GRANTED

No. 98-1991

In the Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL., PETITIONERS,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., RESPONDENTS.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THE "PERMITTED USE" AND "PREFERENCE" RULES EXCEED THE SECRETARY'S AUTHORITY

The briefs of the Secretary and his environmentalist amici bear such oblique relation to petitioners' argument that we summarize again why the 1995 "permitted use" and "preference" rules are invalid. In our opening brief, we showed that the plain language of the TGA required the Secretary, when he adjudicated claims to "preference * * * in the issuance of grazing permits" over public lands "chiefly valuable for grazing," to allocate to a successful applicant the amount of forage "necessary to permit the proper use of" his or her base land or water. 43 U.S.C. §§ 315, 315b. Through this one-time adjudication, the Secretary "recognized and acknowledged" particular "grazing privileges" attached to particular base property. *Id.* § 315b. Congress commanded that those privileges "shall be adequately safeguarded." *Ibid.* For 60 years, that is how the Secretary read the statute, adjusting actual grazing use to range conditions, but reflecting adjudicated forage in the grazing permit and treating the difference between active and adjudicated forage as "suspended use" that again became available to the permittee if forage production increased. See PLC Br. 9, 31-32 (citing regulations).

The 1995 rules violate Congress' mandate and the Secretary's prior consistent practice because they do not safeguard adjudicated forage *in any way*. Rather, they specify that forage is now to be allocated through vague and standardless land use planning in which, the Secretary concedes (at 25-26), forage adjudicated under the TGA is not even "considered," let alone given special weight. Because the "preference" and "permitted use" rules and the land use plans to which they make grazing subject do not acknowledge—much less "safeguard"—adjudicated forage, those rules are *facially* invalid. Rules in which adjudicated forage plays no role—and which make grazing privileges depend solely on land use planning characterized by "unbridled administrative discretion" and "bureaucratic whim or aberration" (2 G. COGGINS ET AL., PUBLIC NATURAL

RESOURCES LAW § 10F.04[3][d])—in "no set of circumstances" operate to safeguard adjudicated forage as the TGA expressly requires. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Because forage adjudications under the TGA are no longer part of the *process* of allocating forage to a permittee, it is inconceivable that the challenged rules would ever produce a lawful result.

Rather than face this argument, the Secretary pretends (at 23) that we complain about a "change in terminology." The Secretary *has* drastically changed his terminology. In contrast to his current denial (at 10-11) that the term "preference" was used to refer to forage adjudications prior to 1978, the Secretary previously *admitted* that the 1995 rules "redefined" "preference" to "omi[t] reference to a specified quantity of forage, *a practice that was adopted by the former Grazing Service during the adjudication of grazing privileges.*" 60 FED. REG. 9921 (1995) (emphasis added). See also Office of the Secretary, *Legal Problems in Grazing Regulation* 3 (Nov. 14, 1936) ("Preference" is "measured by the amount of grazing which is necessary to enable the applicant to make proper use of" base property); HOUSE HEARINGS ON H.R. 3019, 74th Cong., 1st Sess. 21 (1935) (Asst. Interior Solicitor Poole). Nevertheless, our concern is with *substance*. PLC Br. 8 n.2. The Secretary may redefine "preference," but not adopt rules that strip every safeguard away from adjudicated forage.

The Secretary (at 27) mischaracterizes our position as asserting a "permanent right to graze livestock at a particular level." We do not claim that right. Adjudicated forage is the upper limit of forage available to a rancher if ideal range conditions hold, not a "right" to graze a particular number of livestock every year. Often, forage allocated by the Secretary for "active use" under his statutory power to "specify from time to time numbers of stock" allows grazing fewer animals than the maximum to reflect current range condition and carrying capacity. PLC Br. 9. The Secretary conflates his authority to make such year-to-year adjustments—which we do not doubt—

with power to revisit forage adjudications made under the TGA. No statute authorizes *re*adjudication of grazing privileges as part of land use planning, permit renewal, or otherwise.

Nor do we claim that a permittee has a "right" to graze up to the maximum adjudicated forage even when range conditions are ideal. The TGA requires that privileges be adequately safeguarded, not that they never be altered. Under the TGA, a grazing preference could even be eliminated, if the range was reclassified for a purpose inconsistent with grazing like disposal or military use. The problem with the 1995 rules is that they offer *no* protection for adjudicated forage in *any* circumstances: they eliminate recognition of adjudicated forage across the board. The substantive protection provided by the TGA does not give permittees a legal right to public rangelands, or create a property right for the loss of which compensation could be due under the Takings Clause (the sole issue in *Fuller*).[1]

The parts of our argument the Secretary does not mischaracterize he ignores. He offers no explanation for the "as * * * necessary to permit the proper use" of base property clause of TGA § 3 (PLC Br. 19); dwells on the TGA's range protection goal while overlooking its animating purpose to promote the

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[1] Congress saw no inconsistency between its mandates that grazing privileges be safeguarded and that they create no right to federal rangelands. The government's contention that we seek some statutorily barred right also proves too much. The Secretary admits that grazing privileges are not "bare" privileges. He acknowledges (at 33 & n.18) that ranchers *have legal remedies against third parties who interfere with their privileges* (see p. 8, *infra*), as well as procedural protections against adverse grazing decisions; that BLM must renew a grazing permit unless the permittee is out of compliance, or the land is to be disposed of or dedicated to another public purpose; and that Section 315b "forestall[s] arbitrary action by the agency." The Secretary offers no explanation why that protection does not—but safeguarding adjudicated forage does—create a prohibited interest in the public range.

western livestock industry (*id.* at 20-22); is oblivious to statements by Interior officials, contemporaneous with the TGA, that do not fit his theory (*id.* at 8 n.2, 21-22, 30); fails to respond to our argument that Congress ratified agency interpretations inconsistent with the 1995 rules (*id.* at 33); and does not explain why this Court should endorse his grab for powers that Congress refused to grant him in 1993. *Id.* at 33-34.

A. ***The Secretary does not have unbridled discretion.*** Secretary Babbitt sees nothing in the TGA, FLPMA, and PRIA but "broad discretion" for himself. U.S. Br. 30. He says those Acts establish a loose "framework" for decisionmaking (*id.* at 25), leaving him with virtually unbounded discretion to manage the range. The *only* statutory constraints the Secretary acknowledges are the "relative priority" among new grazing permit applicants and the priority granted to existing permittees at renewal, both established by TGA § 3. *Id.* at 16-18, 33 n.18.[2]

But the authority granted by TGA § 2 must be exercised "to insure the objects of * * * grazing districts." Those objects were to regulate and improve the range in order to stabilize the livestock industry—as Congressman Taylor put it, to

[2] The Secretary even contends (at 37 n.20) that the TGA § 3 provision that "*no permittee* complying with the rules * * * shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan" does not mean what it says. (Emphasis added.) The Secretary's pinched reading of the clause as limited to initial preference determinations is ahistorical, because prior to those determinations there were no "permittees," only "temporary licencees." 1937 Rules at 1, CA App. 817; *Legal Problems* at 9. Senator McCarran—who proposed the amendment after the "right, title, or interest" language was added—intended to "guarantee" that grazing privileges "shall be * * * definite and certain" *"so that no intervening agency, governmental or otherwise, may take from the value of the security."* 78 CONG. REC. 11152-53 (1934); see also *id.* at 11152, 11162.

"preserv[e] our remaining * * * public domain and sav[e] the forage on it for the future prosperity of the livestock industry." 78 CONG. REC. 10394. Compare U.S. Br. 4, 5 (purpose of the TGA was to "stop injury" to public rangeland so it could be used for "multiple purpose[s]") with HOUSE HEARINGS ON H.R. 2835, at 133 (statement of Secretary Ickes that "[w]e want to protect the range *in the interest of the livestock industry*") and H.R. REP. NO. 73-903, at 2 (the *"whole purpose"* of the TGA was "to conserve the public range *in aid of the stock industry*") (emphases added). The Secretary's rulemaking power is constrained as well by the specific provisions of TGA § 3, including the requirement that "grazing privileges recognized and acknowledged shall be adequately safeguarded." See *ICC v. ATA*, 467 U.S. 354, 363 (1984) (denying agency "unbridled discretion" that would render "nugatory" the "restraints placed by Congress on the [agency's] power"). As we demonstrate below, the Secretary's attempt to explain away that language as no constraint at all is unavailing.

B. ***Forage levels were adjudicated as part of the preference determination.*** TGA § 3 granted not just a "preference" to grazing privileges to certain persons, but "[p]reference * * * in the issuance of grazing permits * * * as may be necessary to permit the proper use of" base property. Thus, the Secretary is wrong when he asserts (at 18-19) that "[n]othing in the TGA requires [him] to determine how much grazing will be allowed as part of the same decisional process in which he decides the priority of an applicant in obtaining a permit for grazing." Section 3 required that a determination of necessary forage be part of the initial adjudication of preference. See *McLean*, 133 IBLA at 233 n.14 (proper use of base property was the TGA's "ratio decidendi").

Unsurprisingly, the contemporaneous view of senior Interior officials was that preference adjudication included a substantive component quantifying "necessary" forage. *E.g.*, *Legal Problems* at 3 ("[p]reference" is "measured by the amount of grazing which is necessary to enable the applicant to make

proper use of" the base property); P. FOSS, POLITICS AND GRASS at 64 (the Director of Grazing stated in 1934 that "preference rights" are "adjunctive pasture rights which naturally belong to" the base property); HOUSE HEARINGS ON H.R. 3019, at 21, 64 (Asst. Interior Solicitor Poole) ("in measuring the preference" Secretary "g[a]ve [a rancher] such range as is necessary for him to make a proper use of what he has"). See also U.S. Br. 10 (the 1962 rules, reflecting that longstanding practice, identified the components of "adjudication of grazing privileges" as determining priority and "apportion[ing]" "forage production"); 1938 Range Code § 2(e) ("[b]ase property" is "the basis o[n] which the extent of a * * * permit is computed"); 43 C.F.R. § 4100.0-5 (1994); 43 FED. REG. 29058 (1978) (assuring that the rules protect "adjudicated grazing use"). The TGA's plain command that the Secretary determine preference to grazing necessary to make proper use of base property, and the consistent statements and practice of the Secretary in adjudicating forage along with priority, cannot be reconciled with the Secretary's new denial (at 28) that there is any such thing as adjudicated forage.

Indeed, before this litigation began, Secretary Babbitt admitted that, prior to 1995, "preference" had included "a specified quantity of forage" ever since "that practice was adopted by the former Grazing Service during the adjudication of grazing privileges." 60 FED. REG. 9921. The Secretary's new claim (at 19-20) that priority and forage "determinations stem from different statutory provisions" deprives the "as may be necessary to permit the proper use" language of TGA § 3 of any meaning.[3] It is also at odds with the Department's position of

[3] In his Opposition (at 10 n.7), in contrast, the Secretary argued that "'permitted use' in the amended rules is a construction of the phrase 'as may be necessary to permit the proper use of lands.'" A rule that pays no heed to adjudicated forage does not, however, reasonably interpret statutory text requiring that forage be allocated according to the needs of base property and be "adequately safeguarded."

60 years that initial preference adjudications included adjudication of "necessary" forage—a position reflected not only in the statements and rules quoted above but also in the agency's practice of listing adjudicated forage on the permit (U.S. Br. 21; 43 C.F.R. § 4110.2-2 (1994)) and treating the difference between the preference and active use as "suspended use" that could be reactivated if forage production on the allotment increased. PLC Br. 9, 31-32; 43 C.F.R. § 4110.3-1(b) (1984) ("Additional forage permanently available for livestock grazing use shall first be allocated in satisfaction of grazing preferences"); *id.* § 4111.4-2 (1964); *id.* § 161.6(d) (1955).

C. ***The Secretary "recognized and acknowledged" privileges to specific amounts of forage, which must be safeguarded.*** The Secretary (at 32-33 & n.18) admits that TGA § 3's provision that "recognized and acknowledged grazing privileges shall be adequately safeguarded" imposes continuing obligations on him. He says that during the initial adjudication of preferences, that obligation was the substantive one to "protect" grazing privileges previously recognized by state law or local custom during the TGA adjudication process. Yet he claims that "[o]nce permits [were] issued," the "adequately safeguarded" language requires only that he protect permittees from trespass, observe the statutory priority permittees have to renewal, and provide "procedural safeguards."[4]

This distinction is flatly at odds with the statutory language, which draws no line between the periods when preferences were adjudicated and after permits were issued. Through the adjudication process, the Secretary formally "recognized and

[4] The Secretary's "authority" for this proposition is an assertion in a treatise that cites *McNeil* and *Oman*, 179 F.2d 738. Neither case suggests that the "adequately safeguarded" language is thus limited. Indeed, the Court in *Oman*, citing that language, observed that "[a]s long as the permits were unrevoked, the grantor [the United States] would have no more right to interfere with their exercise than would any third party." *Id.* at 742.

acknowledged" grazing privileges in any ordinary sense of those terms—including the adjudicated amount of forage "necessary" for each base property. *Cf.* H.R. REP. NO. 73-903, at 3 (using the term "recognized" to describe pre-TGA recognition of "grazing rights" "by local customs, laws, and decisions of the courts," and "acknowledged" to describe post-TGA preference adjudication); Pet. App. 63a-64a. The plain meaning of the text is that the Secretary must adequately safeguard the privileges he formally adjudicated.

Moreover, the Secretary's reading of the "adequately safeguard" language (at 33) renders other statutory provisions "redundant." *Kungys*, 485 U.S. at 778. TGA § 3 already grants permittees a "preference right * * * at renewal"; TGA § 9 provides procedural protection; and a permittee could obtain an injunction or damages against trespassers. *Red Canyon Sheep Co.*, 98 F.2d at 316; 3 G. COGGINS ET AL., *supra*, § 19.02[1][c] (a "permittee has property 'rights' vis-a-vis other ranchers").

D. ***The 1995 regulations do not safeguard forage adjudicated under the TGA.*** The Secretary asserts (at 25-26) that land use planning "protect[s] petitioners' interests." But he admits that forage levels adjudicated under the TGA as "necessary" to the proper use of base property will now play *no role whatsoever* in land use planning decisions—will not even be "considered" by land use planners. *Ibid.* Because, as Judge Tacha concluded, the "permitted use approach ends recognition of the grazing preference across the board, for all permittees" (Pet. App. 62a), the Secretary has necessarily violated his statutory mandate to safeguard recognized and acknowledged grazing privileges. *Supra*, at pp. 1-2; PLC Br. 34-35.

E. ***Nothing in the FLPMA relieves the Secretary of his obligation to safeguard forage adjudicated under the TGA.*** The Secretary contends that the FLPMA—though BLM described it as working only "minor adjustments" in the TGA—abrogated adjudicated forage. BLM, THE TAYLOR GRAZING ACT: 50 YEARS OF PROGRESS 5 (1984). That is incorrect. To be sure, the FLPMA enacted a policy of multiple use and sustained yield for BLM lands, to be implemented through land use planning.[5] In the future, land use plans and multiple range values would guide adjudication of grazing privileges on newly available grazing lands. § 1712. And the FLPMA confirmed the Secretary's authority to adjust active use to reflect "the condition of the range." § 1752(e). But the Secretary has pointed to nothing in either the text or history of the FLPMA that suggests it authorizes the Secretary to ignore preferences previously adjudicated under the TGA.[6] See Pet. App. 57a ("a grazing adjudication was a one-time decision of the Secretary, made when he first allocated grazing privileges on a particular allotment of the public range").

For two decades from passage of the FLPMA until 1995, that was the Secretary's understanding. TGA-adjudicated preferences continued to be reflected on permits; "suspended use" continued to be the difference between adjudicated and

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[5] Land use planning for multiple use and sustained yield of the range began with the Classification and Multiple Use Act of 1964. 43 U.S.C. § 1411 (expired). BLM did not inaugurate any rule changes between 1964 and 1976 based on the C&MUA or land use plans. The FLPMA continued prior policy. Under the FLPMA until 1995, as under the CM&UA previously, land use planning treated TGA adjudicated preferences as fixed points, not historical footnotes. *E.g.*, 44 FED. REG. 46390 (1979).

[6] The Secretary mistakes our argument when he asserts (at 29) that his FLPMA powers to dedicate land to purposes other than grazing and impose terms and conditions in new permits "positively refute" the claim that a TGA adjudication "binds or overrides the Secretary's decisions concerning the use of the allotment." The Secretary had those powers under the TGA too. Our contention is that the Secretary may not make decisions of that sort without "adequately safeguarding" adjudicated preferences, which at minimum means not ignoring them altogether, as the 1995 regulations do.

active use (*e.g.*, 43 C.F.R. § 4100.0-5 (1984)); and the Secretary even conformed his regulations to the TGA's text and to established practice by defining "grazing preference" as the total AUMs "apportioned and attached to base property" through adjudication. *Ibid.* Explaining his first set of post-FLPMA regulations, the Secretary promised that permittees' "adjudicated grazing use * * * will be recognized under these grazing regulations." 43 FED. REG. 29058. This is also the Interior Board of Land Appeals' understanding of the FLPMA. *McLean*, 133 IBLA at 232-233 & n.12 (post-FLPMA rules "protect all previously adjudicated [grazing] preferences," but under the statute, "future adjudications of grazing use would be based on [vastly different] criteria").

The Secretary's contention that TGA preferences did not survive the FLPMA, and that the TGA's mandate that substantive protection be accorded to adjudicated grazing privileges can now be ignored, does not "harmonize the impact of the two statutes." *United States* v. *Romani*, 523 U.S. 517, 530 (1998). It interprets the FLPMA to override the TGA altogether, though the FLPMA does not mention the term "preference" or refer anywhere to the "adequately safeguard" clause of the TGA. That is not permissible.

"[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal must be clear and manifest.'" *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). See also, *e.g.*, *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946) (the Acts "must be read in pari materia" to try "to reconcile [them], if possible, and give effect to each"). Far from being "clear and manifest" that the FLPMA abrogates TGA-adjudicated privileges, the statute contains no fewer than *three* savings clauses, including the requirement that "[n]othing in this Act * * * shall be construed as terminating any * * * land use * * * authorization existing

on the date of approval of this Act." 43 U.S.C. § 1701 (note); see also *ibid.* (no repeal by implication), § 1701(b). These provisions make it improper to interpret the FLPMA broadly to abolish adjudicated privileges that the TGA instructed the Secretary to safeguard. They demand instead a sensitive reading that preserves as much of the TGA as is not specifically rejected in the FLPMA, including the Secretary's obligation to "adequately safeguard" forage he had "recognized and acknowledged."

F. ***Congress ratified the Secretary's interpretation of the TGA.*** "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986). That principle, which the Secretary fails to address in his brief, applies here. Congress amended the TGA on a number of occasions, and then revisited the area of public land management and grazing use again in the FLPMA and PRIA. See PLC Br. 33. On none of those occasions did Congress amend the TGA provisions requiring that preferences be allocated commensurate with the forage needs of a permittee's base property or that adjudicated grazing privileges be safeguarded. On none of those occasions did Congress challenge the Secretary's practice of treating adjudicated forage as part of the preference. And on none of those occasions did Congress complain about the Secretary's protection of adjudicated forage levels, as when he continued to hold in suspension the difference between adjudicated forage and actual use.[7]

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[7] The Secretary cites a 1936 amendment to the TGA that was primarily designed to increase the acreage available for grazing districts (S. REP. NO. 74-2371, at 2-3 (1936)), but that also authorized him to reclassify lands within grazing districts as more valuable for other uses. By 1936, the Secretary had withdrawn *all* public lands subject to the TGA pending designation of grazing districts. The part

G. ***Congress rejected the range reform rules.*** The Secretary ignores our argument (at 33-34) that Congress' 1993 rejection of his range reform proposals shows that his new rules are impermissible. Yet the Solicitor General has urged, when convenient, that a subsequent Congress' rejection of a statutory amendment is a sound guide to Congressional intent. *E.g.*, Br. for the United States at 22, *United States* v. *Riverside Bayview Homes* (No. 84-701) (arguing that any doubt about the scope of the Clean Water Act "was completely laid to rest" when a subsequent Congress rejected "[a]n amendment to limit the geographic reach of [CWA] Section 404 to traditional navigable waters and their adjacent wetlands"). And this Court has often attached interpretative weight to actions by a subsequent Congress. *E.g.*, *Riverside Bayview Homes*, 474 U.S. at 135-138 (accepting the Solicitor General's argument); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 732-733 (1975) (Congress' refusal to adopt SEC-proposed amendments to § 10(b) "argue[d] significantly in favor of acceptance of" prior judicial interpretation of § 10(b)); *Federal Open Market Comm.* v. *Merrill*, 443 U.S. 340, 354 (1979) (disapproving agency interpretation of FOIA that ran "counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague 'public interest' standard"); *Heckler* v. *Day*, 467 U.S. 104, 113-114 (1984).

Here, Congress rejected *precisely* the powers that the Secretary proceeded to give himself by regulation. Even the proponent of the range reform amendment, Senator Reid, could not countenance the Secretary's permitted use rule. He understood that that rule "eliminat[es the] preference" and "knocked that out" of the bill because of its adverse impact on ranch values. 139 CONG. REC. 25745 (1993); see also *id.* at H8052-8054 (Oct. 15, 1993); PLC Br. 34. As the current Chairmen of House and Senate Committees with responsibility for public lands point out in their amicus brief urging reversal (at 15), Article IV, § 3, cl. 2 of the Constitution grants Congress the authority to govern federal lands. See also 78 CONG. REC. 10396 ("the public-land policy of the Government has always been exclusively the responsibility of Congress") (Rep. Taylor). Particularly in light of that express constitutional authority, the Secretary should not be permitted to arrogate to himself powers that Congress considered and expressly refused to grant him.

H. ***Adverse effects of ending recognition of adjudicated forage are significant.*** The Secretary doubts his new rules make a "change in real-world terms." U.S. Br. 22. But as the Farm Credit amici describe (at 12), "[l]oss of the historical grazing preference will immediately devalue federal land ranches," putting existing loans at risk and making it difficult for ranchers to qualify for new loans. There is nothing irrational (NRDC Br. 10) in ranch lenders and buyers valuing the suspended element of adjudicated forage and not just current "active use." Unlike "active use," which vacillates with rainfall and other factors affecting forage production, adjudicated forage is a fixed point from permit-to-permit that enables ranchers to increase active use when the Secretary determines that range conditions allow. The chart appended to the Secretary's brief (at 9a) is misleading because it shows not variations in use of individual permits, only total active AUMs on all BLM rangelands—a number influenced by a host of factors, especially poor economic returns that have driven many ranchers out of business. *E.g.*, 122 CONG. REC. 4056, 4420 (1976); H.R. REP. NO. 95-1122, at 10, 18 (1978). Even that chart shows an increase in total active AUMs from 1980 to 1990, when forage resources were available and administra-

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of the amendment cited by the Secretary was designed to ensure that "poor grazing land" desired for "industrial" or other purposes was not "tied up" or "stalemated" during the classification process. HEARING ON S. 2539 BEFORE THE SENATE COMMITTEE ON PUBLIC LANDS 3 (1935). The sole effect of the Fiscal 2000 appropriations measure cited by NRDC (at 16-17) was to *extend* grazing permits.

tions friendlier to ranchers' interests controlled the Department. "[I]n real-world terms," a future Secretary less intent than the current one on displacing livestock from the range in favor of other interests will find it easier to increase permittees' forage if baseline preferences are in place. That is why Secretary Babbitt and the NRDC are so intent on eliminating preferences, while all the time protesting that adjudicated forage is of no practical importance.[8]

II. THE RANGE IMPROVEMENTS RULE IS INVALID

In our opening brief we showed that Congress' explicit provision for compensation for improvements "constructed and owned by" permittees demonstrates an understanding that such improvements would in fact exist. We further presented clear confirmation of that congressional understanding from the legislative history of the TGA. The Secretary's answer consists of speculation and evasion and does not carry the day.

A. Unable to locate support in the statute for his assertion of title over ranchers' permanent structural improvements (such as fences, stock water tanks, and pipelines), the Secretary claims instead (at 44) to see four "textual indicators" in 43 U.S.C. § 315c that demonstrate the permissibility of his action.

[8] The Secretary is playing games when he points out (at 22) that "permitted use" under the 1995 rules includes "suspended use" and says this means nothing has changed. Suspended use prior to 1995 was the difference between adjudicated forage and active use. Now, it is the difference between active use and the permitted use "authorized" in a land use plan, which takes no account of adjudicated forage and which can be reduced or eliminated at the whim of land use planners. 43 C.F.R. §§ 4100.0-5, 4110.2-2. Moreover, the Secretary has made clear that he will *not* routinely allow ranchers "to carry suspended numbers on a permit," because that would create "expectation[s] that the AUMs can be returned to active" use. 60 FED. REG. 9931, 9932.

As his first "indicator," the Secretary points out (at 44) that private persons cannot build improvements on the public lands without a permit. Therefore, respondents contend, the Secretary "necessarily has the lesser authority to condition such construction on title to those improvements being held by the United States." *Ibid.* There is no textual basis for this supposition, which in any event does not logically follow. See generally *Dolan* v. *City of Tigard*, 512 U.S. 374, 377 (1994) (city may not "condition the approval of [a] building permit on the dedication of a portion of [the applicant's] property" to public purposes); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

The Secretary's second "indicator" is not an indicator at all, but an attempt to explain away the biggest problem with his position: Congress' explicit provision for compensation for improvements "constructed and owned by a prior occupant." 43 U.S.C. § 315c. The Secretary asks this Court to conclude that this provision does not evince an understanding that permittees could and would own their improvements, but applies only to improvements "that *happen to be* both 'constructed and owned by a prior occupant'"—if the Secretary chooses to allow such ownership. U.S. Br. 44 (emphasis added). But the Secretary offers no support for that reading. His utter lack of any response to the clear textual evidence that Congress envisioned private ownership of improvements is striking, and should be dispositive.

The Secretary's third "textual indicator" (at 45) is that "the new rule is consistent with common law principles." Aside from the problem that it says *nothing* about the text or what Congress intended, this claim is wrong. Had the Secretary read the treatise upon which he relies, he would have discovered that at common law a tenant's fixtures normally did not become property of the landlord:

> a "trade fixture" is removable by the tenant. A trade fixture is * * * a chattel that is brought upon the leased premises by the tenant and installed or affixed there for use in the

> tenant's trade or business. * * * Early American cases * * * reflected a reluctance to extend the trade fixtures concept to agricultural fixtures, but later cases applied the exception to these as well. * * * [The rule] follows from a tendency of courts to conclude that a tenant did not intend, in attaching a chattel to the leased premises, that it become a permanent accession to the realty. In this connection, it has been said that there is a presumption that the tenant annexes chattels to the premises for the tenant's own benefit, and not for the benefit of the landlord's realty.

5 THOMPSON ON REAL PROPERTY § 40.07(b) (D. Thomas ed. 1994). Common law, if relevant at all, supports petitioners.

The final "textual indicator" that the Secretary invokes is the FLPMA's provision requiring, upon cancellation of a grazing permit, compensation to a permit holder for "his interest in" authorized permanent improvements that he placed or constructed on the federal range. The Secretary contends (at 46) that this provision would not be necessary if a permittee owned title to the improvements that he built. But as the Secretary acknowledges (*ibid.*), the provision also applies to range improvements undertaken pursuant to cooperative agreements with the United States. The provision thus serves an independent purpose and is in no way inconsistent with the general rule recognizing permittees' title in the improvements that they construct at their own expense.

B. The Secretary's discussion of the legislative history is also wide of the mark. He begins by asserting (at 46-47), without citing any authority, that Congress must have included the compensation provision out of concern for ranchers who had been grazing their livestock on federal lands *prior* to enactment of the TGA but who would lose that grazing under the TGA. But the legislative history shows that the provision's purpose was forward-looking. During the legislative debates, the Assistant Interior Solicitor explained that the statute "*provides for the placing* of improvements" and that "private investment in such improvement is protected." SENATE

HEARINGS 77, CA App. 1471; see *id.* at 78-79 ("the new permittee should buy outright, at a fair value, whatever improvements *are made*"). The Secretary points to no legislative history in which the bill's proponents referred to the backward-looking concerns that he now claims animated the compensation provision.

Finally, the Secretary attempts (at 47) to blunt the powerful evidence of legislative intent from the Senate hearings by claiming that the Senate Committee's discussions were based on the Forest Service's approach to range improvements, which did not guarantee compensation for permanent improvements. He neglects to point out that that aspect of the Forest Service's practice was singled out for derision as a "policy of confiscation" (SENATE HEARINGS 80, CA App. 1473), and that Congress *did not adopt* the Forest Service rule (*id.* at 77-80), which was based on entirely different statutory authority.

C. The Secretary closes by suggesting (at 48) "reasoned bases" for the adoption of the range improvements rule. Whether reasons for the change can be discerned is beside the point, because the rule violates "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. But even if they were relevant, the Secretary's explanations hardly qualify as "reasoned." The first, that the Secretary's mandate is "simplified if BLM [can] avoid having to negotiate with permittees as titleholders" is true, but proves too much. Doing away with permittees' rights does simplify BLM's job; BLM's duties could be immeasurably simplified if it did away with grazing permits altogether. That does not make it lawful. "Simplification"—a rationale that will apply to the elimination of almost any right—cannot, on its own, serve as a justification for such action. The Secretary's second rationale—unification of Forest Service and BLM procedures—runs into the inconvenient fact that Congress did not adopt the Forest Service's procedure. The Secretary's final proffered justification is that there was 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." The Secretary does not explain the basis for this mysterious assertion. And it is unclear how taking away permittees' right to full title to improvements they build and pay for responds to an overlap between situations where title is shared with the United States and where the United States has full title.

III. GRAZING PERMITS MAY BE GRANTED ONLY TO PERSONS IN THE LIVESTOCK BUSINESS

The Secretary contends (at 41-42) that eliminating the "livestock business" qualification returns to a regime that existed in the earliest days of the TGA. But the TGA limits permits to "stock owners," and that term was understood to refer to *commercial* stock raisers. As the Secretary explained *in 1938*, "'stock owner' should be construed as synonymous with 'in the livestock business' in the popular sense." *Rights of Pueblos under the TGA*, 56 Interior Dec. at 313. The statutory term "stock owner" cannot be understood independent of this contemporaneous meaning. *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759 (1980) (courts "look to the contemporaneous understanding of the term" in issue).[9]

That Congress had the contemporaneous popular meaning of "stock owner" in mind when it passed the TGA is confirmed by the legislative history. See PLC Br. 45-47.[10] The Secretary

[9] When he argues (at 38) that the "plain terms" of the statute resolve the mandatory qualifications question in his favor, the Secretary appears oblivious to the fact that under any approach, the term "stock owner" requires interpretation in light of its context, its common meaning, and the purpose of the Act. Read in isolation, the term "stock owners" would make, for example, any owner of shares in a public company, or any owner of the basic component of soup, eligible for a grazing permit. But "the meaning of statutory language, plain or not, depends on context." *King*, 502 U.S. at 221.

[10] The Secretary challenges (at 40) our observation that the legislative history reflects Congress' understanding that those receiving permits would be persons seeking to make a living by raising livestock. Examples of such comments can be found, *inter alia*, at CA App. 1452 ("I want the stock industry to have some stability. That is my main object in this bill"), 1580 (absent the TGA "those engaged in the livestock industry have no certainty of tenure in their grazing use of the public lands"), 1289, 1371, 1379, 1420, 1435.

says (at 40) that the legislative history does not "establis[h] 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." This apparent concession that Congress intended to limit permits to present *or incipient* livestock operators is welcome. We do not deny that Congress had the latter group of businesspeople in mind, as well as the former. However, as we explain below, repeal of the mandatory qualifications rule cannot be supported on that basis.

Our opening brief (at 47) presented evidence in the form of respondents' contemporaneous interpretation of the Act. At the time of the TGA's enactment, the Secretary noted the need for fair distribution of grazing privileges to persons "engaged in the livestock business who are the owners of commensurate property" (*Legal Problems*, at 5-6); defined such property as land "used according to local custom in livestock operations" (1937 Rules for Administration of Grazing Districts 2, CA App. 818); and contrasted a "free-use applicant" with the applicant for a "regular" permit "for the purpose of carrying on livestock operations." 1938 Range Code 4, CA App. 842. The "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" is entitled to particular respect. *Aluminum Co.*, 467 U.S. at 390. Yet the Secretary relegates to a footnote (at 41 n.22) his sole response to the 1936, 1937, and 1938 Department pronouncements: these statements were "short-hand references" to some (unspecified)

more particular policy. The Secretary offers no authority or even argument to support that unfounded claim. And it is flatly contradicted by the fact that as early as 1942, as the Secretary concedes (at 8), the "livestock business" qualification was clearly expressed in the rules and remained there for *53 years*. Moreover, Congress often amended the grazing laws during the half century that the rules stipulated the livestock business qualification, without once questioning that interpretation, and thereby ratified it.[11]

Finally, even if the Secretary were correct and the TGA did not speak to the issue of mandatory qualifications, his "reasoned analysis" fails to support his action. The Secretary states (at 42) that the former 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." If ambiguities regarding nascent commercial operations are a problem—and they were not under the prior rule, which allowed a purchaser of base property two years to qualify (43 C.F.R. § 4110.2-3(e) (1988))—the logical solution is to limit permits to those engaged in *or preparing to enter* the livestock business. Failing to consider such incremental solutions is unreasonable as a matter of administrative law. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-47 (1983).

CONCLUSION

The Tenth Circuit's judgment should be reversed.

Respectfully submitted.

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[11] The Nature Conservancy claims FLPMA § 302(b) grants independent authority to issue permits outside the livestock business. But that section states that the Secretary shall, "subject to this Act *and other applicable law and under such terms and conditions as are consistent with such law*, regulate" permits as appropriate. It does not abrogate the requirements of the TGA. The Conservancy's concern that it will not be able to own grazing permits stems from the unchallenged invalidation of the conservation use rule and the rules' three-year limit on non-use, not from the livestock business requirement.

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