

No. 98-1991

In the Supreme Court of the United States

—————
PUBLIC LANDS COUNCIL, ET AL., PETITIONERS,

v.

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

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Whether 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.”

**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 not-for-profit organizations that represent the interests of western ranchers, including those who hold permits to graze livestock on the federal range. 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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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 167 F.3d 1287. The order of the court of appeals granting respondents' limited petition for rehearing (Pet. App. 71a-72a) is reported at 167 F.3d at 1289. 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 (Pet. App. 73a-74a), is unreported. The opinion of the district court (*id.* at 75a-100a) is reported at 929 F. Supp. 1436.

JURISDICTION

The Tenth Circuit entered its order on rehearing and amended judgment on February 8, 1999. On April 23, 1999, Justice Breyer extended the time for petitioning for certiorari to June 9, 1999. The petition was filed on that date and was granted on October 12, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the codified and amended Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.*, and Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.*, are set forth at Pet. App. 101a-115a. The uncodified Taylor Grazing Act is reproduced at pp. 801-807 of the Joint Appendix filed in the court of appeals ("CA App."). Copies of that Appendix have been lodged with the Clerk. The 1995 final rule and pertinent parts of the 1994 regulations are reproduced in an Addendum to this brief. Earlier Range Codes are set forth at CA App. 808-1046.

STATEMENT

Petitioners challenge as beyond the statutory authority of the Secretary of the Interior 1995 "range reform" rules that dramatically alter settled principles governing the grazing of domestic livestock on federal lands managed by the Bureau of Land Management ("BLM"). Specifically, petitioners challenge (1) the Secretary's "permitted use" and "grazing preference" rules, which make the forage available to a grazing permittee subject to a discretionary land use planning process and do away with the longstanding assurance that permittees may graze livestock on the public lands up to a historically-based, adjudicated amount of forage; (2) the "range

improvements” rule, which, contrary to prior practice, vests in the United States the title to range improvements paid for by permittees; and (3) the “mandatory qualifications” rule, which eliminates the settled requirement that recipients of grazing permits be “engaged in the livestock business.” These regulations flout the will of Congress as expressed in the Taylor Grazing Act and as previously implemented by the Secretary for nearly 60 years. They threaten grave harm to range-dependent western ranchers and their communities, and they substantially reduce the asset value and security of financial institutions that have extended credit to the ranching industry.

Review of petitioners’ claims is aided by an understanding of the historical development of livestock grazing on the public lands, which this Court has previously examined and which we briefly summarize before turning to the particular facts of this case.

A. Public Lands Policy And Western Settlement

During the 19th century, the United States’ policy towards its public domain was “animat[ed by] the desire of the Federal Government that the West be settled.” *Leo Sheep Co. v. United States*, 440 U.S. 668, 671 (1979). The result was an official “liberality in regard to [the] use” of public land that was “uniform and remarkable.” *Buford v. Houtz*, 133 U.S. 320, 326-327 (1890).

Homesteading was Congress’s preferred inducement to westward settlement. The United States provided, free or at low prices, “land in fee simple absolute to homesteaders who entered and cultivated tracts of a designated size for a period of years.” *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 119 S. Ct. 1719, 1722 (1999). Generally, however, homesteads of the size Congress provided for—initially 160 acres, later 320 acres, and eventually 640 acres—were not viable economic units in the semi-arid lands west of the 100th meridian. See P. FOSS, *POLITICS AND GRASS* 19-27 (1960). There, “it was impossible to raise most crops without irrigation” (*Leo Sheep*, 440 U.S. at 676 n.12), which ruled out successful agrarian homesteading throughout much of the public domain. And *thousands* of acres of land (as well as access to stock water) were necessary for an economic livestock grazing operation.

P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 419-420 (1968). Because homestead acreage was “too small to support a grazing operation” and the land “unfit for anything else,” settlers “were forced to supplement their homestead” by grazing livestock on public lands “or go bankrupt.” FOSS, *supra*, at 3, 26.

The federal government also “direct[ly] encourage[d]” livestock raisers—whether they owned land or were nomadic herdsmen—to make free use of its “great plains and vast tracts of unenclosed land, suitable for pasture.” *Buford*, 133 U.S. at 326; *Light v. United States*, 220 U.S. 523, 535 (1911). Demand for meat in the North and East, railroad construction that opened those markets to western producers, the invention of the refrigerated railroad car, and this ready availability of land for grazing led to a significant expansion of the western livestock industry after the Civil War. E. DALE, THE RANGE CATTLE INDUSTRY 31 (1930). Cattlemen drove their stock from Texas to railheads for shipment, grazing their stock on public lands in the Plains and Rocky Mountain States along the way. DEPARTMENT OF THE INTERIOR, BLM, 50 YEARS OF PUBLIC LAND MANAGEMENT 1 (1984) (“FIFTY YEARS”).

Reviewing this history in 1890, this Court concluded that “there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States * * * in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them.” *Buford*, 133 U.S. at 326. “Everybody,” this Court observed, “used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs, and sheep could run and graze.” *Id.* at 327-328; see also *Light*, 220 U.S. at 535.

B. Congress’s Settlement Policies Lead To Land Use Conflicts

Livestock raisers arrived in the West before other settlers and “naturally [settled] in the better areas”—those with water. Department of the Interior, Office of the Secretary, *Legal Problems in Grazing Regulation* 1 (Nov. 14, 1936) (“*Legal Problems*”) (lodged with the Clerk). Using “homestead and pre-emption laws

to gain control of water sources,” ranchers tried to assert “control of [the] thousands of acres of grassland” necessary to maintain economically viable numbers of livestock. *Leo Sheep*, 440 U.S. at 683. In addition to acquiring homesteads, ranchers purchased land that Congress had granted to the railroads in a checkerboard pattern. Ranchers fenced the public range lands that were interspersed between the railroad parcels for their own use, until Congress made enclosure illegal in 1885. See *id.* at 683-684, citing the Unlawful Inclosures of Public Lands Act, 23 Stat. 321. These efforts to gain a foothold on the public range spurred sometimes bloody “range wars” among cattlemen, sheepmen, and farmers competing for the same resources. *Ibid.*

Because “[s]tockmen made some attempt to manage fenced public domain lands,” outlawing enclosure eliminated a “stabilizing influence” and the range again “became wide open to the first comer.” FOSS, *supra*, at 29. Western States established stock-grower associations to regulate use of the range, and adopted laws to separate sheep and cattle grazing. See *Omaechevarria v. Idaho*, 246 U.S. 343, 344-346 (1918). Stockmen also tried to impose order by dividing the range among themselves by agreement. Nevertheless, range wars erupted when livestock crossed porous boundaries and nomadic herders ignored efforts to restrict their grazing. FOSS, *supra*, at 29-30; FIFTY YEARS at 2. Ultimately, “[t]he only way a stockman [could guarantee] grass” was “to get there ahead of anyone else and have his stock eat it up.” FOSS, *supra*, at 35 (quoting HEARINGS ON H.R. 2835 AND H.R. 6462 BEFORE THE HOUSE COMM. ON THE PUBLIC LANDS, 73d Cong., 1st & 2d Sess. 43 (1933 & 1934) (“HOUSE HEARINGS”) (Rep. Sherman)).

Congress’s homesteading policy compounded the problem of competition for forage. Although “public lands w[ere] far better suited for livestock raising than for small-farm agriculture” (FIFTY YEARS at 1), Congress’s bias towards agrarian settlement continued into the early decades of this century, when “millions of acres of excellent grazing land were homesteaded and plowed up.” *Legal Problems* at 1. The effect was to “crow[d] the stock” into “less productive” portions of the public range. *Ibid.*

The result of more than a century of federal land policy, the Secretary acknowledged in 1936, was “chaotic. The public range was uncontrolled and therefore overgrazed, and the ownership of vast areas lying idle was so diversified as to prevent any economic and coordinated use or administration.” *Legal Problems* at 1-2. The prolonged drought of the early 1930s depleted forage and left the public range unable to “sustain the livestock numbers being grazed.” FIFTY YEARS at 3. A “catastrophic decline in livestock prices” during the Depression further exacerbated ranchers’ problems. GATES, *supra*, at 607. These forces led the western livestock industry to try to secure “Federal legislation” to bring “public lands under coordinated control, provide for their administration, and recognize the dependency of the established ranch properties on the use of the public domain.” *Legal Problems* at 2.

C. The Taylor Grazing Act Of 1934

It was against this backdrop that Congress passed the Taylor Grazing Act of 1934 (“TGA”). By 1934 there was general agreement that “most of the remaining [173 million acres of] public domain is valuable chiefly for grazing.” H.R. REP. NO. 73-903, at 7 (1934), CA App. 1425 (statement of Interior Secretary Harold Ickes). Accordingly, the TGA was designed “to regularize and control grazing on the public range” so that economic livestock grazing could continue. W. CALEF, PRIVATE GRAZING AND PUBLIC LANDS 17, 52-53 (1960).

The House Committee on Public Lands explained that “the whole purpose of the [TGA] is to conserve the public range *in aid of the livestock industry*.” H.R. REP. NO. 73-903, at 2 (emphasis added), CA App. 1420. The Committee was clear that each stated purpose of the Act—“to stop injury to the public grazing lands by preventing overgrazing, and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes” (48 Stat. 1269, CA App. 808)—served to “enlarg[e] * * * available forage” so that the range “may be put to the highest productive use,” livestock grazing. H.R. REP. NO. 73-903, at 2, CA

App. 1420; see HOUSE HEARINGS 133 (“We want to protect the range in the interest of the stock industry”) (Secretary Ickes).

Both the Committee and the Secretary intended the TGA to provide “stockmen whose livelihoods are dependent upon grazing” with “assured grazing privileges, on the basis of which [they could make] definite plans.” H.R. REP. NO. 73-903, at 2, CA App. 1420; see *id.* at 7, CA App. 1428 (Secretary Ickes stated that the TGA provides “those engaged in the livestock industry” with “certainty of tenure in their grazing use of the public lands”); *Legal Problems* at 2 (the TGA would make it “possible for stock growers to plan their annual operations over a period of years with a predetermined knowledge, based upon the average rainfall, of the amount of grazing available”). An assured privilege to graze on the public lands, Congress understood, was also critical to a rancher’s ability to secure loans for operations. *E.g.*, 78 CONG. REC. 5371 (Rep. Taylor), 11140 (Sen. Adams), 11152-53 (Sen. McCarran) (1934).

To these ends, the TGA authorized the Secretary to designate public lands “chiefly valuable for grazing,” and to issue “permits to graze livestock” in these “grazing districts” to “bona fide settlers, residents, and other stock owners.” 43 U.S.C. §§ 315, 315b.¹ Because demand for grazing permits might exceed the carrying capacity of the range, Congress specified that the Secretary must give “preference” to “those within or near a [grazing] district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them.” *Id.* § 315b. Congress also gave ranchers a “preference right * * * to renewal” of their grazing permits, and prohibited the Secretary from denying renewal of a

¹ Isolated tracts of public land outside grazing districts may be leased for grazing, with preference given to “lawful occupants of contiguous lands to the extent necessary to permit proper use” of their land. 43 U.S.C. § 315m. Throughout this brief, “permit” refers to both “permit” and “lease,” and “permittee” refers to both “permittee” and “lessee.”

permit where that would “impair the value of [a] grazing unit” that had been “pledged as security for any bona fide loan.” *Ibid.* In addition, though “creation of a grazing district or the issuance of a permit” does not “create any right, title, interest, or estate in or to the [public] lands” (*United States v. Fuller*, 409 U.S. 488 (1973)), once grazing privileges were “recognized and acknowledged” pursuant to Section 3 of the Act, those privileges had to be “adequately safeguarded.” 43 U.S.C. § 315b.

Recognizing the desirability of range improvements to manage grazing and increase forage, Congress also authorized the Secretary to issue permits for improvements such as “[f]ences, wells, [and] reservoirs.” The TGA specified that a new permittee had to pay the “prior occupant” the “reasonable value” of “improvements constructed and owned by” that prior occupant. *Id.* § 315c.

D. The Secretary’s Implementation Of The TGA

Following passage of the TGA, Executive Order No. 6910 withdrew almost all unreserved and unappropriated public lands in the West from sale or entry. See *Andrus v. Utah*, 446 U.S. 500, 513-514 (1980). The Department’s Division of Grazing (now the BLM) adopted regulations to implement the Act and began a 20-year-plus process of adjudicating grazing privileges. Adjudication involved extensive data collection, input from local grazing advisory boards established by the Secretary, and “case-by-case” assessment of the historical use and forage capacity of the property each applicant owned and the public range each sought to graze. See Pet. App. 15a, 51a-57a, 77a; CALEF, *supra*, at 57-70.

In adjudicating grazing privileges, the Secretary aimed “to disturb as little as possible the existing livestock industry, which is the only industry able to make an economic use of the lands under administration.” *Legal Problems* at 6. To implement TGA Section 3, he established a priority among applicants for permits. Livestock owners with land or water rights (“base property”) that could not be fully exploited without use of the public range, and who had made prior use of public grazing land during a specified priority period,

were given first priority. If grazing remained, the second priority went to applicants with base property but no prior use, and the third to those with prior use but no base property. *CALEF, supra*, at 60-61. In this way, priority “was accorded to owners of land or water who could support their livestock during the seasons when they were off the grazing district, who required the federal lands in conjunction with their own to form an economic ranching unit, and who had used the range during the priority period,” and itinerant grazers typically were excluded. *FOSS, supra*, at 3.

By adjudication, the Secretary awarded successful applicants specific grazing privileges “measured in Animal Unit Months (AUMs), the amount of forage necessary to sustain one animal for one month.” Pet. App. 77a, 51a-53a; see, *e.g.*, 43 C.F.R. §§ 501.2(i), 501.6(b), 501.18(f) (1938), CA App. 849-850; *id.* § 4100.0-5(o) (1978), CA App. 954. This specified quantity of forage (and therefore also of numbers of livestock that could be run on the range) came to be known as the “grazing preference.”² 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.” Pet. App. 57a. It “represented the upper limit that a permittee could graze if optimal conditions prevailed.” *Id.* at 53a.

² A permittee’s adjudicated quantity of forage was not expressly defined in the Range Code as a “preference” until 1978. 43 C.F.R. § 4100.0-5(o), CA App. 954. But from the beginning, the Secretary and Grazing Division (like most everyone else) used the term “preference” to refer to adjudicated forage (as well as to refer to the priorities established by the TGA and by regulation, which fell out of the picture after grazing adjudications were completed). See, *e.g.*, Department of Interior, *Legal Problems* at 3 (“Preference” is “measured by the amount of grazing which is necessary to enable the applicant to make proper use of the lands, water, or water rights owned, occupied or leased by him”); *FOSS, supra*, at 63 (quoting 1934 remarks of Farrington Carpenter, first Director of Grazing (“preference rights” are “the adjunctive pasture rights which naturally belong to [the base property]”). That is how we use the term in this brief. Nothing in this case turns, however, on the word “preference.” Rather, the issue is whether the Secretary may adopt regulations that afford no protection to already adjudicated forage, by whatever term it is described.

The forage actually authorized for use by a permittee in a 10-year permit was often less than the original grazing preference, because the Secretary adjusted a permittee's "active use" allowance to account for changes in the condition of the range. The permittee held the difference between the preference and the active use, measured in AUMs, in suspension. *Id.* at 52a-53a; see 43 C.F.R. § 161.6(5), (8) (1955), CA App. 887; 43 C.F.R. §§ 4110.3-1, -2 (1994). But the preference itself did not change from year to year or from permit to permit. *E.g.*, *McLean v. BLM*, 133 IBLA 225, 232 (1995) ("increased forage production" had "absolutely no effect" on preferences; it "merely meant that those who had established grazing preferences could * * * be awarded additional use").

Adjudicated grazing preferences "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." Pet. App. 77a-78a; *e.g.*, 43 C.F.R. § 501.7 (1938), CA App. 850. They "served as a stabilizing force for the livestock industry and promoted orderly use of the range," allowing permittees "to gauge how large or small their livestock operations could be." Pet. App. 54a; 78 CONG. REC. 5371 (1934) (the TGA provided 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) (Rep. Taylor).

E. The Federal Land Policy And Management Act

In 1976, Congress adopted the Federal Land Policy and Management Act ("FLPMA") to rationalize the BLM's powers over all 430 million acres of public lands it administered. H.R. REP. NO. 94-1163, at 1-2 (1976). Congress instructed that these lands were to be managed for "multiple use and sustained yield," and that this goal was to be achieved through a "land use planning" process. 43 U.S.C. §§ 1701(a)(7), 1712(a), (c). The Act only vaguely describes what that means. See 2 G. COGGINS, ET AL., PUBLIC NATURAL RESOURCES LAW § 10F.04[3] (1999) (the FLPMA

“embodies a general command to plan but is otherwise open-ended”).

Because the FLPMA set forth general policies relating to hundreds of millions of acres of land of vastly different types, Congress stipulated that its policies “shall become effective only as specific statutory authority for their implementation is enacted” and “shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.” 43 U.S.C. § 1701(b). In addition, nothing in the FLPMA was to terminate any existing permit or “land use right or authorization” or work any repeal by implication. 90 Stat. 2786, § 701(a), (f), 43 U.S.C. § 1701 (note).

The FLPMA contains few provisions that relate specifically to grazing. 90 Stat. 2772-2775. As BLM acknowledged, these made only “minor adjustments in the [TGA]” (FIFTY YEARS at 5), and made no change to previously adjudicated forage. Section 401, 43 U.S.C. § 1751, mandated a study of grazing fees and required that half of fee receipts be used to fund range improvements. Section 402, 43 U.S.C. § 1752—which was designed “to emphasize the continuity of grazing operations that is provided for by existing law” (H.R. REP. NO. 94-1163, at 12 (1976))—required the Secretary to issue grazing permits “for a term of ten years,” subject to limited exceptions. It also mandated that a permittee be given “first priority” for renewal if the land remained available for grazing and the permittee had complied with BLM rules and permit conditions and agreed to accept the terms of the new permit. 90 Stat. 2774, § 402(a)-(c).³ Sections 402(d) and (e) provided for incorporation of “allotment management plans” (AMPs) into the terms of permits, and in the absence of an AMP preserved the Secretary’s existing authority to specify from time to time, according to range condition, “the numbers of animals to be grazed and the seasons of use.”

³ The TGA and its implementing regulations already provided for 10-year permits and a preference right of renewal. The FLPMA extended those provisions to additional lands managed by the Forest Service.

Under the FLPMA, adjudications of grazing preferences—*new* adjudications needed when *new* land became available for grazing—would reflect land use planning determinations and no longer had to be tied to the number of livestock that could be supported from forage and feed produced on the allotted range and base property. 43 U.S.C. § 1752; 43 C.F.R. §§ 4100.2-1, -2 (1978), CA App. 955; *McLean*, 133 IBLA at 233 n.14. But nothing in the FLPMA disturbed *previously* adjudicated preferences. To the contrary, noting “[s]erious concern” among permittees, the Secretary specifically assured that “[those] with a grazing * * * permit * * * 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 (1978) (emphasis added).

The FLPMA also did not alter the TGA’s provisions regarding improvements. Indeed, Congress provided for the first time that if a permit is canceled to devote the affected lands to another purpose (such as an artillery range), the United States must pay the permittee “reasonable compensation” for “his interest in authorized range improvements placed or constructed by the permittee” on the public range. 43 U.S.C. § 1752(g).

F. The Public Rangelands Improvement Act

The 1978 Public Rangelands Improvement Act (“PRIA”)—passed primarily to resolve grazing fee issues that Congress could not agree on when it adopted the FLPMA—likewise made no change in existing grazing preferences. The PRIA “establishes and reaffirms” a commitment to “manage, maintain and improve” rangelands so that they “become as productive as feasible for all rangeland values in accordance with management objectives and the land use planning process.” 43 U.S.C. § 1901(b)(2). Congress rejected grazing cutbacks as “undesirable because of their insensitivity to economic factors and potential to totally disrupt or shut down ranching operations” and because “studies” indicated “that range conditions [would] show far greater, and more rapid,

improvement with regulated livestock grazing than without.” H.R. REP. NO. 95-1122, at 10-11 (1978).

Congress instead adopted two grazing-friendly measures. First, to “accelerate on-the-ground range improvements,” it increased the funds potentially available for improvements and clarified what improvements required preparation of environmental impact statements. H.R. REP. NO. 95-1122, at 15-16; 43 U.S.C. § 1904. Second, to address BLM’s efforts to impose unilateral reductions in grazing based on allotment management plans adopted “on an inflexible nationwide basis,” Congress reinforced the requirement that BLM prepare AMPs in “careful and considered consultation” with permittees and grazing advisory boards and provided that AMPs “shall be tailored” to “the specific range condition of the lands involved.” H.R. REP. NO. 95-1122, at 24-25; 43 U.S.C. § 1752(d) (amended); see *Valdez v. Applegate*, 616 F.2d 570 (10th Cir. 1980).

Like the FLPMA, the PRIA specified that its policies “shall become effective only as specific statutory authority for their implementation is enacted” and that it must “be construed as supplemental to and not in derogation of the purposes for which public rangelands are administered under other provisions of law.” 43 U.S.C. § 1901(c).

G. The 1995 “Rangeland Reform” Regulations

1. *Recognized and Acknowledged Preferences Eliminated.* The Secretary drastically changed the Range Code 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 “grazing preference” to mean only “a superior or priority position against others for the purpose of receiving a grazing permit.” 43 C.F.R. § 4100.0-5 (1995). Neither the Secretary’s new definition of “preference” nor any other 1995 rule makes any reference to the number of AUMs adjudicated by the Secretary, thus “end[ing] the long-standing DOI recognition of the adjudicated levels of grazing.” Pet. App. 60a; see 60 FED. REG. 9921 (1995) (“The definition omits reference to a specified

quantity of forage, a practice that was adopted * * * during the adjudication of grazing privileges”).

Having eliminated the concept of adjudicated forage from the “grazing preference,” the Secretary now regulates forage as a “permitted use,” defined as the forage allocated by an applicable “land use plan.” 43 C.F.R. § 4100.0-5 (1995). A permittee’s maximum grazable forage “is established solely by a [BLM] land use plan,” which is subject to change at the “nearly unfettered discretion” of the agency. Pet. App. 62a. The 1995 rules thus terminate “across the board, for all permittees,” the forage levels so carefully adjudicated under the TGA. *Ibid.*

2. *Title to Range Improvements Shifted.* Prior to 1995, the Range Code provided that permittees held title to “removable” range improvements, such as fences, stockwater tanks, and water pumps, which they paid for and built pursuant to range improvement permits. 43 C.F.R. § 4120.3-3(b) (1994). The government held title only to improvements constructed pursuant to cooperative agreements whereby the permittee and the Secretary jointly paid for the improvement. 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].” *Id.* § 4120.3-2. The 1995 rules, in contrast, redefine all “structural” improvements as “permanent” ones and 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. *Id.* § 4120.3-2(a), (b) (1995).

Without ownership, a permittee cannot secure the financing that is essential for major range improvements, such as costly projects to develop water and improve livestock distribution that benefit not only grazing uses, but also all forms of wildlife. And “since title to improvements is [no longer] in the hands of the permittees who construct them, permittees are not statutorily entitled to any compensation from later users” for their investments. Pet. App. 68a; see 43 U.S.C. §§ 315c, 1752(g).

3. *Qualifications for Grazing Rights Reduced.* Prior to 1995, the Secretary interpreted TGA Section 3 to require that grazing permittees “be engaged in the livestock business.” 43 C.F.R.

§ 4110.1 (1994). A permit holder did not have to be engaged *exclusively*—or even *primarily*—in the livestock business. *E.g.*, *Forgey Ranch Co. v. BLM*, 116 IBLA 32 (1990) (permitting bank engaged in livestock business to retain grazing permit). But “[f]rom the beginning,” the government “granted grazing permits and leases only to applicants engaged in the livestock business.” Pet. App. 87a; *e.g.*, *Patterson*, 56 Interior Dec. 380 (1938).

The Secretary’s 1995 regulations (43 C.F.R. § 4110.1 (1995)) eliminate the long-standing requirement that applicants for grazing permits be “engaged in the livestock business.” Now, provided one owns livestock (see U.S. Br. in Opp. 22-23), one need no longer be in the livestock business, or even “graze livestock,” to obtain a “permi[t] to graze livestock.” 43 U.S.C. § 315b.

H. Petitioners’ Suit And The District Court’s Decision

In July 1995, petitioners filed this suit in district court in Wyoming alleging that the Secretary’s new rules were beyond his statutory authority and invalid on their face. Petitioners alleged, *inter alia*, that the “permitted use” and “preference” rules conflict with the Secretary’s duty under the TGA to “adequately safeguard” permittees’ adjudicated forage; that the “range improvements” rule is inconsistent with the plain language of the TGA and FLPMA; and that the elimination of the “mandatory qualification” that permittees be “engaged in the livestock business” is at odds with TGA’s language and purpose. Complaint, CA App. 1-76. Petitioners later substituted a petition for review for this suit, seeking declaratory and injunctive relief on the same grounds. *Id.* at 77-79.

The district court held the challenged regulations invalid and enjoined the Secretary from enforcing them. It first rejected the Secretary’s contention that the “permitted use” and “preference” rules were “a change in form, not substance.” “Under the 1995 regulations,” the court held, the Secretary can change “painstakingly adjudicated” grazing preferences “[w]ith a mere stroke of his pen,” which “violate[s] the Act’s specific mandate to adequately safeguard grazing preferences.” Pet. App. 76a, 78a-79a.

The court also struck down the new range improvements rule. It held that the language of the statutory compensation requirements in the TGA and FLPMA “indicate[s] that Congress intended to grant title to range improvements to those who constructed them.” Pet. App. 82a-83a.

The district court held that the Secretary lacked authority to eliminate the requirement that permittees be “engaged in the livestock business,” reasoning that the TGA’s priorities for granting permits and its legislative history show that “Congress intended * * * to benefit people actually engaged in the livestock business.” Congress did not intend for others to obtain “permits they cannot use.” Pet. App. 86a-88a.⁴

I. The Tenth Circuit’s Decision

A divided panel of the Tenth Circuit reversed in relevant part. The majority concluded that the “permitted use” rule did not significantly modify the law under the Secretary’s 1978 regulations or violate the TGA. It sustained the range improvements rule on the ground that “nothing in the statutory language directs where * * * title must lie.” Pet. App. 34a-35a. And all three judges held that the language of the TGA did not limit grazing permits to those engaged in the livestock business.

⁴ The district court also invalidated the 1995 rule authorizing the BLM to issue a 10-year permit not to graze as a “conservation use grazing permit.” Pet. App. 84a-85a. Affirming, the Tenth Circuit explained that the “plain language” of the governing statutes “unambiguously reflect[s] Congress’s intent” that “‘grazing permits’ be limited to permits issued ‘for the purpose of grazing domestic livestock.’” The court of appeals held that the Secretary lacks the authority to issue permits for “land that he has designated as ‘chiefly valuable for grazing livestock,’” that have the effect of “exclud[ing it] from grazing use even though range conditions could be good enough to support grazing.” Pet. App. 47a-48a. Respondents have not challenged that ruling.

Judge Tacha dissented as to the validity of the permitted use regulation. She rejected the majority's view that making forage subject to the highly discretionary and unguided land use planning process satisfied the TGA's "importan[t] * * * statutory command that * * * grazing privileges recognized and acknowledged shall be adequately safeguarded." Pet. App. 62a-66a. Judge Tacha also dissented as to the validity of the range improvements rule, reasoning that the majority's view "renders that compensation provision [of the TGA] meaningless," because "without title, a permittee [will] not be entitled to the compensation for which the statute provides." *Id.* at 68a-69a. The court of appeals denied petitioners' petition for rehearing *en banc* by a 5-5 vote.

SUMMARY OF ARGUMENT

I. The plain language of Section 3 of the TGA commands the Secretary to allocate grazing privileges according to the needs of base land or water and to "adequately safeguard" those privileges once adjudicated. The 1995 "preference" and "permitted use" rules violate the TGA because they do not safeguard adjudicated grazing privileges at all—indeed, they no longer even recognize forage levels adjudicated under the TGA.

The stated purposes of the TGA and its consistent legislative history confirm that Congress intended to provide long-term stability to the western livestock industry by tying forage to the capacity of a permittee's base property and requiring the Secretary to recognize that level of forage from permit to permit. Congress indicated that such protection was essential to enable permittees to plan their business and to obtain loans for operations and range improvements.

For nearly 60 years, the Secretary interpreted the TGA correctly, safeguarding adjudicated forage levels while adjusting active grazing use to account for range conditions. During that period, Congress repeatedly revisited the TGA without once indicating that the Secretary's interpretation was wrong, thereby ratifying his pre-1995 view of the statute. Moreover, when presented with the Secretary's 1995 regulations in the form of a bill, Congress rejected them.

In these circumstances, the Secretary is not free to deny recognition of adjudicated forage levels. Adjudicated preferences are *not* “adequately safeguarded,” under any reasonable reading of that term, by making grazing privileges turn solely on highly discretionary land use planning in which adjudicated forage levels have no protected status.

II. The TGA, 43 U.S.C. § 315c, and FLPMA, *id.* § 1752(g), mandate that compensation be paid to permittees, in various circumstances, for their ownership interest in range improvements. Those provisions signal that Congress intended permittees to have title to their range improvements. Congress understood, the legislative history demonstrates, that such a rule was necessary to encourage private investment in costly projects to improve the productivity of the range and that title was essential to ranchers and their lenders to provide security for improvement loans. After recognizing for 60 years that a permittee had title to his improvements, the Secretary had no authority under the TGA or FLPMA to promulgate 1995 rules vesting title to future improvements in the United States.

III. The text, structure, and legislative history of the TGA make clear that the only persons qualified to receive “grazing permits” are “stock owners” who are “in the livestock business.” The Secretary interpreted the TGA in that way shortly after its passage and maintained that consistent position for nearly 60 years. The Secretary lacked any basis for jettisoning that mandatory qualification in 1995 to allow permits to be issued to non-grazing or minimally-grazing livestock owners for what amount to prohibited conservation uses.

ARGUMENT

I. THE SECRETARY’S 1995 “PREFERENCE” AND “PERMITTED USE” RULES ARE INVALID

Agencies may not interpret federal statutes in “conflict with the expressed intent of Congress.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). To “ascertai[n] [whether] Congress had an intention on the precise question at

issue,” this Court “employ[s] traditional tools of statutory construction,” including analysis of the “history and policies of the Act.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9, 862 (1984). Judged by this familiar standard, the Secretary’s “preference” and “permitted use” rules are invalid.

The plain language, purpose, and history of the TGA disclose that Congress intended to provide substantive protection for the forage allocated to a grazing permittee in the adjudication process that followed enactment of the TGA. Nothing in the FLPMA or PRIA amended or interfered with that central aspect of the TGA. Nevertheless, the Secretary’s “preference” and “permitted use” rules—which fly in the face of nearly 60 years of agency interpretations and which were specifically rejected by Congress in 1993—withdraw agency recognition, and thus substantive protection, for adjudicated forage levels.

The 1995 rules define the term “grazing preference” to mean only “a superior or priority position against others for the purpose of receiving a grazing permit.” 43 C.F.R. § 4100.0-5 (1995). They regulate forage as a “permitted use,” defined as “the forage allocated by, or under the guidance of, an applicable land use plan.” *Ibid.* As a result, the rules now leave every aspect of grazing privileges, including the adjudicated grazing preference, subject to change at the whim of BLM through the unconstrained land use planning process. Because the Secretary’s rules fail to safeguard adjudicated forage decisions as required by the TGA, they are invalid on their face.

A. The Plain Language Of The TGA Requires The Secretary To Safeguard Adjudicated Forage

Statutory interpretation “begins * * * with the language of the statute itself.” *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). The plain language of the TGA requires the Secretary to adequately safeguard a grazing permittee’s adjudicated forage, which “represents the upper limit that a permittee could graze [on the public range] if optimal conditions prevailed.” Pet. App. 53a. That is the grazing use (and hence the number of livestock) that BLM determined to be appropriate to the permittee’s base

property when, implementing the TGA, it adjudicated competing claims to graze livestock on the public range.

1. Section 3 of the TGA (43 U.S.C. § 315b) provides that “[p]reference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.” Section 3 thus establishes which applicants have priority in the issuance of grazing permits—an important feature, because it was clear when the TGA was enacted that demand for permits would exceed the carrying capacity of the public range. In addition, the “as may be necessary” clause imposes a substantive requirement of commensurability between a permittee’s base property and grazing privileges. When the Secretary adjudicated a grazing use or “preference” to an applicant (see *supra*, p. 8 n.2), that applicant was to be allocated such use of the public range as was necessary to sustain his or her base operation. *Supra*, pp. 7-8.

The Secretary concedes that the statutory phrase “as may be necessary to permit the proper use of [base property]” imposes a substantive requirement regarding the use of the range that a permittee may have and is not merely part of the priority standard. U.S. Br. in Opp. 10 n.7. And from the beginning, the Secretary understood that Section 3 required him to allocate to successful permit applicants forage commensurate with their private holdings, within the limits imposed by the capacity of the range. See *supra*, pp. 7-8 & n.2; Range Code § 1(a) (Mar. 16, 1938), CA App. 839; FOSS, POLITICS AND GRASS at 62-63; PUBLIC LAND LAW REVIEW COMM’N, THE FORAGE RESOURCE S-3 (1970), CA App. 461.

2. Section 3 of the TGA also provides that “[s]o far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded.” Thus, although the Act does not create compensable property rights in the public lands (*United States v. Fuller*, 409 U.S. 488 (1973)), it does mandate that the Secretary adequately safeguard “recognized and acknowledged” grazing privileges to use

the range. See *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949) (the Secretary has “an affirmative obligation to adequately safeguard” grazing privileges); *McNeil v. Seaton*, 281 F.2d 931, 934 (D.C. Cir. 1960) (same).

BLM’s adjudication of the forage level commensurate with a successful permit applicant’s base property, pursuant to TGA Section 3, was the method by which grazing privileges were “recognized and acknowledged.” And Section 3 requires that those adjudicated forage decisions be “adequately safeguarded.”

3. When the provisions of the TGA are “read as a whole,” as they must be (*King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991)), they require that these “recognized and acknowledged” grazing privileges be protected. While the Secretary may have some discretion to determine what level of protection is adequate, he may not strip grazing privileges of any protected status at all by unhitching them from the original grazing adjudication and making their continued existence a matter of unfettered agency discretion within the vague and unguided land use planning process. Yet that is exactly what the Secretary has done. See, *infra*, Part I.G.

B. The TGA’s Purposes Confirm That Congress Intended The Secretary To Safeguard Adjudicated Forage

“[T]raditional tools of statutory construction” confirm this reading of the TGA’s plain language. *Chevron*, 467 U.S. at 843 n.9. Last Term, this Court reaffirmed that “public land statutes should be interpreted in light of ‘the condition of the country when the acts were passed.’” *Southern Ute Indian Tribe*, 119 S. Ct. at 1725. The “pertinent inquiry” here is the intent of Congress when it enacted the TGA, which is ascertained by looking to “the history of the times when it was passed” and “the purpose declared on [the Act’s] face.” *Leo Sheep*, 440 U.S. at 669, 681-682; see also *MCI v. AT&T*, 512 U.S. 218, 228 (1994) (“the most relevant time for determining a statutory term’s meaning” is “1934, when the [relevant] Act became law”).

1. Congress’s purposes in enacting the TGA, stated in the statute’s preamble, were to “stop injury to the public grazing lands

by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development,” and “to stabilize the livestock industry dependent upon the public range.” *Andrus v. Utah*, 446 U.S. 500, 511 (1980) (quoting 48 Stat. 1269). To see these goals as pulling in different directions, as the court of appeals did, “is a classic example of projecting current attitudes upon the helpless past.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 n.7 (1993). Congress regarded the TGA’s purposes as complementary, not contradictory.

The public lands covered by the TGA were those classified by the Secretary, after extensive public hearings, as “chiefly valuable for grazing.” 43 U.S.C. § 315. As we have described, a century of uncoordinated use of the public range, combined with inappropriate agrarian homesteading and drought, had by 1934 resulted in a deterioration in the range that threatened the western livestock business. The Unlawful Inclosures Act precluded limits on the use of the range. Competition for forage by “nomadic livestock owners, whose chief purpose was to use as much of the range as possible, regardless of the rights of prior settlers,” as well as lack of coordination over how owners of base land and water rights would share the range, had reduced the productivity of the range for grazing to the point where ranchers demanded federal action. *Legal Problems* at 2; FOSS, *supra*, at 42, 49-50.

Congress’s object in establishing a system of grazing permits was *not* to preclude the use of the public range for grazing. Far from it, Congress had determined that “preventing overgrazing and soil deterioration,” and “provid[ing] for [the] orderly use, improvement, and development” of these lands “chiefly valuable for grazing,” was the best way “to stabilize the livestock industry dependent upon the public range” and make ranching a long-term economic proposition. 48 Stat. 1269. As Secretary of the Interior Ickes explained in supporting the TGA, “[w]e want to protect the range *in the interest of the livestock industry.*” HOUSE HEARINGS 133 (emphasis added); see FOSS, *supra*, at 57 (quoting Secretary Ickes’ statement that “the upbuilding of the public range coincides with the best interests * * * of the stockmen whose herds and flocks are dependent upon the range”); H.R. REP. NO. 73-903, at 2 (“the

whole purpose of the [Act] is to conserve the public range in aid of the livestock industry”).

Congress’s determination in Section 3 of the TGA to favor those who owned base property in the allocation of grazing privileges was consistent with its goal of conserving and improving the public range to promote the livestock industry. Rather than adopt a policy that might exacerbate overgrazing by transient herdsmen who lacked any vested interest in conserving the range, Congress gave a priority in the allocation of grazing permits to established stockmen whose “privately held properties [we]re economically dependent on the public lands for their proper use.” Department of Interior, *The Nature and Extent of the Department’s Authority to Issue Grazing Privileges Under the Taylor Grazing Act*, 56 Interior Dec. 62, 65 (1937). Giving an owner of base property a preference to graze the number of livestock on the federal range that was commensurate with the carrying capacity of his or her own property resulted in economically viable ranching units and gave the owner an incentive to invest in improving the public land resources. And tying grazing privileges to the objective needs of the dependent land or water helped stabilize the livestock industry over time as dependent property changed hands. Pet. App. 77a-78a; see *Chournos v. United States*, 193 F.2d 321, 323 (10th Cir. 1951) (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”).

2. Congress also advanced its goal of “stabilizing the livestock industry” when it commanded the Secretary to “adequately safeguard” “recognized and acknowledged grazing privileges”—the amount of forage “necessary to permit the proper use” of base property, as adjudicated by the Secretary pursuant to TGA Section 3. Absent protection of the adjudicated preference, there would be no stability in the industry.

First, the protected level of forage is what allowed permittees “to gauge how large or small their livestock operations could be” and plan accordingly. Pet. App. 54a. It was the TGA’s protection of adjudicated preferences that made it “possible for stock growers to

plan their annual operations over a period of years with a predetermined knowledge, based upon the average rainfall, of the amount of grazing available.” *Legal Problems* at 2. See *Hatahley v. United States*, 351 U.S. 173, 177 (1956) (the TGA “seeks to provide the most beneficial use of the public range and to protect grazing rights in the districts it creates”); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) (the TGA aims, “in the interest of the stock growers themselves, to define their grazing rights and to protect those rights * * * against interference”).

Second, the value of a ranch, and the rancher’s ability to borrow money for operations and improvements, depended on the federal government’s recognition of the maximum number of livestock that could be grazed on the public lands. See 2 G. COGGINS ET AL., PUBLIC NATURAL RESOURCES LAW § 19.02, at 19-14 (1999) (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,” which depends on “[t]he number of [animal unit months] in the permit”). Congress went so far in Section 3 of the TGA not just to “safeguard” the continuation of a permittee’s grazing privileges but to *guarantee* it when a permittee’s “grazing unit” (base property and permit) had been “pledged as security for any bona fide loan.” In those circumstances, Congress specified, “no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit,” if denying renewal would “impair the value of the grazing unit.” 43 U.S.C. § 315b; see 43 C.F.R. § 4130.8 (1994). This is a significant restriction on the Secretary’s power to deny permit renewal, for as the *amicus* briefs filed in support of our petition for certiorari by Farm Credit Institutions and the State Bank of Utah attest, loans to federal land ranchers secured by a grazing unit are commonplace, and loss of a grazing permit will virtually always substantially affect the value of the unit.

3. Construing the TGA to mean that the Secretary must recognize and safeguard adjudicated forage decisions conforms to the purposes of the Act. Secretary Babbitt, in contrast, cannot explain how his “preference” and “permitted use” rules—which leave every

facet of the grazing privilege at the mercy of BLM’s discretion and give historically adjudicated forage no special weight or status in the land use planning process—further Congress’s goal “to stabilize the livestock industry dependent on the public range.”

C. The TGA’s Legislative History Shows Congress Intended The Secretary To Safeguard Adjudicated Forage

This Court need not look beyond the TGA’s text and purpose to determine its meaning. But insofar as “legislative history” is one of the “traditional tools of statutory construction” (*PBGC v. LTV Corp.*, 496 U.S. 633, 649 (1990)), it too confirms that Congress meant to safeguard adjudicated forage on the public range. This Court will not defer to an agency construction when “the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress.” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 233 (1986).

The House Report explains that the TGA gives “[o]ccupants and settlers on land within or near a district * * * such preference to range privileges as may be necessary to permit proper use of lands occupied by them.” H.R. REP. NO. 73-903, at 3. That “necessary” amount of grazing was to be safeguarded. Congress recognized the stockman’s need for “assured grazing privileges, on the basis of which definite plans for public operations can be adopted.” *Id.* at 2. Congressman Taylor of Colorado, for whom the Act is named, explained that “to build up or maintain and stabilize the stock-raising industry there must be some *assurance* as to where and what kind of range [stockmen] may rely upon for their stock, *what they can definitely rely upon in the way of pasturage.*” 78 CONG. REC. 5371 (1934) (emphasis added). “Otherwise,” he continued,

there would be no permanence to the business. People who have herds would not be safe; they would have no credit with the banks for securing money. They 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.

Ibid.; see also *id.* at 11140 (Sen. Adams).⁵

The Secretaries of Interior and Agriculture supported the Act on the ground that it would provide public range-dependent ranchers with certainty and stability. Secretary Ickes explained to Congress that the TGA would provide “those engaged in the livestock industry” with “certainty of tenure in their grazing use of the public lands.” H.R. REP. NO. 73-903, at 7. Agriculture Secretary Wallace echoed this sentiment, stating that the Act would “secure stability and certainty of tenure upon the unreserved public lands,” thus enabling livestock raisers to “develop their enterprises in more permanent and constructive ways than is practicable under the hitherto prevailing conditions of complete uncertainty as to their continued use of the ranges upon which their operations depend.” *Id.* at 11.⁶

Congress thus well understood that grazing privileges must be “sufficient” and “definite” to serve the purpose of stabilizing the live-

⁵ Senator McCarran expressed similar views in support of his successful amendment mandating renewal of permits when denial would “impair the value” of a grazing unit “pledged as security for any bona fide loan.” 43 U.S.C. § 315b. The object of the amendment was “to guarantee that the rights to grazing privileges which are conveyed by the bill shall be so definite and so certain that they may be recognized as security when the holder seeks a loan.” 78 CONG. REC. 11153 (1934).

⁶ Commenting on the effect of the TGA a few years after its enactment, Congressman Taylor observed (87 CONG. REC. A3147-A3148 (1941) (emphasis added)):

Today the stockman who has qualified by dependent property and prior use of the range to graze *a definite number of stock* 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.*

stock industry. 78 CONG. REC. 5371. The TGA's requirements that forage be allocated based on the capacity of base property and prior use, and that this adjudicated forage must be adequately safeguarded, were designed to meet these industry needs.

D. The FLPMA And PRIA Preserved Adjudicated Forage And The TGA's Mandate That It Be Adequately Safeguarded

Neither the FLPMA nor the PRIA alter already adjudicated grazing preferences or the TGA's mandate that adjudicated preferences be "adequately safeguarded." See Pet. App. 56a-60a (grazing preferences are the result of one-time adjudications, most of which predated the FLPMA, and so were unaffected by that Act's change in adjudication standards).

1. The FLPMA says nothing at all about previously adjudicated forage, nor did it repeal or amend the TGA's provision that grazing privileges shall be adequately safeguarded. The absence of such changes is conclusive, for the FLPMA provides that "[n]othing in this Act shall be deemed to repeal any existing law by implication." 90 Stat. 2744, § 701(f). Moreover, the FLPMA mandates that "[t]he policies of this Act shall * * * be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law." 43 U.S.C. § 1701(b). Yet another savings clause commands that "[n]othing" in the FLPMA "shall be construed as terminating any * * * *land use or authorization existing on the date of approval of this Act.*" 90 Stat. 2744, § 701(a) (emphasis added). These provisions preserve the purpose of the TGA "to stabilize the livestock industry" by ensuring security and predictability of grazing, and require that the FLPMA not be implemented so as to interfere with existing preferences.

2. Even apart from its savings clauses, the FLPMA cannot be construed to disturb adjudicated forage. "It is a basic principle of statutory construction" that a specific statute "is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The FLPMA was an organic act for the BLM, governing manage-

ment of the public lands generally. BLM has acknowledged that it made only “minor adjustments in the Taylor Grazing Act.” FIFTY YEARS at 5; see 2 G. COGGINS, *supra*, § 19.03[2] (“Congress did not enunciate specific range goals or policies in FLPMA”). It would be anomalous to read the FLPMA’s general provisions as interfering with adjudicated levels of forage, which the TGA specifically safeguards. *Cf. Board of Govs. v. Dimension Financial Corp.*, 474 U.S. 361, 373-374 & n.6 (1986) (rejecting “[a]pplication of ‘broad purposes’ of legislation at the expense of specific provisions”; a broad grant of regulatory power “necessary” to accomplish Act’s purposes “does not permit the [agency] to expand its jurisdiction beyond the boundaries established by Congress”).

In accordance with the FLPMA’s goals and savings clauses, the Secretary did not interpret that Act to change the status of previously adjudicated forage. To the contrary, he stated that “[those] with a grazing [permit] will be recognized as having a preference for continued grazing use * * *. [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 (1978) (emphasis added).

3. That the PRIA preserved the TGA’s purpose to give permittees predictable forage is equally clear. The PRIA states that “the Secretary shall manage the public rangelands in accordance with the [TGA, the FLPMA], and other applicable law consistent with the public rangelands improvement program pursuant to this Act.” 43 U.S.C. § 1903(b). Like the FLPMA, the PRIA requires that the Act “be construed as supplemental to and not in derogation of the purposes for which public rangelands are administered under other provisions of law.” *Id.* § 1901(c). The PRIA is a pro-grazing measure that established an equitable grazing fee, provided for increases in funding for range improvements, and addressed ranchers’ complaints about BLM’s misuse of allotment management plans. *Supra*, p. 12; 43 U.S.C. §§ 1752(d), 1904; H.R. REP. NO. 95-1122, at 25 (1978).

4. The legislative history of both statutes shows that Congress continued the recognition and protection accorded to historical gra-

zing preferences under the TGA. The House Report on the FLPMA explains that the Act was motivated by an “[u]rgent need” for “a clarification of the tenure of grazing users.” H.R. REP. NO. 94-1163, at 3 (1976). Accordingly, the purpose of the grazing tenure provision of the FLPMA, 43 U.S.C. § 1752, was “*to emphasize the continuity of grazing operations that is provided for by existing law*”:

existing grazing operations will be continued so long as the following prevails: The authorized user remains qualified under the law and regulations and accepts and observes the terms and conditions of his lease or permit; and the lands remain in Federal ownership and available for grazing in the discretion of the Secretary concerned.

Id. at 12-13 (emphasis added). Accordingly, BLM Associate Director George Turcott told the House Subcommittee on Public Lands that permittees’ “assurance of tenure” would continue under the FLPMA. See HEARINGS ON H.R. 5224 AND H.R. 5622 BEFORE THE SUBCOMM. ON PUBLIC LANDS OF THE HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94th Cong., 1st Sess. 16 (1975) (“The Taylor Grazing Act gives these people tenure as long as they live up to the rules and regulations and the facets of law that they must comply with”).

The legislative history of the PRIA reveals a similar concern. Although improving range condition was a goal of the Act, Congress refused “to withdraw or ‘rest’ land in unsatisfactory condition from grazing use, or to dramatically reduce the numbers of livestock until natural forces combine to restore the range.” H.R. REP. NO. 95-1122, at 10 (1978). Among the “serious drawbacks” of this approach was that “[m]assive grazing cutbacks and a preponderant reliance on natural recuperation of the range are * * * undesirable because of their insensitivity to economic factors and potential to totally disrupt or shutdown ranching operations.” *Id.* at 11. “Another” was “that studies by the BLM and substantial independent research indicate that range conditions will show far greater, and more rapid, improvement with regulated livestock grazing than without.” *Ibid.* “In summary,” the House Report continued, “the highest and best use of the public range lands lies not in their

withdrawal from grazing use, but rather in the improvement of their soil and forage values.” *Ibid.*

Thus, there is no basis in the text, purposes, or legislative histories of the FLPMA or PRIA for the claim that either statute disturbed previously adjudicated preferences or the requirement that those preferences be “adequately safeguarded.”

E. The Secretary Long Interpreted The TGA To Safeguard Adjudicated Forage

This Court gives “great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement” (*BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983)), especially where the agency’s interpretation “has remained consistent over a long period of time.” *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). These principles have “particular force” where (as here) the agency “was intimately involved in the drafting and consideration of the statute by Congress.” *Aluminum Co. v. Central Lincoln Peoples’ Util. Dist.*, 467 U.S. 380, 389, 390 (1984); see also *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (an agency’s “practice has peculiar weight when it involves a 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”); 78 CONG. REC. 5371 (Rep. Taylor) (Secretary Ickes “very forcibly reported in favor of this bill”).

1. The Department of the Interior and its Division of Grazing were clear, from the start of the process of adjudicating grazing privileges, that they should award qualified permittees the amount of forage that was commensurate with the needs of their base property, within the limits of the carrying capacity of the range. The Secretary explained in 1936 that the Department’s “policy” was “to administer” the TGA so “as to disturb as little as possible the existing livestock industry, which is the only industry able to make an economic use of the lands under administration and at the same time to give the maximum protection to both the public domain and the commensurate ranch properties economically dependent on the

public domain.” *Legal Problems* at 5-6. Accordingly, the Department announced that it would administer the TGA “to promote the proper use of the privately controlled lands and water dependent upon it” for grazing, and thus “required of all users” “[p]ossession of sufficient land, water, or feed to insure a year-round operation for a certain number of livestock in connection with the use of the public domain.” Range Code § 1(a) (Mar. 16, 1938), CA App. 839; see, e.g., HEARINGS ON H.R. 3019 BEFORE THE HOUSE COMM. ON THE PUBLIC LANDS, 74th Cong., 1st Sess. 644 (1935) (“The measuring staff for the allowance of a lease, or the allowance of a permit would depend on what is necessary for the applicant to make a proper use of the land that he is devoting to range operations”) (testimony of R.G. Poole, Assistant Solicitor of Interior); FOSS, *supra*, at 63.

This policy of measuring grazing privileges according to needs of private holdings and prior dependent range use did not change during the 20-years-plus it took to adjudicate all grazing privileges on the public range, or for a long time thereafter.⁷ After passage of the FLPMA in 1978, the Secretary provided that *newly adjudicated* grazing privileges would “be allocated to qualified applicants following the allocation of the vegetation resources among livestock grazing, wild free-roaming horses and burros, and other uses in the land use plans” mandated by the FLPMA. 43 C.F.R. § 4110.2-2(a) (1978), CA App. 955; 43 U.S.C. §§ 1712, 1732; Pet. App.

⁷ See, e.g., Department of Interior, Office of the Secretary, *Rules for Administration of Grazing Districts 2-3* (1937), CA App. 818-819 (“[q]ualified preferred applicants will be given licenses to graze the public range insofar as available and necessary to permit a proper use of the lands, water, or water rights owned, occupied, or leased by them”; “If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the range is reached”); Range Code (1938), CA App. 841-844; Range Code §§ 2(g) & (h), 6(b) (1942), CA App. 858-859, 862-863; 43 C.F.R. §§ 161.1(b), 161.2(g) & (h), 161.6 (1955), CA App. 885-887; 43 C.F.R. §§ 4110.0-2, 4110.0-5(h), (k) & (l), 4111.3-1(d)(2) (1968), CA App. 932-934.

56a-60a. But the FLPMA did not disturb previously adjudicated grazing preferences. See Part I.D, *supra*.

2. In addition, the Secretary consistently treated adjudicated forage decisions as a fixed point in his management of the use of the public range. The BLM could from time to time reduce or increase a permittee's "active use" of the range—the number of animal unit months that the permittee could actually graze on the public range in a given period—to reflect the condition of the range, effect of range improvements, and similar factors. But when that occurred, no change was made in the underlying preference. Rather, the difference between the permittee's "active use" and adjudicated amount of forage was labeled "suspended use" and remained available for conversion to "active use" if range conditions later permitted. See, *e.g.*, 43 C.F.R. § 4110.3-2 (1984), CA App. 1001 (if "reduced grazing is necessary * * * authorized grazing use shall be reduced to the livestock carrying capacity. The difference between the authorized grazing use and the grazing preference shall be held in suspension"); *id.* § 4110.3-1 (allocation of additional forage); 43 C.F.R. § 501.2(q) (1938), CA App. 848; 43 C.F.R. § 161.6(8), (11) (1955), CA App. 887; 43 C.F.R. § 4115.2-1(e)(5) (1968), CA App. 936.

Reflecting this protected status, Department of the Interior officials contemporaneously with the passage of the TGA referred to the adjudicated amount of forage as the "preference." *E.g.*, *Legal Problems* at 3 ("Preference" is "measured by the amount of grazing which is necessary to enable the applicant to make proper use of the lands, water, or water rights owned, occupied or leased by him"). And they labeled that preference a "right." Foss, *supra*, at 63 (Grazing Director Carpenter said "preference rights" are "adjunctive pasture rights which naturally belong to" the base property).

3. The protection afforded adjudicated forage was also evident in the fact that, generally, "the grazing preference remained in place not just from year-to-year * * * but also from permit-to-permit," as well as when the base property was sold or otherwise transferred. Pet. App. 55a; see 43 C.F.R. § 501.7 (1938), CA App. 850; 43 C.F.R. § 161.7 (1955), CA App. 888. For example, the 1978 and

1994 regulations clearly distinguish between the “grazing permit,” which terminates with transfer of the base property, and the transferred “grazing preference,” which does not so terminate. 43 C.F.R. § 4110.2-3(a) (1978 & 1994), CA App. 955, 1064-1065.⁸

4. The Secretary has always had the authority to cancel or suspend preferences “in whole or in part” if “there is a decrease in public land acreage available for livestock grazing” (*e.g.*, 43 C.F.R. § 4110.4-2(a) (1984), CA App. 1002) or for violation of the rules concerning transfer of the preference. *Id.* § 4110.2-3(f) (1978), CA App. 955. And the Secretary has always had the authority to decrease or cancel active use on account of the condition of the range. *E.g.*, 43 C.F.R. §§ 4110.3-2, 4120.2-1 (1984), CA App. 1001, 1006. But for nearly 60 years, the Secretary never claimed the power to eliminate or permanently reduce preferences on entirely subjective bases like those that dominate in land use planning. In light of this history, his sudden claim to have found such authority is not entitled to deference. *BankAmerica Corp.*, 462 U.S. at 131 (“the Government’s failure for over 60 years to exercise the power it now claims * * * strongly suggests that it did not read the statute as granting such power”); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (insofar as “[t]he Department’s current interpretatio[n] [is] in conflict with its initial position” it “is entitled to considerably less deference”); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Norwegian Nitrogen Prods.*, 288 U.S. at 315. The Secretary’s contemporaneous, long-held, and “uniformly

⁸ The Internal Revenue Service’s treatment of grazing privileges further evidences the certainty and security afforded adjudicated preferences by the TGA. The IRS treats “[f]ederal grazing privileges” as “an intangible asset” and therefore as part of a decedent’s gross estate. *Uecker v. Commissioner*, 81 T.C. 983, 993 (1983), *aff’d*, 766 F.2d 909 (5th Cir. 1985). And it disallows depreciation of a BLM grazing permit because the permit is always renewed and thus has an indefinite useful life. *Ibid.*; see also *Shufflebarger v. Commissioner*, 24 T.C. 980, 992 (1955) (once established, a grazing privilege “is to be regarded as an indefinitely continuing right”).

maintained” view of the scope of his authority supports our interpretation of the governing statutes. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 449 (1978).

F. Congress Ratified The Secretary’s Prior Interpretation Of The TGA And Rejected His Range Reform Rules

1. Congress amended the TGA on a number of occasions over the years, without amending the provisions of Section 3 that require the allocation of forage commensurate with the needs of a rancher’s base property and the “adequat[e] safeguard[ing]” of grazing privileges. See, *e.g.*, Act of June 26, 1936, Title I, § 1, 49 Stat. 1976 (increasing the acreage covered by the Act from 80 to 142 million acres); Act of May 28, 1954, § 2, 68 Stat. 151 (eliminating the acreage limitation); *Andrus*, 446 U.S. at 519 (noting a 1958 amendment). Congress revisited the topics of public land management and grazing use in the FLPMA and PRIA, again without interfering with—indeed specifically preserving—those provisions of the TGA that relate to previously adjudicated preferences. See *supra*, Part I.D.

Even congressional inaction or silence can support an inference that Congress has approved or ratified an agency interpretation of a statute, particularly when such interpretations are generally known or longstanding. *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Wilmette Park Dist. v. Campbell*, 338 U.S. 411, 417-418 (1949). Here, “however, the inference is supported by more than mere congressional inaction.” *Zemel*, 381 U.S. at 11. In amending the TGA and enacting the FLPMA and PRIA, while leaving “completely untouched” the provisions at issue (*id.* at 12), Congress ratified the Secretary’s longstanding view that his statutory powers do not include altering the forage adjudicated under the TGA. The Secretary was not thereafter free to abandon that congressionally approved interpretation.

2. Furthermore, in 1993 Congress *rejected* an amendment to the Interior Department’s appropriations bill, proposed by Senator Harry Reid, that would have incorporated many of the “range reform” regulations that Secretary Babbitt later adopted. H.R.

2520, 103d Cong., 1st Sess. (1993); Reid Amendment discussed at 139 CONG. REC. 25744-46 (1993); H.R. 2520 adopted without the Reid Amendment, 139 CONG. REC. D1266 (1993). Although Senator Reid generally supported the Secretary's agenda, even he declined to champion the permitted use rule, because "eliminating the preference" and substituting permitted use "would devalue the permit in the eyes of lending institutions. I knocked that out." 139 CONG. REC. 25745. Combined with Congress's ratification of the Secretary's earlier and inconsistent position, its refusal to enact the Secretary's range reform rules ought to preclude subsequent administrative adoption of such a radical and anti-historical change.

G. The Secretary's "Permitted Use" And "Preference" Rules Do Not Safeguard Adjudicated Forage At All

1. The Secretary admits that his 1995 definition of "grazing preference" as "a superior or priority position against others for the purpose of receiving a grazing permit" "omits reference to a specified quantity of forage, a practice that was adopted * * * during the adjudication of grazing privileges." 60 FED. REG. 9921 (1995). Now, a permittee's amount of forage is "allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit." 43 C.F.R. § 4100.0-5 (1995). Under this "permitted use" rule, forage is no longer tied to the amount "necessary to permit the proper use" of the base property, as adjudicated by the Secretary. Rather, it depends solely on the vagaries of land use planning under the FLPMA.

2. A permittee's forage adjudicated under the TGA is not "safeguarded" *at all* in the land use planning process. It is not an exaggeration to say that land use planning allows the Secretary to eliminate historical forage levels "[w]ith a mere stroke of his pen." Pet. App. 79a. As a leading commentator friendly to heightened regulation of grazing admits, "BLM planning regulations are vague to the point of opaqueness," "devoid of guidance," "inconsistent," "generally inadequate," and "hampered by * * * changes in policy direction" to such a degree that "no decision is ever final." 2 G. COGGINS, *supra*, §§ 10F.04[2], [3][a],[b]. Likewise, range man-

agement plans issued pursuant to the land use planning process are “phrased in glutinous generalities” and grant BLM officials “such unbridled administrative discretion” that “*all federal land users are subjected to unforeseeable risks of bureaucratic whim or aberration.*” *Id.* § 10F.04[3][d] (emphasis added). BLM is “free to choose its own schedules, its own priorities, its own methods, and its own topics,” and “the overall planning picture * * * is one of confusion.” *Id.* §§ 10F.04[1], [3][c]. The regulations confirm this assessment. *E.g.*, 43 C.F.R. § 1610.4-2 (1998) (BLM planning criteria “may be changed as planning proceeds, based on public suggestions and findings of the various studies and assessments”); *id.* § 1610.5-5 (once in effect, plans may be revised based on “new data, new or revised policy” or “a change in circumstances”).⁹

Undoubtedly, there are myriad ways that the Secretary can “adequately safeguard” adjudicated forage. But the claim that land use planning, without more, is one of those is absurd. Unchecked by objective limits, the land use planning process eliminates entirely the certainty and predictability for ranchers (and their lenders) that Congress intended to promote.¹⁰ The Secretary is required “to apply *some* limiting standard, rationally related to the goals of the Act,” to give content to the TGA’s mandate that grazing privileges

⁹ The vagueness that plagues BLM land use planning originates in the FLPMA itself, which “resounds with abstractly attractive language that is very difficult to pin down.” 2 G. COGGINS, *supra*, § 10F.04[3][c]. The Secretary’s failure to devise meaningful guidance for land use planning such that adjudicated forage is “safeguarded” suggests that the non-delegation doctrine has been violated. See *American Trucking Ass’n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). A decision here that removes adjudicated preferences from the land use planning morass would help to avoid this constitutional difficulty. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979).

¹⁰ Experience with National Forest planning demonstrates the harm that occurs to ranchers when they have no security of tenure and the land use plan makes forage allocations. *E.g.*, *Federal Lands Consortium v. United States*, 1999 WL 979232 (10th Cir. Oct. 28, 1999); *Nevada Land Action Ass’n v. United States Forest Service*, 8 F.3d 713 (9th Cir. 1993); *McKinley v. United States*, 828 F. Supp. 888 (D.N.M. 1993).

be “adequately safeguarded,” and his failure to do so means that he “has not interpreted the terms of the statute in a reasonable fashion.” *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 734, 736 (1999). Deference “has its limits,” and it “does not mean acquiescence” in such a wholly untenable agency interpretation. *Presley v. Etowah County Comm’n*, 502 U.S. 491, 508 (1992).

3. The court of appeals’ majority found protection for grazing privileges in the current regulatory scheme on the theory 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.” Pet. App. 32a. This reasoning ignores the fact that the TGA provided *substantive* protection for the amount of forage “necessary to permit the proper use” of base property, as the Secretary long recognized. Limiting the protection afforded to adjudicated grazing privileges to mere procedural devices impermissibly “contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute.” *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976).

The court of appeals’ reading also makes superfluous 43 U.S.C. § 315h, which entitles permittees to notice and “hearings on appeals.” It therefore “violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.” *Kungys v. United States*, 485 U.S. 759, 778 (1988); see also *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 n.11 (1988) (collecting authorities).

4. The term “adequately safeguarded” finds analogy in the Bankruptcy Code, which allows a secured creditor to obtain relief from a stay of proceedings against a debtor in bankruptcy in order to “adequately protec[t]” the creditor’s interest in property. 11 U.S.C. § 362(d)(1). Examples of “adequate protection” include

requiring “cash payments” or “an additional or replacement lien” to the creditor, “to the extent” the stay or other action “results in a decrease in the value of [the creditor’s] interest.” *Id.* § 361(1), (2). A court may grant other relief that “result[s] in the realization by [the creditor] of the indubitable equivalent of [its] interest in such property.” *Id.* § 361(3).

Common to these measures is the notion that “adequate protection requires a debtor to propose some form of relief that will preserve the secured creditor’s interest in the collateral.” Annotation, 66 A.L.R. Fed. 505, 512 (1984); see *United States Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988). Analogously, while the Secretary may use different methods to “adequately safeguard” adjudicated forage, he cannot terminate his recognition of adjudicated forage decisions altogether and leave future grazing privileges to a wholly discretionary land use planning process that allows him to prefer the favored land use *du jour* over livestock grazing.

5. The text, purpose, and legislative history of the governing statutes all point in one direction: Congress has mandated substantive protection of adjudicated forage, which may not be eliminated or reduced on the basis that the Secretary in his discretion deems other uses of the public lands more politically desirable. This Court “must give effect to th[is] unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 843.

Throwing adjudicated forage levels into an entirely discretionary land use planning process in which they are not recognized and carry no special weight is not a means to “adequately safeguard” adjudicated forage. In those circumstances, *grazing privileges are not “safeguarded” at all*. The Secretary’s preference and permitted use rules must therefore be set aside as contrary to the TGA or, at the very least, an unreasonable interpretation of its provisions.

II. THE RANGE IMPROVEMENTS RULE IS INVALID

Prior to 1995, the Secretary's regulations provided that when a permittee entered into a cooperative agreement with the Department to build and install "structural" range improvements (such as fences, stock tanks, and pipelines) on public lands, title to the improvements would be "shared by the United States and the cooperator(s) in proportion to the actual amount of respective contribution to the initial construction." 43 C.F.R. § 4120.3-2 (1994). In 1995, however, the Secretary—purportedly to return to "common law concepts regarding retention of the title of permanent improvements in the name of the party that holds title to the land," 60 FED. REG. 9897 (1995)—redefined all "structural" improvements authorized after August 21, 1995 as "permanent" and ruled that their title would lie in the United States. 43 C.F.R. § 4120.3-2(b) (1995). That rule, which altered 60 years of administrative practice, violates the statute and cannot stand.

1. There is nothing in either the language or design of the TGA that even begins to support the contention that Congress granted the Secretary authority to forbid permittees to own the improvements that they construct. To the contrary, Section 3 of the TGA, 43 U.S.C. § 315c, requires that when a new permit is issued, compensation must be paid for "improvements constructed and owned by a prior occupant." The statute on its face thus contemplates that the land will contain improvements "constructed and owned" by permit holders. Of course, if Congress had not contemplated permittee ownership of such improvements, TGA's payment provision would be pointless. Moreover, 43 U.S.C. § 1752(g) provides that, if the Secretary cancels a grazing permit, the United States must compensate the permittee for the value of his interest in any range improvements. As the district court observed, "[s]uch compensation would not be necessary if the permittee did not own the range improvement." Pet. App. 83a.

2. Confronted with the plain meaning of the statute, the Tenth Circuit majority insupportably concluded that the statute can "plausibly be construed to say no more than *if* the Secretary allows a permittee *both* to construct *and* own an improvement, the

permittee shall be entitled to compensation for its reasonable value upon transfer.” Pet. App. 37a (emphasis in original). That is not “a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. It relies on an assumption that Congress gave the Secretary the discretion to allow or forbid ownership, an assumption supported nowhere in the text of the TGA or FLPMA. Indeed, as the dissenting judge below pointed out, “[t]he TGA is a statute replete with discretionary language and congressional grants of rulemaking authority. Such discretionary language or rulemaking authority is conspicuously absent on the question of who should hold title to range improvements.” Pet. App. 70a.

That absence is particularly telling given Congress’s explicit grant of discretion regarding a related subject—determination of the compensation to be paid—elsewhere in Section 315c.¹¹ It is untenable to maintain that, in the very section in which it explicitly authorized the Secretary to make rules to determine appropriate compensation, Congress somehow neglected to mention an intended grant of the far broader discretion to determine whether ownership would be allowed at all. Congress knew how to delegate authority under the TGA, and when it did so, it did so explicitly.

Moreover, the Tenth Circuit majority’s reading of the statute, like the Secretary’s rule 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. *Cf. National Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998) (rejecting agency’s statutory interpretation that rendered statutory provision meaningless).

¹¹ “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 *to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive.*” 43 U.S.C. § 315c (emphasis added).

3. Given the plain meaning of the statute, the Court need go no further. But were there any doubt remaining, it would be resolved by the history of Section 315c, which makes clear Congress's intent to permit the builders of range improvements to own them. See *Dunn v. CFTC*, 519 U.S. 465, 468-479 & n.14 (1997) (examining legislative history and statutory purpose and concluding that "administrative deference is improper" "[b]ecause the statute, as a whole, clearly expresses Congress' intention"); *Cardoza-Fonseca*, 480 U.S. at 448-449 (finding agency's interpretation to be in conflict with statute after examining statute's plain language, relationship to treaty, and legislative history). Improvements are critical to good range use and condition, and are part and parcel of what Congress sought to achieve by passing the TGA. Thus, in his testimony regarding the Colton Bill (the predecessor bill to Taylor's legislation), Interior Solicitor Edward Finney addressed the proposal for 10-year range permits and declared, "[t]he moment that a man has a definite tenure on a definite area of land we believe he will be interested in preserving that and improving it, providing water, fences, and various things that are needed to best utilize that public domain." HEARINGS ON H.R. 11816 BEFORE THE HOUSE COMM. ON THE PUBLIC LANDS, 72d Cong., 1st Sess. 77 (1932), CA App. 1286.

The 1885 Unlawful Inclosures Act prohibited construction of fences on the public range. With adoption of the TGA, Congress recognized that fences, as well as improvements to distribute water, would be essential. Congress considered but *rejected* the Forest Service rule in which title to such improvements lay with the permittee for 10 years then was transferred to the United States. HEARINGS ON H.R. 6462 BEFORE THE SENATE COMM. ON PUBLIC LANDS, 73d Cong., 2d Sess. 77-80 (1934) ("SENATE HEARINGS"), CA App. 1471-1473. *Cf.* 60 FED. REG. 9897 (justifying 1995 change in title to range improvements as conforming to Forest Service practice).

A draft of Section 315c provided that an applicant was to pay the prior occupant "reasonable pro rata value for the use of" improvements. CA App. 1433. In discussing the shortcomings of

that proposal,¹² the draftsmen plainly understood that the person who constructed improvements owned them; they debated only whether and how title would pass to the new permittee:

Senator O'Mahoney: Value for use is a rental value. It is not a title value. Value for use, as the language appears in this bill, would mean only rental. The ownership would still remain in the original permittee.

Senator Carey: It should pass to the succeeding lessee.

Senator O'Mahoney: Yes; there ought to be a provision whereby a succeeding lessee may acquire the full rights, the full title to the improvements.

Senator Adams: That is, either acquire the full ownership or pay a rental.

Senator O'Mahoney: Yes.

Senator Adams: Those are two alternative possibilities.

Senator O'Mahoney: But I presume that it would not be the purpose of this committee to recommend that an old lessee could maintain a right which would enable him to charge a rental after he had gone off. Yet, under the language of this bill, it seems to me that is possible.

Senator Carey: I think the new permittee should buy outright, at a fair value, whatever improvements are made.

Senator O'Mahoney: I agree with you, Senator.

Senator Carey: And when he moves off, he sells to the next fellow the same way.

Senator O'Mahoney: Yes. In other words, if a lessee puts in improvements on the land, those improvements are valuable only for grazing. They are not valuable to him after he leaves, but they

¹² Following the hearings, Section 315c was amended and the present language ("the reasonable value of such improvements") substituted for the earlier wording.

may be valuable to his successor. His successor should have the right to acquire the full title to them. He may destroy them in the course of his 10-year lease, or he may add to them, and then, in turn, when he surrenders his lease, he will be required to sell them to the successor again.

SENATE HEARINGS 78-79, CA App. 1472. The “two alternative possibilities” that the lawmakers discussed were (1) allowing the builder of an improvement to *retain* title even after the permit was passed to another, and (2) requiring him to *transfer* title instead. Neither scenario contemplated that title in the first instance would be anywhere but in the builder.

Indeed, when the Interior Department’s Assistant Solicitor came before the Senate during the debates on the TGA he assured legislators that the statute “provides for the placing of improvements, such as fences, wells, reservoirs, and so forth, upon permitted areas in connection with their development and use, and *private investment in such improvement is protected.*” *Id.* at 77, CA App. 1471. As would be expected, therefore, the Interior Department’s contemporaneous interpretation of the statute recognized that the statute contemplates private ownership of range improvements. 43 C.F.R. Part 501 (1938) (CA App. 855) directed that, where a new application “relates to improvements of the character contemplated by [43 U.S.C. § 315c], constructed on the public lands within the grazing district and owned by a prior occupant, the applicant * * * must, at the time of filing such application, describe and enumerate said improvements, state their reasonable value, item by item, furnish evidence that the applicant has paid to the owner of such improvements the reasonable value thereof, and *that the title thereto, free and clear of all liens and encumbrances, has vested in the applicant for such permit or cooperative arrangement or agreement*” (emphasis added).

In sum, just as the plain meaning of the statute makes clear the invalidity of the range improvements rule, the legislative history contains not even a trace of evidence to support the Secretary’s bold assertion that Congress authorized him to declare permittees’ structural range improvements to be government property. To the con-

trary, as Congressman Taylor himself acknowledged, his bill drew the line between agency discretion and Congressional power in favor of the legislature (78 CONG. REC. 5372, CA App. 1578):

The Secretary could do practically everything that is provided for in the bill *if we had simply turned it over to him*. Nearly all these things could be provided for by regulations. However, *many people are not willing to just give carte blanche provisions* of that kind in the bill. They, with some justification, feel that *there are some things that they should specifically provide for or reserve* in the law itself for their guaranty.

The Secretary certainly could claim authority to regulate range improvements in the manner asserted here, “if [Congress] had simply turned it over to him.” But Congress did not do so. And it remains with Congress, not the Interior Department, to legislate in this arena. The range improvements rule is beyond the scope of the agency’s power, and therefore is invalid.

III. PERMITS TO GRAZE LIVESTOCK MAY BE GRANTED ONLY TO THOSE ENGAGED IN THE BUSINESS OF GRAZING LIVESTOCK

Section 3 of 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 language, structure, history, and purpose of the TGA for the Secretary to allow issuance of livestock-grazing permits to those who are not in the business of grazing livestock, and the Secretary’s new rule that would do so is invalid.

1. The government has conceded that “[t]he TGA directs that grazing permits be granted only to stock owners.” U.S. Br. in Opp. 22. And indeed TGA Section 3 authorizes the Secretary only

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 * * *.

This section expressly restricts grazing permits to “bona fide settlers, residents, and *other stock owners*.” It also contemplates that the “stock owners” to whom permits may be granted will be commercial stock owners. That is precisely how the Secretary interpreted the TGA in 1938, when he squarely determined that “‘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. 308, 313 (1938).

Confirming the correctness of this interpretation, the TGA distinguishes between, on the one hand, “stock owners” to whom grazing “permits” may be issued and, on the other, persons who keep small quantities of livestock “for domestic purposes,” who are eligible for “free grazing.” 43 U.S.C. § 315d. The TGA makes no mention of livestock that is kept for neither commercial nor domestic purposes. Accordingly, the 1938 Range Code contrasted a “free use applicant” with “an applicant for a *regular* grazing license or permit *for the purpose of carrying on livestock operations*.” § 2(p), CA App. 842. The language and structure of the Act compelled such an interpretation.

2. The majority below read the clause “[p]reference 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” to mean that *only* landowners need be engaged in the livestock business, whereas occupants, settlers, and owners of water or water rights need not be so qualified. That 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. Even if it were somehow “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 Dep’t v. ACF Indus.*, 510 U.S. 332, 343 (1994).

3. Properly read (and as interpreted by the Secretary for six decades), the preference clause applies to persons engaged in the livestock business who are either landowners, bona fide occupants or settlers, or owners of water or water rights. So construed, the provision not only makes sense, but also comports with Congress's purpose for including the preference clause in the statute: to protect commercial 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 617. Congress never indicated any intention that non-commercial users be granted grazing permits. Instead, it was concerned with differentiating *among* commercial users—between those operators who did and those who did not own suitable base property.

4. The legislative history confirms the foregoing construction. Describing his bill, Representative Taylor emphasized that its goal was "to protect and improve" the public lands, "so that they may be put to the highest *productive* use." H.R. REP. NO. 73-903, at 2, CA App. 1420. "[P]roductive"—of commercial livestock. "It should be understood," he explained, "that the whole purpose of the bill is to conserve the public range *in aid of the livestock industry*." *Ibid.* And he described the grazing permit as a "*stockman's permit*": "I want a stockman's permit to be worth something. I want the *stock industry* to have some stability. That is my main object in this bill." SENATE HEARINGS at 40, CA App. 1452 (emphasis added).

Interior Secretary Ickes evinced a similar understanding when he provided assurances that the TGA's beneficiaries would be those in the livestock business. He declared that if the bill were to be passed, "[l]arge areas now nearly ruined could be rehabilitated and restored to grazing use, deterioration of other large areas could be halted, and the process reversed to one of improvement, *thus increasing our production of beef and mutton*." SENATE HEARINGS at 6, CA App. 1435 (emphasis added). The Secretary further assured Congress that "we have no intention to run amuck

in any state or in any area and drive stockmen off their ranges or deprive them of rights to which they are entitled either under State laws or by customary usage. If we were not interested in the maintenance of the range, we would not be here for this bill; *that is, the maintenance of the range in the interest of the State and of stockmen.*” *Id.* at 10-11, CA App. 1437 (emphasis added).

The legislators’ debates also make plain their understanding that permittees were to be engaged in the livestock business. For example, this exchange occurred between Representatives Lemke, Englebright, and White, and sheep industry witness Dan Hughes (HOUSE HEARINGS at 96, CA App. 1375):

Mr. Lemke: In regard to this reduction, should not that be applied first to those who have more than they are really entitled to there, so as to bring the small man down a little more easily? Would you not recommend that, instead of treating the small man as you would somebody who has two or three hundred thousand head of stock?

Mr. Hughes: I would make a pro-rata reduction.

Mr. Lemke: You would apply the same reduction to the poor little devil who is barely making a living that you would to the large user of the range, with two or three hundred thousand head of stock?

Mr. Hughes: No, sir; and your bill provides for the free use of the range to such a man, just as the regulations of the Forest Service do, for the extremely small man.

Mr. Englebright: That is, where he raises them for domestic purposes.

Mr. White: He is limited to four head there, is he not?

Mr. Lemke: You could hardly make a living on the desert with only four head of stock.

Mr. Hughes: I will have to answer that in this way: The ones living in the true desert are only existing. They are not doing anything in the true desert except in connection with sufficiently large units of livestock to enable them to stand the overhead of keeping men there constantly, and employing them to build up

the water supply, to handle trucks, and do work of that nature, so as to be able to properly take care of their stock.

Like dozens of others, that exchange reflects Congress's fundamental understanding that the persons receiving permits (as opposed to domestic raisers, who were entitled to free use) were to be persons seeking to "make a living" by raising livestock.

5. In addition to frustrating the TGA's purposes, the new regulation reverses DOI's contemporaneous and long-standing interpretation of the Act. The DOI observed as early as 1936 that a "fair and just distribution of range privileges must be made to those persons *engaged in the livestock business* who are the owners of commensurate property which is dependent on the public domain for proper use. It must be recognized that the Taylor Grazing Act is primarily a land-use statute, and to carry out its provisions it is the policy of the Department, through the Division of Grazing, to administer it in such a manner as to disturb as little as possible the existing *livestock industry*, which is *the only industry able to make an economic use of the lands* under administration and at the same time able to give the maximum protection to both the public domain and *the commensurate ranch properties economically dependent on the public domain.*" *Legal Problems* at 5-6 (emphasis added).

So, too, the 1937 *Rules for Administration of Grazing Districts* defined "property" as "land and its products or stock water owned or controlled and used according to local custom *in livestock operations.*" CA App. 818. And, as noted above, the 1938 Range Code contrasted a "free use applicant" with "an applicant for a *regular* grazing license or permit *for the purpose of carrying on livestock operations*" (*id.* at 842); and the Secretary's 1938 *Pueblo* decision equated "livestock owner" with someone "in the livestock business." 56 Interior Dec. at 313. These contemporaneous applications of the statute are compelling evidence that grazing permits were intended only for those in the business of grazing livestock.

6. With the 1995 elimination of the "livestock business" qualification, individuals or organizations owning small quantities of stock can acquire grazing permits, even though they intend not to graze at all or to graze only a nominal number of livestock—all the while ex-

cluding others from using the public range for grazing. Nothing could be further from the purpose of the TGA to promote a stable commercial livestock industry in the West.

The Secretary acknowledges that the new mandatory qualifications rule was meant at least in part to enable “natural resource conservation organizations” to obtain permits. 60 FED. REG. 9901 (1995). That rule is no different in effect from the Secretary’s “conservation use rule,” *which was struck down by the 10th Circuit and which the government does not seek to defend in this Court*. See *supra*, p. 15 n.4. Under the new rule, persons who go out and acquire a few livestock for non-commercial purposes may obtain a permit for what amounts to a conservation purpose and then effectively mothball the permit. That sort of end-run around the TGA is impermissible. The rule is invalid, and cannot stand.

CONCLUSION

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

Respectfully submitted.

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DECEMBER 1999