rangelands, as measured by what they call "adjudicated forage." Br. 18. By "adjudicated forage," petitioners quote approvingly, if incompletely, from Judge Tacha's dissent:

> In short, 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 him or her to graze up to that upper limit.*

Pet. App. 53a (non-italicized portion quoted in Pet. Br. 18). Contrary even to the dissent below, which recognized that the amount of permitted grazing depended entirely on

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[15] The contrast with the regulatory process in the 1940s and 1950s could not be clearer. In that era, rancher-dominated grazing advisory boards essentially determined, without scientific data or input from other federal land users (such as hunters, fishermen, and conservationists), how much grazing would be permitted. See Coggins & Lindberg-Johnson, *supra*, 13 Envtl. L. at 80-81. In the FLPMA, Congress recognized that the process needed to be more scientifically rigorous and inclusive of other interests. Thus, to the extent petitioners are complaining about what multiple-use considerations the Secretary must take into account and what citizens other than grazing permittees should be entitled to have a voice in the process of deciding how the public lands are to be used, their complaint is more appropriately directed to Congress, which enacted the FLPMA, and not to the Secretary, who is merely implementing the mandates of that Act.

whether "the Secretary allowed him or her to graze up to that upper limit," petitioners appear to assert that "adjudicated forage" is a determination made at some time over the past 65 years that entitles a permittee for all time to graze a particular number of animals if the "optimal conditions prevailed." Pet. App. 53a. Not only is petitioners' view not *compelled* by the TGA, it is flatly inconsistent with the texts of the TGA, FLPMA, and PRIA, as well as the many other land use considerations the Secretary is obligated to make under congressionally-mandated directives other than the TGA.

Petitioners begin by arguing that "[t]he *plain language* of the TGA *requires* the Secretary to adequately safeguard * * * *adjudicated forage*." Br. 18 (emphasis added). To underscore their point, petitioners repeatedly refer to "adjudicated forage" in purportedly describing the text of the TGA and its history. See Br. 8 n.2, 13-14, 16, 18, 20, 23-24, 26-27, 29, 31, 34, 35, 37. It is impossible to credit a "plain language" argument, however, that so frequently invokes a phrase Congress did not use in the TGA, FLPMA, or PRIA. Nor did Congress use *other* words to encapsulate the particular concept petitioners have created. Petitioners' central thesis, therefore, is the antithesis of "plain language."

Indeed, petitioners' theory is flatly *inconsistent* with the terms of the TGA, which provide that permits are "subject to the preference right of the permittees to renewal *in the discretion of the Secretary of the Interior*, who shall specify from time to time numbers of stock and seasons of use." 43 U.S.C. 315b (emphasis added). Any prior "adjudication" concerning the number of AUM's to be allowed on an allotment was simply an administrative determination at one particular point in time of the forage to be made available for livestock grazing. No regulation purported to make that determination a permanent one; nor could it have done so consistent with the statutory declaration that "the issuance of a permit pursuant to the provisions of this subchapter shall

not create any right, title, interest, or estate in or to the lands." *Ibid.* To do so also would have been inconsistent with the FLPMA, which confers authority on the Secretary "to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof." 43 U.S.C. 1752(a).

Petitioners' position likewise cannot be reconciled with the FLPMA provision granting an existing permittee a first priority for renewal of an expiring grazing permit *only* if the lands in question "remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 1712," the permittee is in compliance with rules and conditions applicable to the expiring permit (which themselves may provide for termination or reduction of grazing in certain circumstances, see pp. 6-7, *supra*), and the permittee "accepts the terms and conditions to be included by the Secretary concerned in the new permit" (which similarly may provide for reduced grazing acreage or forage). 43 U.S.C. 1752(c). That provision gives existing users merely "a right of first refusal" for any new lease or permit, "provided that grazing will be continued by the Secretary" and the users "accept the terms and conditions of the new lease or permit." H.R. Rep. No. 1163, *supra*, at 13. An existing user thus must accept and comply with the Secretary's determinations concerning whether, to what extent, and in what manner grazing will occur. Those requirements positively refute petitioners' notion that a *past* adjudication of forage for a particular allotment or the *past* receipt of a permit reflecting such an adjudication in any way binds or overrides the Secretary's decisions concerning the use of the allotment, so long as the Secretary respects an existing permittee's preference as among potential permittees *if* grazing is to be allowed.[16]

[16] Petitioners try to evade that clear language by asserting that the FLPMA applies only to "*newly adjudicated* grazing privileges" (Br. 30),

Nor is petitioners' position consistent with this Court's decision in *United States* v. *Fuller*, 409 U.S. 488 (1973), which construed 43 U.S.C. 315b as denying the right of a grazing permittee in a condemnation proceeding to compensation for the increased value of his land created by the existence of a federal grazing permit. As then-Justice Rehnquist's opinion for the Court stated, "it would seem *a fortiori* that [the government] need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright." 409 U.S. at 492. Similarly, it would seem *a fortiori* that statutory provisions that authorize but do not require issuance of grazing permits in the first instance, that allow the Secretary to devote grazing lands to other purposes, and that confer broad discretion on the Secretary to set the numbers of grazing stock and to modify or cancel a permit, cannot be construed to require the Secretary for all time to permit grazing of a specified number of livestock contingent only upon the availability of forage.[17]

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but the only citation they give for that reading (Br. 30-31) is Judge Tacha's dissent. She in turn does not cite any authority, and there is none, because the FLPMA by its terms applies to *all* public lands and has been so applied by the BLM from the start. See p. 6, *supra*; Pet. App. 56a-60a.

[17] Petitioners' reliance on Tax Court decisions (Br. 32 n.8) for their theory of an "indefinitely continuing right" to graze a set number of livestock is misplaced. See *Uecker* v. *Commissioner*, 81 T.C. 983 (1983), aff'd, 766 F.2d 909 (5th Cir. 1985); *Shufflebarger* v. *Commissioner*, 24 T.C. 980, 995 (1955). Those cases construed the Internal Revenue Code (in the context of permits issued by the Forest Service, not BLM); petitioners cite no principle of law that construction and application of a substantive statute in the revenue context binds the agency charged with administering the underlying statute. Moreover, notwithstanding inaccurate dicta in those opinions, the holdings themselves are consistent with the Secretary's position. In *Shufflebarger*, the court held that the purchase of base property that had a preference in obtaining grazing privileges could not be depreciated over the life of a permit. *Id.* at 999. The court's reasoning is consistent with the Secretary's 1995 rules that preference is a *priority* among prospective permittees and not a substantive right to graze a certain number of livestock: "[W]hile 'a preference conveys no legal right to the use of the national-forest range,' it does entitle 'the holder to special consideration over other applicants who have not established preferences.'" *Id.* at 981 n.1 (quoting statute). *Uecker* is inapposite for the same reasons.

2. Petitioners misconstrue the TGA's "adequately safeguarded" provision

a. In support of their theory of a permanent statutory entitlement to a given level of "adjudicated forage," petitioners erroneously rely on the provision in Section 3 of the TGA that "grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. 315b. Nothing in that provision prohibits the Secretary from issuing the rules challenged here. Petitioners do not address (Br. 19) the bookend portions of the provision, which in full reads:

> *So far as consistent with the purposes and provisions of this subchapter*, grazing privileges recognized and acknowledged shall be adequately safeguarded, *but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.*

43 U.S.C. 315b (emphasis added). The "purposes and provisions of this subchapter" (*ibid.*) include the Secretary's mandates to regulate the "occupancy and use" of the public lands, "to preserve the land and its resources from destruction or unnecessary injury," "to provide for the orderly use, improvement, and development of the range," 43 U.S.C. 315a, and to "specify from time to time the numbers of stock and seasons of use" on the range, 43 U.S.C. 315b. So even under petitioners' theory, an "adjudicated forage" determination would be "adequately safeguarded" if the Secretary determined that such an amount must be reduced to meet "the purposes and provisions of this subchapter," *ibid.*, such as "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration," 48 Stat. 1269 (preamble).

Petitioners' claim of fixed "adjudicated rights to graze" on a particular allotment (Pet. Br. i Question 1) that must be adequately safeguarded (in petitioners' sense of being given permanent effect) also is inconsistent with the TGA's express declarations that a grazing permit does *not* create an "interest * * * in or to the lands" and that the Secretary "shall specify *from time to time* the numbers of stock and seasons of use." 43 U.S.C. 315b (emphasis added). See also 4 C.A. App. 1412 ("The time has passed, if it ever existed, when these public lands could be used practically as private property by those who had livestock of different kinds.") (statement of petitioner American Farm Bureau Federation in support of the TGA to the House Committee on Public Lands).

In any event, the drafting history of the TGA directly refutes petitioners' assertion of "an indefinitely continuing right" to "adjudicated preferences." Br. 32 n.8. The House bill provided that "grazing *rights*" that were "recognized and acknowledged by the local customs, laws, and decisions of the courts" would be "adequately safeguarded." H.R. 6462, 73d Cong., 2d Sess. § 3 (1934). But the Senate substantially amended that language, substituting the term "grazing *privileges*" for "grazing rights," removing any reference to "local customs, laws, and decisions of the courts," and otherwise rewriting the provision into its form as enacted. See 48 Stat. 1271.

b. The Secretary's rules are fully consistent with the text of the TGA that Congress ultimately enacted. To the extent Section 3's "adequately safeguarded" language was intended to protect ranchers who had obtained "privileges" to graze livestock on federal lands in the pre-TGA period—the situation addressed by the House bill, discussed above—those privileges were "safeguarded" as the Secretary implemented the TGA by granting a priority to those who had used the public range prior to enactment of the TGA. See H.R. Rep. No. 903, *supra*, at 3 (describing pre-existing legal determinations that recognized certain grazing privileges); 1936 Rules, *supra*, at 2 ("priority of use" is such use of public range prior to 1934 "as local custom recognized and acknowledged as a proper use"); 1937 Rules, *supra*, at 2-3 (giving priority to persons who used public range for full season within five years prior to TGA); 56 Interior Dec. 62 (1937).

Once permits have been issued, the "adequately safeguarded" language ensures that permittees have legal protection against incursion on their privileges by non-permittees, and it "means that the BLM must observe statutory preferences and priorities in granting and renewing permits." See 2 George Coggins & Robert L. Glicksman, *Public Natural Resources Law* § 19.02[1][c], at 19-20 (1996); see, *e.g.*, *McNeil* v. *Seaton*, 281 F.2d 931, 937 (D.C. Cir. 1960) (permittees are "protected against tortious invasion" and entitled to preference as against others). The TGA was enacted prior to the Administrative Procedure Act, so Section 315b may have been thought necessary to forestall arbitrary action by the agency.[18]

By contrast, there is no support in the text, history or administration of the TGA (or in common sense) for petitioners' assertion of an "adequately safeguarded" right to

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[18] Petitioners erroneously rely on *Oman* v. *United States*, 179 F.2d 738 (10th Cir. 1949), in support of their claim that the amended rules conflict with Section 315b. In *Oman*, the court of appeals merely stated that Section 315b requires "adequate safeguards" for "grazing privileges recognized and acknowledged," a proposition wholly consistent with the decision below. *Id.* at 742 n.11. Moreover, the same procedural safeguards attend grazing use decisions under the amended rules as under the prior rules. Section 315h of the TGA requires that the Secretary "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." As under the prior rules, decisions affecting active use could be challenged administratively. 43 C.F.R. 4160.4 (1995). And like the prior rules, the amended rules provide that "[a]ny person whose interest is adversely affected by a final decision of the authorized officer may appeal the decision for the purpose of a hearing before an administrative law judge." *Ibid.*

graze that operates indefinitely (indeed permanently), even in the face of a considered and procedurally proper decision by the Secretary to dedicate the rangelands in question to non-grazing uses or to reduce grazing to protect the land. No such right has ever been "recognized or acknowledged" by the Secretary, in light of the statutory declarations that grazing privileges "shall not create any right, title, interest, or estate in or to the lands" and that the numbers of stock shall be determined "from time to time." 43 U.S.C. 315b. As this Court's decision in *Fuller* makes clear, grazing permits have always been conditioned on the potential exercise by the Secretary of his broad reserved powers to regulate the use of the public range. It is only such *conditional* privileges that have ever been "recognized or acknowledged" and that must, in turn, be "adequately safeguarded" for as long as they are allowed to exist. See Pet. App. 52a (Tacha, J., dissenting) (a determination in an administrative adjudication of the "upper limit of forage that the permittee *could* graze" "*never guaranteed* a permittee the right to graze that amount of forage every year"); *Federal Lands Legal Consortium* v. *United States*, 195 F.3d 1190, 1197 (10th Cir. 1999) (permittees "cannot have a property interest in their grazing permits, much less the permits' terms and conditions").

3. The FLPMA and the PRIA support the rules

Petitioners erroneously contend (Br. 26-27) that the FLPMA and the PRIA support their theory that the Secretary was prohibited by the TGA from issuing the 1995 preference and permitted use rules. Petitioners observe that "[t]he FLPMA says nothing at all about previously adjudicated forage" (Br. 26), which is not surprising since petitioners themselves had not coined the term "adjudicated forage" until their brief on the merits in this case.[19] Petitioners also quote incompletely from the FLPMA to argue that the many land-use policies Congress articulated in Section 102 of the Act, 43 U.S.C. 1701, "shall become effective only as specific statutory authority for their implementation is enacted." Pet. Br. 10 (quoting 43 U.S.C. 1701(b)). In fact, that provision does not end with "is enacted," but rather further states "is enacted *by this Act* or by subsequent legislation." 43 U.S.C. 1701(b) (emphasis added). Subsequent provisions of the FLPMA itself *direct* the Secretary to engage in land-use planning, 43 U.S.C. 1712(a), to consider the multiple uses of the public lands, 43 U.S.C. 1732(a), to develop allotment management plans for grazing if they are effective "in improving the range condition of the lands involved," 43 U.S.C. 1752(d), to provide for cancellation of permits, 43 U.S.C. 1752(g), and to confer on permittees seeking renewal only a right of first refusal, 43 U.S.C. 1752(c).

The Secretary's authority to issue the 1995 rules is unaffected by two other FLPMA provisions and one PRIA provision cited by petitioners: (1) that the FLPMA does not "repeal any existing law by implication" (Br. 26 (quoting § 701(f), 90 Stat. 2744)); (2) that the FLPMA is to be construed "as supplemental to and not in derogation of" the other public land laws (Br. 26 (quoting 43 U.S.C. 1701(b))); and (3) that the PRIA requires the Secretary to "manage the public rangelands in accordance with the [TGA, the FLPMA], and other applicable law consistent with the public rangelands improvement program pursuant to this [Act]" (Br. 27 (quoting 43 U.S.C. 1903(b))). The 1995 rules do not repeal any existing law by implication or conflict with other public land laws. When the provisions of the TGA and FLPMA are read together, nothing in the former prohibits

[19] In the certiorari petition, petitioners preferred the phrase "adjudicated preference," a phrase that also has no counterpart in the TGA, FLPMA, or PRIA. See Pet. 15, 16, 19, 20. The change in terminology may reflect petitioners' recognition that nothing in the 1995 rules affects a prior-determined "preference" or priority to obtain any grazing privileges that the Secretary might determine the range can sustain without injury.

the Secretary from engaging in the land-use planning and other activities mandated by the latter. And the TGA's many references to improving the range and preserving it for other values is completely consistent with the multiple-use directive of the FLPMA and the PRIA's purpose to conserve and improve public rangelands. See 43 U.S.C. 315, 315a, 315c, 315f.

4. Petitioners' economic reliance argument is unpersuasive

Petitioners contend that the 1995 rules hinder their ability "to gauge how large or small their livestock operations could be." Br. 22 (quoting Pet. App. 54a (Tacha, J., dissenting)). Their argument for economic reliance on the prior rules is misplaced. First, as we have demonstrated, see pp. 21-22, *supra*, the regulations consistently have authorized the Secretary to decrease the number of AUMs, and the historical data show that the Secretary in fact has done so. Second, petitioners concede that "the rancher's ability to borrow money for operations and improvements[] depended on the *federal government's* recognition of the maximum number of livestock that could be grazed on the public lands." Br. 23 (emphasis added). Any such reliance by ranchers, therefore, must take into account the revocability of the grazing privilege within the discretion of the Secretary. See, *e.g.*, *Fuller*, 409 U.S. at 492; *Baca* v. *King*, 92 F.3d 1031, 1037 (10th Cir. 1996) ("No court has the power to order the BLM * * * to grant [a permittee] another grazing lease, because the very determination whether to renew grazing permits * * * [is] completely within the Secretary of the Interior's discretion.").

As the government pointed out when the TGA was first implemented, the rancher "who maintains the highest percentage of his capital investment in breeding stock will show the greatest returns. * * * For a short period this may bring more income and probable profits, but, if so, it is at the

expense of the production capacity of the land. It is a form of exploitation which inevitably leads to range depletion." *The Western Range*, S. Doc. No. 199, 74th Cong., 2d Sess. 196 (1936) (letter from Secretary of Agriculture). Seen in light of the contradictory economic incentives promoted by petitioners—short-term profitability leads to long-term *de*-stabilization of the industry—the TGA gave the Secretary the authority to promote the *long*-term public interests in the use of the range and the *long*-term stabilization of the livestock industry by basing grazing permit decisions on the "*protection*, administration, regulation, and *improvement* of such grazing districts." 43 U.S.C. 315a (emphasis added).[20] Precisely for that reason economists have recognized that the economic reliance value asserted by ranchers "has never been recognized by public land agencies and thus has never belonged to ranchers. From this vantage point, the 'right' to purchase and transfer grazing permits is revocable and ranchers do so at their own risk." L. Allen Torell & John P.

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[20] Petitioners construe language in 43 U.S.C. 315b to "*guarantee*" (Br. 23) renewal of a permit if the base property and permit have been "pledged as security for any bona fide loan." 43 U.S.C. 315b. That construction was rejected long ago by the D.C. Circuit in *LaRue* v. *Udall*, *supra*. The court there explained that "[a]s [its] context shows," the provision "is one of the factors to be considered by the Secretary in establishing preferences between conflicting applications for permits on the federal range." 324 F.2d at 431. "By no means," the court continued, "should it be construed as providing that, by maintaining a lien on his grazing unit, a permittee may also create and maintain a vested interest therein" as against the United States. *Ibid.* Moreover, the language petitioners cite provides for renewal only if the permittee is "complying with the rules and regulations laid down by the Secretary of the Interior," 43 U.S.C. 315b, which, as we have explained, provide for reductions in grazing and allocation of grazing lands to other uses. See also Dep't of Interior, *General Explanation of the Taylor Grazing Act* 3 (July 1934) ("After a permit has been issued, its renewal may not be refused *for the purpose of allowing a preference application* if the permittee is complying with all rules and regulations of the Secretary of the Interior, where such refusal will impair the value of a livestock unit that has been pledged by the permittee as security for a loan.") (emphasis added).

Doll, *Public Land Policy and the Value of Grazing Permits*, 16 Western J. Agric. Econ. 174, 183 (1991). Nonetheless, stability is being achieved for the livestock business dependent on the public range, as evidenced by the fact that such ranchers have a higher net earnings rate than ranchers who do not graze on the public lands, even as the public rangelands provide only approximately two percent of total feed consumed by cattle in the lower 48 States. See Report of the Secretaries of Agriculture and the Interior, *Grazing Fee Review and Evaluation Update on the 1986 Final Report* 2 (1992); Kenneth H. Mathews, Jr. et al., *Cow/Calf Ranching in 10 Western States*, Commodity Economics Division, Economic Research Service, U.S. Dep't of Agriculture, Agricultural Economic Report No. 682, at 3 (1994).

II. THE COURT OF APPEALS PROPERLY UPHELD THE 1995 MANDATORY QUALIFICATIONS RULE

Petitioners assert that the court of appeals erred in unanimously upholding the Secretary's 1995 mandatory qualifications rule, which deleted the prior requirement that applicants for grazing permits be "engaged in the livestock business." That contention is incorrect in light of the plain language of the TGA and its legislative history.

A. Describing the language of the TGA as "absolutely clear," the court of appeals unanimously concluded that "there is not even a colorable argument that [Section 3 of the TGA] *requires* the Secretary to issue grazing permits *only* to those engaged in the livestock business." Pet. App. 43a. Section 3 of the TGA, in pertinent part, authorizes the Secretary to "issue or cause to be issued permits to graze livestock on such grazing districts 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. By its plain terms the statute does *not* require that all permittees be "engaged in the livestock business." Section 3 of the TGA uses the phrase "engaged in the livestock business" only in a succeeding sentence, to identify which applicants must be given "preference" for grazing in a grazing district: "Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." *Ibid.*

Petitioners' position treats the phrase "stock owners" in the qualifications sentence of Section 3 as synonymous with the phrase "engaged in the livestock business" in the preference sentence of that section, even though Congress deliberately chose *different* words in the two sentences. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (Court will "refrain from concluding here that the differing language in the two subsections has the same meaning in each."); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 (1993).

In addition, by treating those phrases as synonymous, petitioners' reading nullifies key phrases in the sentence in Section 3 specifying who shall have preference in obtaining a permit. As the language quoted above makes plain, preference shall be given to those who are "within or near a district" *if* they are either landowners engaged in the livestock business, *or* bona fide occupants or settlers, *or* owners of water or water rights. If the latter two groups are to receive a preference, they necessarily must be qualified to receive permits (*i.e.*, be "stock owners"). Yet by their insistence that *all* permittees be engaged in the livestock business, petitioners' construction imposes an additional requirement on the latter classes of preferred applicants (*i.e.*, that the "bona fide occupants" et al. be "engaged in the livestock business") not found in the statutory language itself. See *Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotations marks omitted).

B. Petitioners' reliance on the TGA's legislative history (Br. 45-47) is misplaced, since "[g]iven the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). In any event, the legislative history does not support petitioners' position.

Petitioners primarily rely on an exchange among three Members of Congress and a witness for the sheep industry during the House hearings. See Pet. Br. 46-47. Nothing in that exchange comes remotely close to establishing that Congress intended to foreclose stock owners who were not already engaged in the livestock business at the time of application from being qualified to obtain a federal grazing permit. And notwithstanding their assertion that the exchange they quote is "[l]ike dozens of others" (Pet. Br. 47), petitioners do not offer a single additional citation of support.

Indeed, the more compelling legislative history negates petitioners' position. During the Senate hearing, a proposal was made to add a qualification that all permittees be engaged in the livestock business, but that proposal was rejected. Compare *To Provide for the Orderly Use, Improvement, and Development of the Public Range: Hearings on H.R. 6462 Before the Senate Comm. on Public Lands and Surveys*, 73d Cong., 2d Sess. 74 (1934), with 43 U.S.C. 315b. That decision was consistent with a Senate amendment to the House version of the bill, which removed the word "livestock" from a provision specifying the types of corporations qualified to obtain a grazing permit. The House version contained a qualification requirement limited to "individuals, groups, associations or corporations authorized to conduct a *livestock* business." See H.R. 6462, § 3 (quoted in *Senate Hearing*, *supra*, at 2) (emphasis added). The TGA as enacted includes, more generally, all "corporations authorized to conduct business." 43 U.S.C. 315b. That history of language actually considered and rejected is far more persuasive, see,

e.g., *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993), than statements at a committee hearing.[21]

C. Petitioners' principal contention appears to be that, because the Secretary for many years imposed as a qualification that applicants be engaged in the livestock business, he cannot change that rule. See Pet. Br. 45, 47.[22] Petitioners misapprehend both the nature and history of the rule and the Secretary's authority to revise it.

The Department's early rules and administrative decisions were consistent with the language in Section 3 of the TGA that mentioned persons "engaged in the livestock busi-

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[21] Both the text of the TGA and its legislative history show that Congress's chief concern was that the stock owners who applied for permits possess nearby base property, not that they be engaged in the livestock business. The text requires all permit applicants seeking a preference to own or control base property "within or near a district," 43 U.S.C. 315b, and the floor debates evince concern about migrant grazers and a desire to give permits to those who owned, controlled, or had improved nearby base property. See 78 Cong. Rec. 6356, 6358-6359 (1934).

[22] Notwithstanding petitioners' generous use of italics when quoting from a 1936 document, Dep't of Interior, *Legal Problems in Grazing Regulation* (Nov. 14, 1936) (see Pet. Br. 47), the short-hand references in that document to the livestock industry in describing the general thrust of the TGA could not fairly be construed as intending to override the formal regulations issued by the Secretary, which contained no requirement of being engaged in the livestock business to obtain a permit. See note 23, *infra*. (We note as well that that document refutes petitioners' central contention on the permitted use rule. A section entitled "Conservation regulations" states that the Secretary is "authorized to increase or reduce the number of stock which may graze in a district, to designate the seasons of use, and to do any and all things necessary for the protection and administration of the public range, namely, to preserve the land and its resources from destruction and unnecessary injury and to provide for its orderly use, improvement and development." *Legal Problems*, *supra*, at 4.) The 1938 Solicitor's Opinion cited by petitioners (Br. 44, 47) addressed the quite different question of whether a Pueblo Indian Tribe qualified for a TGA permit even though the livestock was owned by its members, not the Tribe itself. See *Rights of Pueblos and Members of Pueblo Tribes Under the Taylor Grazing Act*, 56 Interior Dec. 308 (1938).

ness" only in the context of preference, not as a mandatory qualification.[23] In 1942, without any explanation, the Secretary substituted the words "engaged in the livestock business" for "owns livestock" in the mandatory qualifications regulations. 7 Fed. Reg. 7686. That requirement, however, was imposed as a matter of administrative discretion, not statutory command. Section 3 itself authorizes the Secretary to issue permits "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 (emphasis added). The emphasized phrase authorizes the Secretary to impose a qualification standard that does not include all "stock owners," and he did that in 1942 by providing that only persons "engaged in the livestock business" were entitled to participate in the use of the range. Given his legislative rulemaking authority on the subject, the Secretary had full discretion to change that rule in 1995, as long as the change was not arbitrary or capricious, *Chevron*, 467 U.S. at 844, and the Secretary provided a "reasoned analysis," *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991); *Chevron*, 467 U.S. at 863-864; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The old rule created uncertainties for applicants "where the livestock operator is in an initial developmental stage and is not yet ready to run cattle on the range." 60 Fed. Reg. at 9926.[24]

[23] See 1937 rules, *supra*; Mar. 1938 Range Code § 3. For early administrative decisions that did not impose any "engaged in the livestock business" requirement, see *Joseph Livingston*, 56 Interior Dec. 305, 306 (1938) (3 C.A. App. 1182) (citing 1936 Rules for the proposition that a "qualified applicant will be considered in a *preferred* classification if he is a member of any one of the following four classes: 1. Landowners engaged in the live-stock business. 2. Bona fide occupants. 3. Bona fide settlers. 4. Owners of water or water rights."). *Willis J. Lloyd*, 58 Interior Dec. 779, 787 (1944) (3 C.A. App. 1189) (emphasis added) (business of parties dismissed as unimportant).

[24] See *Ralph E. Holan*, 18 Interior Bd. Land App. (IBLA) 432, 434 (1975) (3 C.A. App. 1179); see also *John F. MacPherson*, 1 Interior Grazing Dec. 566, 567-68 (1952) (3 C.A. App. 1190-1191). In those cases, the IBLA affirmed the denials of permit applications to livestock owners who indicated that they "would be in the livestock business if BLM were to grant them the desired lease or permit." *Holan*, 18 IBLA at 433 (3 C.A. App. 1178); *MacPherson*, 1 Interior Grazing Dec. at 567 (3 C.A. App. 1190) (applicant sought to graze 500 cattle).

Petitioners' position would effectively foreclose new entrants into the livestock business from obtaining a grazing permit. Petitioners' stated fear—that the new rule would be used to end livestock grazing on the public lands (see Pet. Br. 47-48)—is neither supported by the administrative record nor consistent with other regulations.[25]

III. THE COURT OF APPEALS PROPERLY UPHELD THE 1995 RULE GOVERNING OWNERSHIP OF FUTURE PERMANENT RANGE IMPROVEMENTS

Petitioners contend (Br. 43) that the Secretary may not, when deciding whether to allow new permanent range improvements on public grazing lands, impose as a condition that the United States shall hold title to such improvements. That contention is contrary to the text of the TGA, the history of the provision, and decisions by this Court in analogous situations. The Secretary provided a reasoned basis for the rule change, which the court of appeals properly accepted.

A. Neither Section 4 of the TGA, 43 U.S.C. 315c (set out in full at Pet. App. 105a) nor Section 402(g) of the FLPMA, 43 U.S.C. 1752(g) (set out in full at Pet. App. 115a) forecloses the Secretary from adopting the amended rule upheld by the court below, which provides as follows: "Subject to valid existing rights, title to permanent range improvements such as fences, wells, and pipelines where authorization is granted

[25] A longstanding rule requires that a grazing permit be used for grazing, and that "[f]ailing to make substantial grazing use as authorized for 2 consecutive fee years" is a "[p]rohibited act." See 43 C.F.R. 4140.1, 4170.1 (1998). That rule has been in effect since 1962. See *id.* § 161.6(e) (1962).

after August 21, 1995 shall be in the name of the United States." 43 C.F.R. 4120.3-2(b) (1995). Because both the TGA and the FLPMA are silent on the precise point in issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Rust*, 500 U.S. at 184 (quoting *Chevron*, 467 U.S. at 842-843).

Important textual indicators in 43 U.S.C. 315c belie petitioners' assertion that Congress has foreclosed the rule chosen by the Secretary. First, private persons have no right to build *any* range improvements on federal grazing land except "under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve." 43 U.S.C. 315c. Because the Secretary has discretion to allow or disapprove construction of permanent range improvements on federal lands, he necessarily has the lesser authority to condition such construction on title to those improvements being held by the United States. Cf. *United States* v. *Alaska*, 503 U.S. 569, 591 (1992) ("It would make little sense, and be inconsistent with Congress' intent, to hold that the Corps legitimately may *prohibit* construction of a port facility, and yet to deny it the authority to seek the less drastic alternative of conditioning issuance of a permit on the State's disclaimer of rights to accreted submerged lands."); see also *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405-406 (1917).[26]

Second, although 43 U.S.C. 315c provides that a permittee shall provide compensation for any improvements that happen to be both "constructed and owned by a prior occupant," that language does not require the Secretary to allow a permittee to own all improvements he makes (especially *permanent* improvements) on public lands in the first place; it

[26] The 1938 regulation petitioners cite (Br. 42) addressed the situation of improvements constructed by ranchers whose livestock grazed prior to the TGA. Nothing in that regulation purported to vest title to all subsequently constructed improvements in the permittee who constructed them.

merely ensures that an applicant for a permit to graze on lands having improvements that in fact *are* owned by a prior permittee must pay "the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior." 43 U.S.C. 315c.

Third, the new rule is consistent with common law principles, under which "[t]he parties' relative rights to tenant annexations [*i.e.*, fixtures] may be defined by the lease. The lease may provide, for example, that tenant annexations become the property of the landlord, and that they are to be left by the tenant at the expiration of the lease." 5 *Thompson on Real Property* § 40.07(a) (David A. Thomas ed. 1994). "Where applicable, such lease provisions will generally determine the rights of the parties." *Ibid.* (footnote omitted). The Secretary's rules under the TGA have long provided that "[t]he United States shall have title to range improvements authorized under cooperative agreements." 43 C.F.R. 4120.6-2 (1978). The only real change of substance in the 1995 rules is the provision that all permanent range improvements henceforth shall be made through cooperative agreements. *Id.* § 4120.3-2 (1995).[27] There is no suggestion in 43 U.S.C. 315c that it was meant to deprive the Secretary, on behalf of the United States, of such authority that any lessor of property would have.

Fourth, the FLPMA reinforces the conclusion that while a grazing permittee who builds range improvements on public lands has an "interest" in such improvements, that does not mean the permittee must have title to them. When a grazing permit is canceled by the Secretary, "the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the

[27] The rules provide for an accounting of the contributions by cooperators, see 43 C.F.R. 4120.3-2 (1995), so that reasonable compensation can be paid in the event the grazing permit is canceled, see *id.* § 4120.3-6 (1995) and 43 U.S.C. 1752(g).

Secretary concerned, of his *interest in* authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease." 43 U.S.C. 1752(g) (emphasis added). As the court below correctly reasoned, "[t]hat this provision was even considered necessary in order to ensure that permittees who construct permanent improvements would be compensated upon cancellation of their permits by the United States belies the suggestion that a permittee is considered to own title to an improvement merely because he constructs it." Pet. App. 38a. Thus, even though the Secretary's rules permissibly require that all permanent range improvements constructed after August 21, 1995, be undertaken pursuant to a cooperative agreement and thereby vest title in the United States, the regulations continue prior regulatory practice by providing compensation to the builders of such improvements in the event their permits are canceled. 43 C.F.R. 4120.3-5, 4120.3-6(c) (1995); *Id.* §§ 4120.3-5, 4120.3-6(c) (1994).[28]

B. The history underlying the range improvements provision refutes petitioners' assertion (Br. 38) that, because the TGA plainly contemplates that there may be *some* ownership rights of range improvements in prior occupants, Congress must have intended to vest title to *all* permanent range improvements in the grazing permittee. When the TGA was enacted, cattle and sheep ranchers had been grazing their livestock on federal lands for decades, and had constructed range improvements to facilitate that use. Since a primary purpose of the TGA was to install the Secretary as the referee for the future grazing use of the lands, Congress well understood that some of those "prior occupants" were

[28] Consistent with Section 315c, the amended rules also provide that permittees may hold title to *removable* range improvements, 43 C.F.R. 4120.3-3(b) (1995) ("The permittee or lessee may hold title to authorized removable range improvements used as livestock handling facilities such as corrals, creep feeders, and loading chutes, and temporary structural improvements such as troughs for hauled water.").

going to lose out in the process of determining who had the right to graze their livestock on lands subject to the TGA. Section 4, 43 U.S.C. 315c, is most naturally read as a means of providing compensation by the winners in that process to the losers whose prior construction of range improvements necessarily would benefit the new permittees under the TGA.

Petitioners erroneously rely (Br. 40-41) on discussions in the Senate hearings on the TGA. The bill then under consideration would have required a subsequent occupant to pay "a reasonable pro-rata value" for improvements constructed by a prior occupant. 4 C.A. App. 1471. That "pro-rata value" proposal was based on the Forest Service's approach to range improvements at the time, under which a permittee's investment was amortized over a 10-year period. *Id.* at 1472-1473. A new permittee would purchase whatever portion of the value was left over before the government acquired the improvement at the end of the 10-year period. *Ibid.* Significantly, too, the Forest Service did not guarantee compensation for a permittee's investment in an improvement to facilitate grazing on its lands. *Id.* at 1473. Unable to reach any agreement, Senator O'Mahoney suggested the need for clarification, and the Interior Department witness agreed to suggest alternative language. *Ibid.* The testimony cited by petitioners thus did not address the Secretary's discretion to provide for public ownership of permanent improvements on public lands. See *Rust*, 500 U.S. at 189-190 (it is "well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations").

C. Because the 1995 range improvement rule represented a departure from prior practice, the Secretary was obliged to provide a reasoned basis for the changes. See *State Farm Mut. Auto Ins. Co.*, 463 U.S. at 42. As the court below correctly determined, the Secretary "provided several explana-

tions for the changes, any one of which would be sufficient to meet this narrow standard of review." Pet. App. 40a-41a.

First, because the FLPMA requires the Secretary to promote multiple use and sustained yield of federal lands, that mandate is "simplified if BLM [can] avoid having to negotiate with permittees as titleholders to permanent improvements." Pet. App. 41a. Second, "[t]he Forest Service has long had a policy of retaining title to permanent improvements and has not observed that private contribution has been discouraged." 60 Fed. Reg. at 9935. The changed rule, therefore, "would unify procedures for authorizing improvements between BLM and the Forest Service given that many permittees use land administered by both agencies and both agencies have the same goals with respect to ecosystem management so far as consistent with the specific terms of their respective governing statutes." Pet. App. 41a.[29] Third, the new rule "clarifies a confusing overlap in the prior rule, under which certain improvements could fall under the category providing for shared title as well as the category granting full title to the United States." *Ibid.* The new rule on range improvements therefore is amply justified and reasonable. See *Rust*, 500 U.S. at 187.

[29] Empirical experience should allay any concerns that permittees will be less likely to construct improvements as a result of the challenged rule. The 1995 rule at most reinstates a policy on ownership of permanent range improvements that was in place before regulatory changes in 1984 left the ownership question unclear. See 60 Fed. Reg. at 9897. BLM data on pre- and post-1984 range improvement investment by permittees shows that there is no empirical basis for a belief that the challenged rule will discourage investments in range improvements. See Statistics from BLM Grazing Data Administrator, Dep't of Interior, Bureau of Land Mgmt., *Total Funds Spent by Ranchers for Improvements Through Section 4 (RI) Permits 1978 to 1993* (July 11, 1994) (on file with the Nat'l Resources Science Ctr. (NARS), Denver, CO) (2 C.A. App. 458). The data show an annual average of $1.7 million in range improvements from 1978 to 1983, and $1.9 million from 1984 to 1993. *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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