

No.

In the Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL., PETITIONERS,

v.

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

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

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

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

**CORPORATE DISCLOSURE STATEMENT
AND PARTIES TO THE PROCEEDINGS**

Petitioners are the Public Lands Council, the American Farm Bureau Federation, the American Sheep Industry Association, the Association of National Grasslands, and the National Cattlemen's Beef Association. Petitioners are all not-for-profit organizations. None has parent corporations or non-wholly-owned subsidiaries, and no publicly held corporation owns 10% or more of any petitioner's stock.

Respondents are Bruce Babbitt, Secretary of the Department of the Interior, Tom Fry, Director, U.S. Bureau of Land Management, the Department of the Interior, and the U.S. Bureau of Land Management.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-70a) is reported at 167 F.3d 1287. The order of the court of appeals granting respondents' petition for rehearing (App. 71a-72a) is reported at 167 F.3d 1287. The order of the court of appeals denying petitioners' petition for rehearing, and denying their petition for rehearing *en banc* by an equally divided vote (App. 73a-74a), is unreported. The opinion of the district court (App. 75a-100a) is reported at 929 F. Supp. 1436.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. Petitioners' timely petition for rehearing was denied on January 28, 1999. Respondents' timely petition for rehearing was granted and an amended opinion issued on February 8, 1999. On April 23, 1999, Justice Breyer extended the time for filing this petition for certiorari to June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions pertinent to this case are set forth at App., *infra*, 101a-129a.

STATEMENT

This case—brought by a coalition of nonprofit ranching and farming organizations whose members are among the tens of thousands directly and adversely affected by the decision

below—challenges the validity of three Department of the Interior regulations that dramatically altered settled principles governing the use of public lands for grazing livestock. The relevant statutory framework, established through more than 60 years of legislation, is comprised of a series of enactments intended to bring certainty and stability to those who rely on the public lands for grazing their animals. See the Taylor Grazing Act, 43 U.S.C. § 315, *et seq.* (the “TGA”), the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.* (the “FLPMA”), and the Public Rangelands Improvement Act, 43 U.S.C. § 1901, *et seq.* (the “PRIA”). In 1995, however, the Secretary of the Interior promulgated regulations that radically transformed Congress’s carefully crafted scheme and undermined a system upon which ranchers had depended for decades.

One regulation (the “permitted use” rule) did away with the longstanding assurance that permittees would have the right to graze the public lands from year to year up to a historically-based, adjudicated maximum amount of forage. A second regulation (the “range improvements” rule), contrary to years of prior practice, vested in the United States title to permanent range improvements such as fences, wells, and pipelines paid for and built by ranchers. The third regulation (the “mandatory qualifications” rule) eliminated the long-standing requirement that applicants for livestock-grazing permits be “engaged in the livestock business.”

The Secretary’s regulations flout the will of Congress as expressed in the plain language of the TGA, threaten grave harm to range-dependent ranchers and western communities, and reduce the asset value and security of financial institutions that have extended credit to the ranching industry. Because the divided decision of the Tenth Circuit is likely to be the last word on the validity of those regulations absent this Court’s review, certiorari is warranted.

A. Adjudicated Grazing Preferences and Their Evisceration by the “Permitted Use” Regulation

Congress’s “whole purpose” in enacting the TGA was “to conserve the public range *in aid of the livestock industry.*” H.R. Rep. No. 73-903, at 2 (1934) (emphasis added). To that end, the TGA authorized the Secretary of the Interior to designate public lands “chiefly valuable for grazing and raising forage crops” and to issue “permits to graze livestock” in these “grazing districts.” 43 U.S.C. §§ 315, 315b. Because applicants for permits far outnumbered available rangelands, Congress charged the Secretary with allocating grazing rights fairly, according to established priorities. It further instructed that “[s]o far as consistent with the purposes and provisions of [the Act], grazing privileges recognized and acknowledged shall be adequately safeguarded.” *Id.* §§ 315b, 315m.

Following passage of the TGA, the Department of the Interior engaged in an adjudication process to allocate grazing privileges. That twenty-year process involved extensive data collection, input from local grazing advisory boards, and “case-by-case” assessment of the historical use and forage capacity of the public lands each applicant sought to graze. App. 15a, 51a-57a, 77a. Qualified applicants were awarded specific “grazing preferences,” “measured in Animal Unit Months (AUMs), the amount of forage necessary to sustain one animal for one month.” App. 77a, 51a-53a; see 43 C.F.R. § 4100.0-5(o) (1978). Those adjudicated rights to graze “attached to the base property, and followed the base property if it was transferred,” providing “predictability and security to livestock operators who remained in one area.” App. 77a-78a.

An adjudicated grazing preference was “a one-time decision of the Secretary, made when he first allocated grazing privileges on a

particular allotment of the public range.” App. 57a. It “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.” App. 53a. The forage actually authorized for and used by a permittee in a given year typically differed from the preference. The Secretary adjusted a permittee’s “active use” allowance upward or downward to account for changes in the condition of the range. App. 52a-53a. See *McClellan v. Bureau of Land Management*, 133 IBLA 225, 232 (1995) (“[I]ncreased forage production on the Federal range had absolutely no effect on grazing preferences,” but “merely meant that those who had established grazing preferences could exercise more of those preferences or be awarded additional use”); Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 Idaho L. Rev. 505, 508 (1994).

Congress again addressed livestock grazing uses when it adopted the FLPMA in 1976. The FLPMA and its implementing regulations worked some changes in the procedures for issuing permits and the criteria for determining future grazing preferences. Permittees were entitled to “first priority” for renewal if willing to “accep[t] the terms and conditions to be included in the new permit” (43 C.F.R. § 4130.2(e)(3) (1978)), and permits were to be “modified or canceled” as necessary to comply with applicable “land use planning decisions.” *Id.* § 4130.2(d)(3). Moreover, post-1978 adjudications of grazing preferences—the *new* adjudications necessary when new land became available for grazing—no longer had to be tied strictly to the number of livestock that could be supported from forage and feed produced on the allotted range. See 43 C.F.R. § 4110.0-5; *McClellan*, 133 IBLA at 233 n.14.

Notwithstanding those changes, the Secretary did not disturb *previously* adjudicated grazing preferences. To the contrary, noting “serious concern” among “livestock operators now authorized to graze on the public lands,” the Secretary specifically ruled that “[those] with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. [Their] *adjudicated grazing use*, their base properties, and their areas of use (allotments) *will be recognized* under these grazing regulations.” 43 Fed. Reg. 29,058 (July 5, 1978) (emphasis added). The Secretary’s interpretation reflects the FLPMA’s several savings provisions (Pub. L. 94-579, § 701), which specifically preserved the TGA and every “land use right or authorization existing” when the FLPMA was enacted. *Id.* § 701(a), (f). The 1978 PRIA likewise made no change in existing grazing preferences. 43 U.S.C. § 1901 *et seq.*

Under the TGA, FLPMA, and PRIA, grazing preferences effectively “remained in place not just from year-to-year within the ten-year term of the permit, but also from permit to permit.” App. 55a. Preferences thus “served as a stabilizing force for the livestock industry and promoted orderly use of the range by guaranteeing permittees the right to graze a predictable number of stock on the public lands and by allowing them to gauge how large or small their livestock operations could be.” App. 54a. As the district court held, “the grazing preference guaranteed permittees a right to graze from year to year those amounts of forage that the Secretary actually authorized and provided them with the certainty that if forage were abundant, grazing up to their preference limit would be authorized.” *Ibid.*; see 78 Cong. Rec. 5371 (1934) (Congress enacted the TGA in order to provide ranchers with “assurance as to where and what kind of range they may have and *depend upon* for their stock, what they can *definitely rely upon* in terms of pasturage”) (emphasis added).

Secretary of Interior Bruce Babbitt drastically changed the Department's grazing regulations in 1995. Consistent with the statutory history outlined above, existing regulations defined a grazing preference as "the total number of [AUMs] of livestock grazing on public lands apportioned and attached to [the permittee's] base property." 43 C.F.R. § 4100.0-5 (1994). The 1995 regulations redefine the term "grazing preference" to mean only "a superior or priority position against others for the purpose of receiving a grazing permit." *Id.* § 4100.0-5 (1995). The new definition makes no reference to the number of AUMs adjudicated by the Secretary, thus "end[ing] the long-standing DOI recognition of the adjudicated levels of grazing." App. 60a; 60 Fed. Reg. 9921 (Feb. 22, 1995) ("The definition omits reference to a specified quantity of forage, a practice that was adopted * * * during the adjudication of grazing privileges").

Having eliminated forage allocation from the concept of a "grazing preference," the Secretary now regulates forage as a mere "permitted use," defined as the forage allocated by an applicable "land use plan." 43 C.F.R. § 4100.0-5. As a "permitted use," a permittee's maximum grazable forage "is established solely by a land use plan adopted by the BLM," which is subject to change by the BLM. The regulations terminate adjudicated grazing preferences "across the board, for all permittees, without reference either to their individual circumstances or to the condition of the land covered by their permits." App. 62a. To be sure, the permittee retains "a bald right to preference at renewal time." *Ibid.* But there is no longer any assurance that historically adjudicated grazing privileges will be honored.

The "permitted use" rule thus "erases the certainty and predictability that existed under the pre-1995 regulatory scheme," substituting a regime in which "the agency has nearly unfettered discretion" over forage use. App. 62a. The land use plan will now

determine whether and how many livestock a permittee may put on the public lands. Absent protected grazing rights, grazing may take second place in the land use plan to competing mineral lease, off-road vehicle, wilderness, and other uses. The permitted number of livestock will vary drastically depending on which land use issue of the day garners most public support.

B. The Secretary’s Unauthorized Assertion of Title to Range Improvements

The TGA also governs ownership of range improvements constructed by grazing permittees on public lands—fences, wells, reservoirs, and the like that can cost tens and even hundreds of thousands of dollars. If the right to use property containing such improvements is transferred, the Act mandates that the permittee who made the improvements must be reimbursed. 43 U.S.C. § 315c (“No permit shall be issued which shall entitle the permittee to the use of such improvements *constructed and owned by a prior occupant* until the applicant has paid to such prior occupant the reasonable value of such improvements”). The FLPMA further provides for “reasonable compensation” for improvements when a permit is canceled so lands can be used for “another public purpose.” *Id.* § 1752(g).

Prior to the Secretary’s 1995 actions, regulations provided that permittees would hold title to improvements they paid for and built pursuant to range improvement permits. The government would hold title only to those improvements constructed pursuant to cooperative agreements whereby the permittee and the Secretary jointly pay for the improvement. 43 C.F.R. §§ 4120.6-2 to -3 (1978); App. 66a-67a. Even then, title to “structural or removable” improvements was “shared by the United States and cooperator(s) in proportion to the actual amount of the[ir] respective

contribution[s].” 43 C.F.R. § 4120.3-2 (1994). The 1995 regulations, in contrast, “mak[e] all permanent range improvements subject to cooperative agreements.” App. 35a-36a. And they provide that “title to permanent range improvements such as fences, wells, and pipelines where authorization is granted after August 21, 1995 shall be in the name of the United States”—regardless of the breakdown of construction costs. 43 C.F.R. § 4120.3-2(a), (b) (1995).

This change is significant. “[S]ince title to improvements is not in the hands of the permittees who construct them, permittees are not statutorily entitled to any compensation from later users” for their investments. App. 68a. 43 U.S.C. § 315c (new permittee must compensate for improvements “owned by” prior occupant”); § 1752(g) (compensation for permittee’s “interest in” improvements). And without ownership, the permittee cannot secure the third-party financing that is essential for most major range improvement projects, such as costly projects to develop water and improve its range-use distribution, which benefits wildlife and big game as well as grazing uses.

C. The Secretary’s Unauthorized Reduction of the Qualifications for Grazing Rights

The TGA authorizes the Secretary to issue grazing permits to “bona fide settlers, residents, and other stock owners.” 43 U.S.C. § 315b. “Preference shall be given,” the Act further mandates, “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 by them.” *Ibid.*

Prior to 1995, the Department consistently interpreted § 315b to require that all grazing permittees “be engaged in the livestock

business.” 43 C.F.R. § 4110.1 (1994). This did not mean that permit holders had to be engaged *exclusively*—or even primarily—in the livestock business. See, e.g., *Forgey Ranch Co. v. BLM*, 116 IBLA 32 (1990) (permitting bank engaged in livestock business to retain grazing permit). “From the beginning,” however, the government “granted grazing permits and leases only to applicants engaged in the livestock business.” App. 87a; see, e.g., *Patterson*, 56 Interior Dec. 380 (1938) (denying application because applicant was not engaged in livestock business).

The Secretary’s 1995 regulations eliminated the long-standing requirement that applicants for grazing permits be “engaged in the livestock business.” The regulations retained requirements that permittees “own or control land or water base property,” be United States citizens, and be authorized to conduct business in the State for which the permit is sought. 43 C.F.R. § 4110.1 (1995). But one need no longer “graze livestock” to obtain a “permi[t] to graze livestock.” 43 U.S.C. § 315b. The current “mandatory qualifications” rule eliminates that requirement.

D. The District Court’s Decision Enjoining Enforcement of the Regulations

In July 1995, petitioners challenged the final regulations alleging that the “permitted use,” “title to range improvements,” and “mandatory qualifications” regulations were beyond the Secretary’s statutory authority and invalid on their face. The district court in Wyoming, Judge Brimmer, struck down those regulations and enjoined the Secretary from enforcing them.

Emphasizing the TGA’s requirement that “recognized and acknowledged” grazing privileges “be adequately safe-guarded,” the district court rejected the Secretary’s contention that his “permitted use” rule was “a change in form, not substance” that “d[id] not

eliminate or interfere with anything in the [TGA].” App. 76a. “Under the 1995 regulations,” the court observed, “a permittee no longer has an adjudicated right to graze a predictable number of livestock on public lands.” App. 78a. Whereas grazing preferences were “painstakingly adjudicated” and “could not be canceled, suspended, or reduced without an evidentiary hearing,” the “right of renewal” provided by the permitted use regulation allows the Secretary to change a permittee’s grazable forage “[w]ith a mere stroke of his pen.” App. 78a-79a. Such a rule “violate[d] the Act’s specific mandate to adequately safeguard grazing preferences.” App. 79a.

The district court also struck down the new range improvements rule. The court reasoned that the TGA provision requiring a new permittee to compensate a prior occupant for rangeland improvements “strongly suggests that the individual who constructed the improvement should own it.” App. 82a. The court found further support for its ruling in the FLPMA’s mandate that the United States compensate a permittee “for the value of his interest in any range improvements” when it cancels a grazing permit. App. 82a-83a. The TGA and FLPMA together “clearly indicate that Congress intended to grant title to range improvements to those who constructed them.” App. 83a.

Finally, the district court invalidated the 1995 regulation eliminating the requirement that permittees to graze livestock be “engaged in the livestock business.” Citing the Act’s established priorities for granting permits and its legislative history, the court explained that “Congress intended [the TGA] to benefit people actually engaged in the livestock business.” Congress did not intend that non-livestock owners should be able to obtain “permits they cannot use * * * thereby preclud[ing] livestock operators from grazing their livestock on public lands.” App. 87a.

E. The Divided Court of Appeals' Decision and Evenly Divided Ruling Denying En Banc Review

A divided panel of the Tenth Circuit reversed the district court's decision in relevant part. The majority concluded that the "permitted use" regulation was not a significant modification of the law, but merely a "return to the position taken in the 1978 regulations." App. 21a. Those regulations, it held, had done away with recognition of historically adjudicated preferences. As for Congress's mandate that grazing privileges be "adequately safeguarded," the panel was satisfied that "any change in a privilege assigned through the permit process is safeguarded to the extent that parties aggrieved by the Secretary's decisions have the right to challenge them." App. 32a.

The majority also sustained the range improvements rule. Citing the Secretary's "discretion" to "authorize construction [of improvements] under 'such cooperative agreement' as he 'may approve,'" the panel reasoned that "nothing in the statutory language directs where * * * title must lie." App. 34a-35a.

Finally, the court rejected petitioners' challenge to the mandatory qualifications rule. Notwithstanding the TGA's limited authorization of "permits *to graze livestock*," the court focused on the Act's mandate that preference for such permits be given to "bona fide occupants or settlers" and "owners of water rights" in addition to "landowners engaged in the livestock business." App. 43a. In light of this language, the panel held that § 315b did not require the Secretary to issue grazing permits only to those engaged in the livestock business. *Ibid.*

Judge Tacha dissented as to the validity of the permitted use regulation. Noting the "importance of the statutory command that * * * grazing privileges recognized and acknowledged shall be

adequately safeguarded,” she rejected the majority’s view that adjudicated grazing levels were not “recognized” under the 1978 regulations. App. 50a. While “the 1978 regulations altered the criteria for awarding *new* preferences,” Judge Tacha observed, there is “no question * * * that the 1978 regulations continued to recognize *already-existing* grazing preferences.” App. 52a (emphasis added).

Judge Tacha also dissented as to the validity of the range improvements rule. The TGA’s provision that “a permittee who ‘construct[s] and owns’ an improvement on the public lands is entitled to compensation for its value,” she concluded, “plainly indicates * * * that when a permittee constructs an authorized improvement, he or she holds title to that improvement.” The majority’s view “renders that compensation provision meaningless,” because “without title, a permittee [will] not be entitled to the compensation for which the statute provides.” App. 68a-69a.

Petitioners’ petition for rehearing *en banc* was denied by an evenly divided court.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the Tenth Circuit’s decision because the Secretary’s regulations are inconsistent with statutory language, legislative history, and prior agency interpretations, and cannot be justified under *Chevron*. The issues presented are of immense practical importance throughout the western states, where BLM manages some 170 million acres of public rangelands—including huge portions of Nevada, Utah, Oregon, and Wyoming—on which more than 20,000 permittees graze livestock. App. 3a. In addition to harming grazing permittees, their families, and their communities, the challenged regulations directly impact

thousands of financial institutions that have made loans based upon the security of grazing preferences.

The controversial nature of the legal questions in issue and the need for this Court's immediate intervention is shown by the sharp division of opinion below. The district court and Judge Tacha concluded that the Secretary's regulations exceeded his statutory authority; the panel majority held otherwise; and the court of appeals divided 5-5 as to whether to review the panel decision *en banc*. In those circumstances, this Court should not allow a two-judge opinion to be the last word on issues of such critical practical importance throughout the western states, in particular where no other court of appeals is likely ever to address those issues.

I. THE SECRETARY'S REGULATIONS ARE FLATLY INCONSISTENT WITH THE GOVERNING STATUTES

In promulgating the challenged rules, the Secretary has sought to transform by regulation the entire management system governing the use of the public range. That prerogative, however, is reserved for Congress.

A. The Secretary Has No Authority To Substitute "Permitted Use" For Adjudicated Grazing Preferences

As a matter of law, the Secretary lacks the authority to modify the TGA by means of the permitted use rule, for Congress has directly and unambiguously spoken to the question at issue: "So far as consistent with the purposes and provisions of [the Act], grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. §§ 315b, 315m; see *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949) (the Secretary has "an affirmative obligation to adequately safeguard" ranchers' grazing

privileges). The permitted use rule most emphatically does not “adequately safeguard” “grazing privileges recognized and acknowledged,” and therefore is invalid.

1. The vehicle by which grazing privileges historically have been “recognized and acknowledged” is the grazing adjudication conducted pursuant to section three of the TGA. After the TGA was passed, “there were many more applicants for use of the range than could be accommodated.” The Secretary allocated grazing privileges to some applicants and denied them to others using an “adjudicatory process” that “took nearly two decades.” App. 57a. The adjudication process recognized ranchers’ historical claims to the use of particular parcels of land: “[o]nly those livestock operators who could prove a prior use of the unclaimed lands * * * could acquire a preference.” Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands*, 30 Idaho L. Rev. at 508. Following a grazing adjudication and issuance of a “grazing decision,” “the Secretary engaged in that same type of adjudicatory process only when new public lands became available for grazing.” App. 57a. These fixed, historically adjudicated grazing levels were, from the beginning, essential to the TGA’s stated goals of stabilizing the livestock industry and promoting the orderly use of the range. See App. 54a. See generally *The Nature and Extent of the Department’s Authority to Issue Grazing Privileges*, 56 Interior Dec. 62, 65 (1937); P. FOSS, POLITICS AND GRASS 65-67, 101 (1968).

The Secretary’s new regulation unilaterally eliminates these grazing decisions, which were the product of a careful adjudication process. The regulation completely dispenses with any consideration of “recognized and acknowledged” adjudicated grazing levels. It redefines the entrenched concept of the “grazing preference”—which hitherto had meant a maximum amount of forage “apportioned and attached” to the permittee’s base

property—to mean simply a superior position against others for the purpose of receiving or renewing a grazing permit or lease. And it relegates the allocation of forage to a newly added concept, “permitted use,” that ties the available forage to applicable land use plans, not to the historical adjudication of grazing levels under the Act. Under the permitted use rule, “the maximum amount of forage that a permittee can graze is established solely by a land use plan adopted by the BLM, with no reference to the results of the grazing adjudications.” App. 62a. “The result,” as Judge Tacha observed, “is that the agency has nearly unfettered discretion to * * * increase or decrease permittees’ maximum allowed forage use without reference to the individual grazing decisions laboriously adjudicated by the Secretary following passage of the TGA.” *Ibid.* Land use plans must accommodate a host of competing uses, and are reviewed periodically to reflect new data or information, new or revised policies, or changed circumstances. 43 C.F.R. §§ 1610.5-5, 1610.5-6 (1998). By making “permitted use” subject to those changeable plans, the regulations destroy predictability and certainty and deprive ranchers of any assurance that they can graze a specified number of livestock.

It is no exaggeration to say that “grazing privileges recognized and acknowledged” are accorded *no regard whatsoever* under the new regime. By removing the maximum forage allocation from the grazing preference, severing the longstanding link between AUMs and the Department’s original adjudication of preference, and apportioning the AUMs to land use plans rather than base property, the Secretary has breached his fundamental duty under the Act to adequately safeguard recognized and acknowledged grazing privileges. There may be a number of different ways in which the Secretary could “adequately” protect adjudicated grazing privileges; creating a scheme completely unhinged from existing adjudicated preferences is not one of them.

2. The majority erroneously concluded that the regulation complies with the TGA because previously adjudicated privileges have not been “recognized” after the adoption of the 1978 regulations. The majority contended that under those rules, “previously adjudicated grazing uses were to be recognized” only “for the length of existing permits.” App. 17a. “Nowhere in the 1978 regulations,” the court declared, “was there any requirement * * * that the authorizing officer must recognize or refer to the original grazing adjudications, or even the most recent adjudications, in issuing new permits.” App. 19a.

The majority’s view rested on the false premise that the Secretary adjudicated a new grazing preference each time he renewed a grazing permit. App. 22a. But an “adjudication” was a one-time event in the life of a grazing permit, and the Secretary did not adjudicate a new grazing preference merely because a permit was up for renewal. See *Ortiz v. BLM*, 126 IBLA 8, 9 (1993) (involving a preference that, despite numerous transfers, “date[d] from the early 1930s” when it was issued to the original applicant); *McLean*, 113 IBLA at 227 (involving a preference dating from prior to 1970).

The majority’s mistake derived in part from its misinterpretation of the 1978 regulations’ reference to “future adjudications.” Contrary to the majority’s assumption, “future adjudication” on its face refers not to the renewal of a grazing permit, but to “a post-1978 decision made by the Secretary to allocate permanent grazing privileges to various applicants *when new lands come under BLM’s control* and become available for grazing.” App. 58a (emphasis added).

Although the 1978 rules permitted the government to adjudicate a new grazing preference “on a case-by-case basis, subject to the Secretary’s detailed regulatory requirements” (App. 56a), such changes were “based either on the individual circumstances of a

particular permittee—*e.g.*, in response to a change in the permittee’s control over the base property—or on the condition of particular grazing allotments—*e.g.*, if a reduction in grazing was necessary to improve rangeland productivity.” App. 53a. In that way, the Secretary fulfilled his statutory obligation to “specify from time to time numbers of stock and seasons of use.” 43 U.S.C. § 315b.

But apart from such circumstances “the preference level generally remained the same from year-to-year, through transfers of the base property, and from permit to permit.” App. 54a. “The new permitted use rule,” by contrast, “wipes the slate clean.” App. 65a. Accordingly, the new regulation cannot be supported as a mere extension of the 1978 regulations.

Indeed, the majority’s interpretation is undercut by the Department’s own pronouncements at the time it promulgated the 1978 rules. Noting “serious concern” among “livestock operators now authorized to graze on the public lands,” the Secretary ruled that those “with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. [Their] *adjudicated grazing use*, their base properties, and their areas of use (allotments) *will be recognized* under these grazing regulations.” 43 Fed. Reg. 29,058 (July 5, 1978) (emphasis added).

3. The majority’s decision was also based on its erroneous view that stabilization of the livestock industry was not a primary goal of the TGA. App. 24a n.5.

The very title of the legislation identified one of its purposes as “*to stabilize the livestock industry dependent upon the public range.*” 78 Cong. Rec. 5371 (1934). Congressman Taylor of Colorado, after whom the bill would be named, quoted that title and remarked that this purpose is “of the greatest and highest possible importance.” *Ibid.* Taylor explained that without assurance of the

amount of forage available, “there would be no permanence to the business;” ranchers “would not be safe; they would have no credit with the banks for securing money.” *Ibid.* And he paid special note to the “many vested rights, which should and must be respected and protected, which have grown up on the range.” *Ibid.* Senator Adams, also of Colorado, commented during debate on the bill that the lack of assurance and certainty as to grazing land and forage had interfered with the rancher “in many ways among others with his capacity to borrow money because, lacking the assurance of feed for his animals, it has been more difficult to procure necessary loans.” *Id.* at 11,140. As anticipated by the framers of the TGA, the grazing preference has made a critical contribution to the financial stability of the ranching industry. See App. 79a.

More generally, Congress made clear that the law was intended to provide ranchers and farmers with “some type of *assurance* as to where and what kind of range they may have and *depend on* for their stock, what they can *definitely rely* upon in the way of pasturage.” 78 Cong. Rec. at 5371 (emphasis added).

There can be no doubt but that protecting and ensuring stability for range-dependent ranchers was a manifest purpose of the TGA. See *Chournos v. United States*, 193 F.2d 321, 323 (10th Cir. 1951) (holding that the purpose of the TGA is to “stabilize the livestock industry and to permit the use of the public range according to the needs and the qualifications of the livestock operators with base holdings”). Until the Secretary sought to sever the historical tie between maximum forage allocations and adjudicated preferences, that worthy goal had been honored in Department of the Interior regulations. The permitted use rule, however, does violence to that clearly articulated Congressional purpose.

4. Indeed, a legislative proposal incorporating many of the grazing regulations that the Secretary later adopted was *rejected* by Congress in 1993. H.R. 2520, 103d Cong., 1st Sess. (1993), defeated after filibuster at 139 Cong. Rec. D1265-66 (1993). And although the sponsor of H.R. 2520 generally supported the Secretary's proposed regulations, even he excluded from his bill the permitted use rule, explaining "that eliminating th[e] preference" and substituting permitted use "would devalue the permit in the eyes of lending institutions. I knocked that out." 139 Cong. Rec. S14083, 14087 (1993). Despite Congress' defeat of the range reform regulations in 1993 and the absence of any new statute or authority, the Secretary nonetheless went ahead and adopted the regulations now before this Court. His usurpation of the legislative prerogative could hardly be more flagrant.

5. Although portions of the statutory and regulatory framework are complex, the ultimate issue in question is straightforward. Congress mandated that recognized and acknowledged grazing privileges be safeguarded. The only privileges that have been "recognized and acknowledged" in any significant fashion are historically adjudicated grazing preferences. Yet the Secretary's regulations pay those adjudicated preferences no heed.

No tenet of administrative law requires that a rule so clearly at odds with the governing statute be the object of deference. Under the framework enunciated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), when "Congress has directly spoken to the precise question at issue * * * that is the end of the matter." Such is the case here.

And even if the statutory language somehow did leave room for interpretation, the permitted use rule "goes beyond the scope of whatever ambiguity [the statute] contains." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994). By allowing the

Secretary to disregard adjudicated preferences entirely, and base forage-allocation decisions on “land use” plans rather than grazing privileges, that rule is “manifestly contrary to the statute” and therefore invalid. *Chevron*, 467 U.S. at 843-844; see *United States v. Haggard Apparel Co.*, 119 S. Ct. 1392, 1399 (1999) (regulation will not control if it is “inconsistent with the statutory language or is an unreasonable implementation of it”).

The Secretary’s radical revision of the law is at once extremely significant for western ranchers and entirely improper. As the District Court summarized (App. 79a-80a):

With a mere stroke of his pen, the Secretary has boldly and blithely wrested away from Western ranchers the very certainty, the definitiveness of range rights, and the necessary security of preference rights that their livestock operations require. Congress gave Western ranchers these rights by enacting the Taylor Grazing Act, and many decades of satisfactory operations and the course of case by case adjudications have confirmed these rights. * * * [T]he Secretary’s disregard of his congressionally imposed duty * * * must be stopped before it wreaks havoc with the ranching industry that Congress has tried to preserve.

B. The Secretary Has No Authority To Deny Permittees Title To Their Range Improvements

43 C.F.R. § 4120.3-2(b) purports to vest in the United States title to all permanent range improvements authorized under cooperative agreements after August 21, 1995. That regulation is plainly inconsistent with the TGA.

The TGA specifically addresses the ownership of improvements. It provides that permanent improvements such as fences and wells may be constructed under permit or cooperative arrangement

approved by the Secretary, and that a new applicant cannot use “such improvements constructed and owned by a prior occupant” until he has compensated the prior occupant for the reasonable value of the improvements. 43 U.S.C. § 315c.

To contend, as the Tenth Circuit majority did, that “the entire payment provision can * * * be viewed as purely conditional, operative only if the Secretary allows both construction and ownership” (App. 37a), is to strain the language and sense of the statute beyond the breaking point. The clear and necessary implication of the payment provision is that a permittee who lawfully pays for and constructs an improvement owns it. As Judge Tacha noted, “discretionary language or rulemaking authority is conspicuously absent on the question of who should hold title to range improvements.” App. 70a.

Moreover, the majority’s reading of the statute, like the regulation itself, would render the compensation provision meaningless. If a permittee did not own the improvements he pays for and constructs, there would be no reason for a statutory provision that requires him to be compensated for the improvements that he owns. The statute does contain such a provision, and Congress clearly intended to preclude a regime under which the United States could confiscate by fiat improvements paid for by permittees. The range improvements rule is in conflict with the will of Congress as expressed in the TGA and, accordingly, is invalid.

C. The Secretary Has No Authority To Drop The Mandatory Qualification For Livestock Grazing Permits That The Permittee Graze Livestock

The TGA authorizes the Secretary to issue “permits *to graze livestock*.” 43 U.S.C. § 315b (emphasis added). It is flatly at odds with the plain language of the TGA for the Secretary to allow

issuance of livestock-grazing permits to those who do not graze livestock.

By purporting to eliminate the requirement under the TGA (and prior regulations) that those receiving livestock-grazing permits be “engaged in the livestock business,” the Secretary would allow anyone who owns or leases land or water base property to obtain livestock grazing permits, regardless of whether or not he grazes livestock. In upholding the Secretary’s action, the court seriously misread the relevant statutory provision. Section 315b of the TGA authorizes the Secretary

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 * * *. 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.

The majority emphasized that preference in issuing livestock grazing permits must go to “landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights,” and read this clause to mean that *only* landowners need be engaged in the livestock business, whereas occupants, settlers, and owners of water or water need not be so qualified.

But statutory terms must be read not in isolation but in light of “the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil*, 519 U.S. 337, 341 (1997); see *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme”). Attention to context shows that the court’s construction of Section 315b—which

is even at odds with its own determination that the Secretary has no authority to issue a grazing permit for non-grazing “conservation” uses (App. 45a-49a)—is simply wrong.

First, the entire section is concerned with who may be granted permits “to graze livestock.” It makes no sense to read the provision to include among possible permittees classes of persons who do not have livestock to graze.

Second, application of the provision is expressly limited to “bona fide settlers, residents, and *other stock owners*.” Congress’s use of the phrase “and other stock owners” plainly signifies that the “bona fide settlers” and “residents” to whom permits will be issued all are to be stock owners. See, e.g., *U.S. Nat’l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 454 (1993) (“text consists of words living a communal existence * * * the meaning of each word informing the others and all in their aggregate tak[ing] their purport from the setting in which they are used”).

Third, the court’s construction is irrational. It would mean that those who satisfy the base property requirement because they own land would have to be engaged in the livestock business, while those who satisfy the base property requirement because they own water would not have to be engaged in the livestock business. There is no conceivable basis for such a distinction. However “plausible when viewed in isolation,” the court’s reading “is untenable in light of [Section 315b and the TGA] as a whole” and does not “produc[e] a substantive effect that is compatible with the rest of the law.” *Oregon Revenue Dept. v. ACF Indus.*, 510 U.S. 332, 343 (1994).

The proper reading of the statute is one that gives preference to landowners engaged in the livestock business, bona fide occupants

or settlers *engaged in the livestock business*, or owners of water or water rights *engaged in the livestock business*—the way the Secretary interpreted the statute for six decades. It is akin, for example, to a rule regarding confidentiality that would purport to apply to “lawyers who obtain confidential information, paralegals, or investigators.” The logical construction would be that the rule is meant to apply to paralegals and investigators who obtain confidential information. While perhaps inartfully drafted, the statute must be read so as to make sense. See *U.S. Nat’l Bank of Oregon*, 508 U.S. at 454; *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

So construed, the provision not only makes sense, but also comports with Congress’s purpose for including it in the statute: to protect ranchers against itinerant grazers “who owned or leased little land but had grazed their flocks over the public lands and stripped it of its forage, thereby denying it to local ranchers, who had a heavy taxable investment.” P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (Public Land Law Review Commission, November 1968). That purpose was served by requiring that the livestock owners who received permits owned suitable base property. When thus properly understood, the statute clearly does not support the Secretary’s abandonment of the requirement that permittees be engaged in the livestock business.

II. REVIEW IS TIMELY NOW BECAUSE THE ISSUES PRESENTED ARE OF IMMENSE PRACTICAL IMPORTANCE AND NO CIRCUIT SPLIT IS LIKELY TO ARISE

The Secretary’s 1995 regulations were “intensely controversial,” “hotly disputed,” engendered “massive public interest,” and worked a “revolutionary change” in the historic treatment of grazing on the public lands. Pendery, *Reforming Livestock Grazing on*

the Public Domain, 27 *Env'tl L.* 513, 514, 525, 259, 564 (1997). The impact of this “major shift in federal range policy” (*id.* at 518) on public-range-dependent ranchers and the use of millions of acres of the public range cannot be overstated.

1. Judge Tacha explained the severe adverse effects imposed on the ranching community by the Secretary’s unlawful and ahistoric actions. The grazing preferences eliminated by the Secretary’s regulations promoted stability and certainty in the livestock industry “by guaranteeing permittees the right to graze a predictable number of stock on the public lands and allowing them to gauge how large or small their livestock operations could be.” App. 54a. That stability is essential to effective business planning by individual permittees—hence also to the livelihoods of western ranching families. A rancher can no more manage his or her business efficiently without reasonable predictability as to the number of livestock that can be grazed than a manufacturer could manage its business if leases for its plants were subject to abrogation from year to year.

Certainty is also “practically important to permittee-ranchers because the value of their private base ranches is determined in part by” the attendant grazing rights, so that “[d]iminution of the permit * * * diminishes their net worth.” G. COGGINS, *PUBLIC NATURAL RESOURCES LAW* ¶ 19.02[1][a], at 19-9 (1998). Consequently, the assurance provided by grazing preferences has been important to the willingness of banks and other financial institutions to provide the loans often necessary to keep permittees in business. As the district court recognized, “[b]ank loans are often based on [livestock] carrying capacity. A permittee without a definite and certain grazing preference may be unable to obtain necessary financing and be forced out of the livestock industry.” App. 79a; see also 78 Cong. Rec. at 5371 (ranchers “cannot secure money from the banks if they cannot show that they have some definite and sufficient place

on the range where their stock may be adequately grazed”); G. COGGINS, *supra*, ¶ 19.02, at 19-14 (“The number of [animal unit months] in the permit is critical to the rancher-permittee” because the “value of the permit is figured into the sale price of the ranch to which the permit is appurtenant, and bankers make loans on the basis of, and secured by, permit value”); RANGELANDS REFORM 1994 FINAL ENVIRONMENTAL IMPACT STATEMENT 26, 127.

Banks and other financial institutions too depend on the value of grazing preferences as collateral for loans. Absent assurance that a ranch will continue to carry a specific number of livestock, these institutions will be forced to withdraw or radically change their lending policies. See Brief *Amicus Curiae* of Farm Credit Associations in Support of Ptn. for Rehearing (Oct. 30, 1998). Congress’s purpose to enable ranchers to secure necessary credit will be thwarted.

What the “permitted use” concept has “wrested away from Western ranchers,” the district court correctly determined, is “the very certainty, the definitiveness of range rights, and the necessary security of preference rights that their livestock operations require”—a change in the ground rules for grazing on the public lands that “wreaks havoc with the ranching industry” and threatens to put many ranchers out of the livestock business altogether. App. 79a-80a.¹ Congress, of course, is free to alter the terms upon which the

¹ Commenting on the effect of the TGA a few years after its passage, Congressman Taylor observed (Appellee’s Add. 6, at 48):

Ranch values are up 40 to 60 percent over 5 years ago.
* * * Ranches that were going under the hammer 10 years ago are now contributing to the local tax structure. Today the stockman who has qualified by dependent property and prior use of the range to graze a definite number of stock

public lands have been used for grazing for over 60 years by stripping permittees of their settled grazing preferences, but it has not done so. Given the central importance of preferences to 20,000 plus ranching families who contribute some \$400 million to the economies of the far western states, and given that the management of 170 million acres of public lands is affected, this Court should not allow the Secretary's glib destruction of grazing preferences in favor of "permitted uses" based on periodic, changeable land use plans to go unreviewed.

The Secretary's reduction in the qualifications necessary to obtain grazing permits, so that a permittee need no longer be in the livestock business, likewise undermines the very industry that Congress sought to promote and stabilize. It threatens that in the future, rangelands will be taken out of livestock production to be used for other purposes, diminishing the total land available for grazing and thwarting permit applicants who *are* in the livestock business.

The adverse practical impact of the remaining regulation in issue is equally easy to discern. If ranchers have to make significant investments in structural range improvements like fences, water

and definite range, has a definite asset. It has vastly improved his credit facilities. Banks and loan companies know that the man who has an established livestock business and grazing privileges on the public range contributes to the economic stability of his community.
* * * There are evidences everywhere that property values have increased in line with the legitimate range rights attached to the private property upon which grazing privileges are based.

The Secretary would now reverse this course and take away these gains.

tanks, pumps, pipelines, and cattle guards without maintaining *any* title to those improvements, the incentive to make improvements is significantly reduced. See 139 Cong. Rec. S15297, S15372-73 (Nov. 9, 1993) (the rule “is a disincentive to the construction of improvements on public lands”). And without ownership of improvements, permittees will in any event be unable to obtain the financing necessary for most significant range improvement projects.

Such an unfair, involuntary transfer of ownership—ownership that is fully recognized in the TGA and FLPMA and that can reflect the investment of hundreds of thousands of dollars—can serve only to undermine ranching as a business and a way of life. Knowledgeable commentators have concluded that “[f]ederal lands ranching is a culture in crisis” and can only be preserved if courts protect ranchers’ grazing rights as Congress intended:

If current trends continue, this way of life will be extinct within twenty (20) years. Ranchers do not need handouts or government support programs; all they need is recognition and protection of their federal land preferences * * * [S]ince the federal agencies have made it clear that they will not recognize any rights unless compelled by the court to do so, *the courts must step in if this culture is to survive for the coming generations.*

Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands*, 30 Idaho L. Rev. at 524 (emphasis added). Petitioners ask this Court to grant certiorari not to preserve western ranching culture for its own sake, but because that is what Congress directed in specific ways that the Secretary has chosen to ignore or evade.

2. Given the tremendous practical importance of the issues raised in this petition, this Court should not delay review until a circuit split

arises. See, e.g., *Andrus v. Utah*, 446 U.S. 500, 506 (1980); *United States v. Coleman*, 390 U.S. 599, 601 (1968) (granting certiorari, in cases where there was no circuit split, to resolve significant issues affecting the public lands). It is highly unlikely that any such division of opinion among the courts of appeals will ever occur.

First, the public lands managed by the BLM on which private grazing is permitted are located in the Ninth and Tenth Circuits, with very small and isolated grazing lands in the Eighth Circuit. Pendery, *supra*, 27 *Env't'l L.* at 522. No other courts of appeals than these (and the D.C. Circuit) would even in *theory* have an opportunity to address the propriety of the regulatory provisions in issue.

Moreover, as a *practical* matter, the Tenth Circuit's ruling in this case will be the last word on the subject unless this court intervenes. Widely dispersed *individual* permittees in the low-margin livestock business lack the financial resources to mount a costly challenge to the regulations in district court and to pursue their case on appeal. The most likely plaintiffs in a complex case such as this are petitioners here—the leading national organizations representing the interests of permittees. But petitioners chose to combine their limited resources to litigate their case in the Tenth Circuit. In short, it is unlikely that another circuit will ever have occasion to pass on the questions presented in the petition. Even if a plaintiff did seek to raise those issues elsewhere, that litigation would not be resolved for years, during which time ranchers would suffer from the Secretary's unlawful destruction of their rights.

Absent this Court's immediate review, a panel opinion of just two judges—with which the district judge and a dissenter disagreed and which half the participating judges of the Tenth Circuit thought sufficiently problematic to warrant *en banc* review—will stand as the law of the land and result in tens of thousands of permittees los-

ing long-established rights that Congress sought to protect. In these circumstances, nothing will be achieved by letting the issue “percolate” in the lower courts to see if a circuit split develops: this Court’s review is timely *now*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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