No. 98-1991

In the Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Secretary of the Interior issued final amended public rangeland management regulations in February 1995, following a lengthy rulemaking in which petitioners participated, along with state and local officials, ranchers, and other public land users. The district court held four of the amended regulations invalid, and the court of appeals reversed in part, sustaining three of those four amended regulations. The questions presented are:

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

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

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 167 F.3d 1287. The original opinion of the court of appeals is reported at 154 F.3d 1160. The order of the court of appeals granting respondents' petition for rehearing (Pet. App. 71a-72a) is reported at 167 F.3d at 1289. The opinion of the district court (Pet. App. 75a-100a) is reported at 929 F. Supp. 1436.

JURISDICTION

The order on rehearing and amended judgment of the court of appeals was entered on February 8, 1999. On April 23, 1999, Justice Breyer extended the time for

filing a petition for a writ of certiorari to June 9, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This petition concerns the Secretary of the Interior's authority to regulate livestock grazing on public rangelands under the Taylor Grazing Act (TGA), 43 U.S.C. 315 *et seq.*, the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. 1901 *et seq.*

1. The Secretary of the Interior, through the Bureau of Land Management (BLM), is charged with managing approximately 170 million acres of public rangelands throughout the western United States. Management of the public rangelands is guided and constrained by congressional mandates found primarily in the TGA, FLPMA, and PRIA. Pet. App. 3a.

Until 1934, the Secretary did not have explicit statutory authority to regulate grazing on public lands. "There thus grew up a sort of implied license that these lands * * * might be used so long as the Government did not cancel its tacit consent." *Light* v. *United States*, 220 U.S. 523, 535 (1911). That tacit consent of the United States to "suffer[] its public domain to be used for [grazing] purposes," however, "did not confer any vested right" on people using the public lands. *Ibid.*

The unrestricted access to public lands for grazing led to substantial injury to those lands. Congress responded to the need to regulate private use of the federal lands by enacting the TGA. Act of June 28, 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. 315-315r). The Act was intended "to insure the objects of such grazing districts, namely, to regulate

their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. 315a. As with the original status of the users of public lands, livestock grazing permits under the TGA do not "create any right, title, interest, or estate in or to the [public] lands." 43 U.S.C. 315b.

The TGA grants the Secretary broad discretion in managing public lands that sustain livestock grazing. Section 2 directs the Secretary to "make such rules and regulations * * *, and do any and all things necessary * * * to insure the objects of such [public lands], namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." 43 U.S.C. 315a.

The TGA recognizes a number of competing uses for federal rangelands. See 43 U.S.C. 315a (establishing objects of grazing districts). The Act authorizes the Secretary of the Interior to issue permits to allow grazing permittees to construct "[f]ences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock" on public lands. 43 U.S.C. 315c. Nothing in the Act restricts the Secretary's authority, either in issuing permits or in requiring authorization prior to modifications of permits, to consider the management of livestock to the exclusion of other interests. See *LaRue* v. *Udall*, 324 F.2d 428, 430 (D.C. Cir. 1963) ("[T]he Taylor Grazing Act is a multiple purpose act."), cert. denied, 376 U.S. 907 (1964).

Congress has extended the multiple-use policy in other statutes governing the management of public

lands. In the FLPMA, 43 U.S.C. 1701 *et seq.*, for example, Congress established a policy to manage public lands on a multiple "use and sustained" yield basis. See 43 U.S.C. 1701(a)(7) (stating goal of FLPMA to promote "multiple use"); see also 43 U.S.C. 1702(c) (defining "multiple use"). The FLPMA provides for the regulation of grazing through "grazing permit[s]" and the development of "allotment management plan[s]" (AMPs). 43 U.S.C. 1702(k) and (p). AMPs are developed in consultation with the permittees, and prescribe the extent and manner in which livestock operations are to be conducted to meet multiple-use, sustained-yield, and other management objectives. 43 U.S.C. 1702(k). The FLPMA confers broad discretion on the Secretary to modify the numbers of livestock grazing and to set limits on seasonal use of grazing lands. 43 U.S.C. 1752; see also *Perkins* v. *Bergland*, 608 F.2d 803, 806 (9th Cir. 1979). Congress also confirmed in FLPMA the rule that a grazing permit confers no rights in federal lands. 43 U.S.C. 1752(h).

In the PRIA, 43 U.S.C. 1901 *et seq.*, Congress made findings that "vast segments of the public rangelands are producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits, and for that reason are in an unsatisfactory condition." 43 U.S.C. 1901(a)(1). In PRIA, Congress articulated general findings that the public rangelands were in an unsatisfactory state (43 U.S.C. 1901(a)(1), (2) and (3)), and that those conditions could be addressed by increased management and funding (43 U.S.C. 1901(a)(4)). Congress affirmed a policy of range improvements to make public rangelands "as productive as feasible for all rangeland values." 43 U.S.C. 1901(b)(2).

2. In August 1993, BLM published a statement of intention to propose amendments to the Department of the Interior's (DOI) rangeland management regulations. See 1 C.A. App. 145; DOI, Bureau of Land Management (BLM), *Rangeland Reform '94: A Proposal to Improve Management of Rangeland Ecosystems and the Administration of Livestock Grazing on Public Lands* (Aug. 1993).[1] That announcement initiated a formal regulatory process that had been under discussion within DOI during the preceding years.[2] Those

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[1] For convenience, citations to the court of appeals appendix (C.A. App.) also include a parallel citation to the publicly-available document.

[2] In 1990, BLM initiated the "Range of Our Vision" program and published a document entitled *State of the Public Rangelands 1990, The Range of Our Vision, 2009: Diamond Jubilee of the Taylor Grazing Act*, as a first step toward addressing and resolving public rangeland issues.

In 1991, the BLM Director asked the agency's National Public Lands Advisory Council (NPLAC) to make recommendations to help guide BLM's rangeland management program. 1 C.A. App. 180; 58 Fed. Reg. 43,208 (1993). NPLAC in turn assigned a "Blue Ribbon Panel" (Panel) to review the rangeland management program needs and to recommend reform. The Panel produced a report in March 1992, *Rangeland—Program Initiatives and Strategies* (*Panel Report*), which (1) cited a need for grazing program goals and objectives that sustain natural systems while providing for human needs and desires (*id.* at 5); (2) recommended in part that BLM develop rangeland program goals and objectives based on modern ecological concepts, to assure protection of the basic resources (soil, water and vegetation) and the sustainability of the rangeland systems (1 C.A. App. 209; DOI, Bureau of Land Mgmt., *Rangeland Reform '94 Draft Environmental Impact Statement* (DEIS) 1-4 (1994)); and (3) concluded that BLM should give foremost consideration to the protection of the basic rangeland components of soil, water and vegetation, explaining that, "without assurances for the future well-being of these basic

proposals became known as "Rangeland Reform '94," and were described in a booklet entitled *Rangeland Reform '94* (1 C.A. App 145), approximately 35,000 copies of which were distributed in late August and September 1993 to all BLM grazing permittees and lessees,[3] interested congressional staff, and others. Public debate, commentary, and review of the announced proposals followed.[4]

On March 25, 1994, the Secretary published the proposed rangeland management rules (59 Fed. Reg. 14,314), with a comment period to end September 9,

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natural resources, there is precious little to squabble about" (*Panel Report* 1).

BLM then initiated a major effort to analyze critically how it conducts resource management across the full spectrum of its activities and programs (1 C.A. App. 180; 58 Fed. Reg. at 43,208, and also organized an Incentive-Based Grazing Fee Task Force to study alternative grazing fee concepts coupled with land management stewardship initiatives. In the spring and summer of 1993, the Secretary of the Interior held five town hall meetings in the West to discuss improvement of rangeland management (*ibid.*). The public scoping process to develop an Environmental Impact Statement (EIS) began in July 1993.

[3] Throughout this brief, "permit" refers to both "permit" and "lease," and "permittee" refers to both "permittee" and "lessee."

[4] During the 70-day scoping process and the 60-day comment period on the Advance Notice of Proposed Rulemaking, the BLM received approximately 12,600 pieces of mail from approximately 8000 persons on that notice, an accompanying notice of intent to prepare an Environmental Impact Statement (EIS), and the Rangeland Reform '94 summary booklet. 1 C.A. App. 204-212; DEIS 1-7. BLM then identified and refined key components of the rangeland improvement effort in preparing a proposed rule and a draft EIS. *Id.* at 212. During a three-month period beginning November 17, 1993, Secretary Babbitt met 20 times around the West with groups that included governors, state and local officials, ranchers, and other public land users. 1 C.A. App. 209; DEIS 4.

1994 (58 Fed. Reg. 38,154 (1993)). On May 13, 1994, BLM published a notice of availability of the Draft Environmental Impact Statement (DOI, Bureau of Land Mgmt., *Rangeland Reform '94 Draft Environmental Impact Statement* 1-7 (1994) (DEIS), 59 Fed. Reg. 25,118); for which the comment period also ended on September 9, 1994, 59 Fed. Reg. at 39,778. To facilitate and encourage public comment, the Department conducted 48 hearings on the DEIS and the proposed rule throughout the West, as well as one hearing at BLM's Eastern States Office in Virginia (59 Fed. Reg. at 25,385), and held open houses before the hearings to answer individual questions about the proposed rules (1 C.A. App. 230; 60 Fed. Reg. 9894 (1995)). More than 1900 people testified at the hearings. *Ibid.* DOI also received and considered more than 20,000 pieces of mail from more than 11,000 persons on the notice of proposed rulemaking and the DEIS, and catalogued and considered more than 38,000 individual comments. *Ibid.*

On December 30, 1994, DOI published notice that the Final Environmental Impact Statement was available. DOI, Bureau of Land Mgmt., *Rangeland Reform '94 Final Environmental Impact Statement* (1994) (FEIS), 59 Fed. Reg. 67,717. On February 13, 1995, Secretary Babbitt signed the Record of Decision (ROD) for the FEIS. 1 C.A. App. 309. The final rules were published February 22, 1995, with an effective date of August 21, 1995. *Id.* at. 230; 60 Fed. Reg. at 9894.

3. a. In July 1995, petitioners filed a complaint challenging ten of the amended regulations on their face. 1 C.A. App. 1. Petitioners later substituted for that suit a petition for review, seeking declaratory and injunctive relief on the same grounds that had been stated in their complaint. *Id.* at 77. Petitioners alleged

that most of those rules were invalid for lack of statutory support, poorly-reasoned bases, or inadequate responses to comments. They challenged two regulations for alleged constitutional defects. In addition, petitioners asserted that the FEIS and accompanying Record of Decision violated the National Environmental Policy Act (NEPA), 42 U.S.C. 4332 *et seq.* 1 C.A. App. 3.[5]

b. The district court held four amended regulations to be invalid and enjoined their enforcement, reasoning that the rules exceeded the Secretary's statutory authority or lacked a reasoned basis. Pet. App. 75a-100a. Those four regulations concern: (1) the distinctions between "grazing preference" and "permitted use," which refer, respectively, to (a) the preference to be accorded qualified applicants for grazing permits ("grazing preference rule"), and (b) the extent of use of the rangelands allowed under a permit ("permitted use rule"); (2) ownership of future permanent range improvements ("range improvements rule"); (3) mandatory qualifications for permit applicants ("mandatory qualifications rule"); and (4) the issuance of grazing permits for conservation use ("conservation use rule").

4. The Secretary appealed, and the court of appeals reversed in substantial part. Although the court unanimously recognized that the relevant statutes provide no "right[s]" in private persons "in or to" the public rangelands, but rather govern only "when and how private individuals will be allowed to use those lands" (Pet. App. 13a-14a, quoting in part 43 U.S.C. 315b), the court divided on the application of that principle to the rules under challenge. By divided vote, the court re-

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[5] The certiorari petition raises no claims of constitutional defects, and no claims of NEPA violations.

versed the district court's order with respect to the grazing preference and permitted use rules and the rule governing title to future permanent range improvements. Judge Tacha dissented from those determinations. Pet. App. 50a-70a. The panel unanimously reversed the portion of the district court's order invalidating the mandatory qualifications rule and unanimously affirmed the portion of the district court's order invalidating the conservation use rule.

The court of appeals denied petitioners' petition for rehearing and suggestion of rehearing en banc (Pet. App. 73a-74a), which sought review of the court of appeals' decisions with respect to the grazing preference, permitted use, and range improvements rule.[6]

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals properly upheld the amended rules on grazing preferences. Those rules represent a rational and reasonable construction and implementation of the Taylor Grazing Act, which confers broad authority on the Secretary to "make such rules and regulations * * *, and do any and all things necessary * * * to insure the objects of such [public lands], namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use,

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[6] The panel granted respondents' petition for rehearing (Pet. App. 71a-72a), which sought to amend a small portion of the court's reasoning with respect to its invalidation of the conservation use rule, but did not seek to disturb the result. That portion of the court's decision is not at issue here.

improvement, and development of the range." 43 U.S.C. 315a.

Section 3 of the TGA authorizes the Secretary to establish the conditions for issuance of grazing preferences:

> Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.

43 U.S.C. 315b. The prior rules defined the term "grazing preference" to include the extent of use of the rangelands allowed under a grazing permit. See 43 C.F.R. 4100.0-5 (1994). The amended rules clarify that (1) the term "grazing preference" denotes the preference to be accorded qualified applicants for grazing permits, and (2) the new term "permitted use" denotes the extent of use of rangelands allowed under a grazing permit. See *id.* § 4100.0-5 (1995). Both concepts are fully consistent with the plain language of Section 3 quoted above.[7]

a. Petitioners assert that the amended rules eliminated "adjudicated rights to graze" (Pet. 3) held by persons grazing livestock on the public rangelands. See Pet. 11-20. Their arguments are misplaced. First, the statute's use of the term "preference" negates petitioners' claim of "rights to graze" (Pet. 3) a particular

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[7] Thus, the term "grazing preference" in the amended rules is a construction of the phrase "[p]reference shall be given in the issuance of grazing permits" in Section 3, while the term "permitted use" in the amended rules is a construction of the phrase "as may be necessary to permit the proper use of lands." 43 U.S.C. 315b.

number of livestock on the public rangelands. See 43 U.S.C. 315b. Petitioners identify no statutory requirement that the Secretary define the term "preference" with regard to adjudicated animal unit months (AUMs),[8] nor any statutory impediment to the Secretary's issuance of amended rules implementing the statutory term "preference."

Second, petitioners' criticism does not account for the use of the term "preference" in the TGA itself. The amended rule defines "grazing preference or preference" to mean:

> a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee.

43 C.F.R. 4100.0-5 (1995). As the Secretary explained in the rulemaking response, the change properly reflects the original use of "preference" in the TGA to mean priority in the issuance of grazing permits among potential users of those privileges, such that certain applicants for grazing permits (including permittees seeking renewal) are favored over others. 1 C.A. App. 259; 60 Fed. Reg. at 9922.[9]

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[8] After Congress enacted the Taylor Grazing Act in 1934, the Department of the Interior initiated an administrative process called "adjudications" in which livestock carrying capacities expressed in animal units per month (AUMs) were identified for owners of "base property" (*i.e.*, owners of land or water in or near a grazing district).

[9] See *McNeil* v. *Seaton*, 281 F.2d 931, 936-937 (D.C. Cir. 1960) ("The word [preference] in the context here used is to be taken in its ordinary sense. Its meaning is plain. It is a term with which Congress is fully familiar as in legislation dealing with immigration, preference in employment, Indian land allotments and many other fields. So here."); 2 C.A. App. 839; DOI, Division of Grazing,

Third, neither the TGA nor its legislative history uses the term "rights" to describe the grazing privileges on the public rangelands permitted under the Act, and the "adjudications" themselves did not purport to establish any such "rights." From the Secretary's initial implementation of the TGA in the 1930s, adjudications determined "grazing privileges," not "rights to graze." See U.S. C.A. Reply Br. Addendum (copies of adjudication decisions). As even the dissent recognized, those adjudications

> identified the property owned by the permittee that was to serve as the base for the livestock operation and to which the grazing privileges attached, and * * * identified the maximum amount of forage, expressed in AUMs, that the permittee could graze on the public lands. *Cf.* Federal Range Code, § 6(b) (1938) (describing priority of issuance of grazing permits to qualified applicants). That maximum amount of forage eventually became known as the grazing preference, although that term was not added to the grazing regulations until 1978. See 43 C.F.R. § 4100.0-5(*o*) (1978).

Pet. App. 51a-52a. The "identification" in the adjudications of the "maximum [grazing] amount of forage * * * that the permittee *could* graze" did not establish a "right to graze" that amount of forage. Indeed, as the

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Federal Range Code § 1b (Mar. 16, 1938) ("Preference in the granting of grazing privileges will be given to those applicants within or near a district."). See also *Red Canyon Sheep Co.* v. *Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) ("those who * * * bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to permits *as against others* who do not possess the same facilities for economic and beneficial use of the range") (emphasis added).

dissent also recognized, the "preference" identified in adjudications "*never guaranteed* a permittee the right to graze that amount of forage every year." *Id.* at 52a (emphasis added).

The adjudicated AUMs could not have established fixed grazing rights because the relevant statutes provide no "rights" in private persons "in or to" the public rangelands, but provide simply "when and how private individuals *will be allowed* to use those lands":

> Congress and the various Secretaries of the Interior have developed over the last sixty years a somewhat complicated regulatory scheme governing the federal lands. Yet this complicated scheme stems from a simple premise: the lands at issue here belong to the United States government; the issuance of grazing permits "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b. *Congress passed the aforementioned statutes governing when and how private individuals will be allowed to use those lands and charged the Secretary of the Interior with enforcing its intentions.*

Pet. App. 13a-14a (emphasis added).[10]

Fourth, the amended rules preserve all elements of preference previously found in the "grazing preference" rule. Indeed, in the final rulemaking the Secretary responded to the very same claim that petitioners now advance–that the amended rules "mean that preference was being abolished"–by explaining that the amended

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[10] See *United States* v. *Fuller*, 409 U.S. 488, 493-494 (1973); *Holland Livestock Ranch* v. *United States*, 655 F.2d 1002 (9th Cir. 1981); *Diamond Ring Ranch, Inc.* v. *Morton*, 531 F.2d 1397 (10th Cir. 1976); *McNeil* v. *Seaton*, 281 F.2d at 936; *Red Canyon Sheep Co.*, 98 F.2d at 314.

rules represent "merely a clarification of terminology" and do "not cancel preference":

> The term "preference" was used during the process of adjudication of available forage following the passage of TGA to establish an applicant's relative standing for the award of a grazing privilege. * * * Through time, common usage of the term evolved to mean the number of AUMs attached to particular base properties. But this usage dilutes the original statutory intent of the term as an indication of relative standing. *The term "permitted use" captures the concept of total AUMs attached to particular base properties, and use of this term does not cancel preference. The change is merely a clarification of terminology.* * * * The Department believes that permitted use is the more appropriate term to describe and quantify the number of AUMs of forage being allocated.

1 C.A. App. 259; 60 Fed. Reg at 9922 (emphasis added). The rules thus should not adversely affect the stability of the livestock or lending industries; they merely clarify the regulations within the statutory framework in which the terms "preference" and "use" appear.

b. Petitioners also incorrectly contend that the court of appeals erred in upholding the Secretary's authority to shift components of the prior grazing preference rule into the "permitted use" rule. See Pet. 13-14. The rangeland management rules in effect prior to 1995 used the term "grazing preference" to mean "the total number of animal unit months [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 C.F.R. 4100.0-5 (1994). A permittee's "grazing preference" under the prior rule included both

"active use" (defined as "the current authorized livestock grazing use," *ibid.*) and "suspended use" (representing the adjudicated AUMs held in "suspension" from active use, *ibid.*). See *id.* § 4110.2-2(a) (1994).[11]

The amended rules simply move the reference to AUMs from the definition of the term "grazing preference" in the prior rules to the new regulatory term "permitted use," which is defined as "the forage [expressed in AUMs] allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease." 43 C.F.R. 4100.0-5 (1995). Like "grazing preference" in the prior rule, "permitted use" in the amended rules expressly "shall encompass *all* authorized use *including* * * * suspended use." *Id.* § 4110.2-2(a) (1995) (emphasis added). And, like "grazing preference" in the prior rules (see note 11, *supra*), "permitted use" is (1) specified in permits as a designated amount of forage expressed in AUMs (43 C.F.R. 4110.2-2(a) (1995)); (2) attached to base property (*id.* § 4110.2-2(c) (1995); and (3) transferable with the base property, in whole or part, upon application and approval (*id.* § 4110.2-3 (1995)).[12]

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[11] The "grazing preference" under that rule was (1) specified in all grazing permits or leases as a designated amount of forage expressed in AUMs (43 C.F.R. 4110.2-2(a) (1994)); (2) attached to base property (*id.* § 4110.2-2(c) (1994)); and (3) transferable with the base property, in whole or part, upon application and approval (*id.* § 4110.2-3 (1994)).

[12] Petitioners improperly rely on *Oman* v. *United States*, 179 F.2d 738 (10th Cir. 1949), in support of their claim that the amended rules conflict with Section 315b. In *Oman*, the court of appeals merely stated that Section 315b requires adequate "safeguards" for "grazing privileges recognized and acknowledged," a proposition wholly consistent with the decision below. "[G]razing

In the 1995 rulemaking process, the Secretary expressly decided not to alter the pre-existing scheme and rejected the elimination of suspended use:

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

FEIS 144. The issuance of the amended rules thus should have no effect on the predictability of grazing on the public rangelands or "financial stability" (Pet. 18) in livestock operations (including policies affecting lending to grazing permittees).[13]

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privileges recognized and acknowledged" are substantively protected under the amended rules by the inclusion in "permitted use" of "all authorized use * * * including suspended use." 43 C.F.R. 4110.2-2(a) (1995). Moreover, the same procedural safeguards attend grazing use decisions under the amended rules as under the prior rules. Section 315h of the TGA broadly requires that the Secretary "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." 43 U.S.C. 315h. Under the prior rules, decisions affecting active use could be challenged administratively, and under the amended rules, decisions affecting active use likewise may be challenged administratively. 43 C.F.R. 4160.4 (1995). And, like the prior rules, the amended rules provide that "[a]ny person whose interest is adversely affected by a final decision of the authorized officer may appeal the decision for the purpose of a hearing before an administrative law judge." *Ibid.*

[13] The amended rules are consistent with the "savings provision" in FLPMA, which preserves "any valid lease, permit, patent, right-of-way, or other land use right or *authorization* existing on the date of approval of this Act." 43 U.S.C. 1701 note (Savings Provisions) (emphasis added). "Permitted use" in the amended

c. The change in terminology from "grazing preference" in the prior rules to "grazing preference" and "permitted use" in the amended rules will not decrease the stability of the livestock industry by instituting a new connection between grazing-use determinations and the land use planning process, as petitioners erroneously assert. See Pet. 15, 17-18. The Secretary has employed land use plans to set allowable grazing levels at least since 1978, as a result of the land use planning process requirements established by Congress in FLPMA. See 43 C.F.R. 4110.2-2(a) (1978); *Delmer McLean* v. *BLM*, 133 Interior Bd. Land App. 225, 230 (1995) ("As a comparison of the post-1978 regulations with the previously existing Federal Range Code makes clear, the entire basis upon which grazing preferences was determined was drastically altered."). Thus, petitioners' apparent complaint (Pet. 17) about a land use planning process in effect since 1978 is unpersuasive as a challenge to the 1995 amended rangeland management rules.

Moreover, using land use plans in determining grazing preferences will likely result in greater, not lesser, stability for grazing permittees. As the Secretary explained when the final rules were issued, absent a major change in the overall situation on the range, "changes in permitted use through BLM initiatives are unlikely" where land use plan objectives are being met. 1 C.A. App. 260; 60 Fed. Reg. at 9923. As even the dissent below recognized, under the prior rules, "[p]er-

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rules includes "all *authorized* use," and thus on its face is consistent both with the FLPMA savings provision and with decisions of the court of appeals. 43 C.F.R. 4110.2-2(a) (1995) (emphasis added). See, *e.g.*, *Sierra Club* v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988); *City & County of Denver* v. *Bergland*, 695 F.2d 465 (10th Cir. 1982).

mittees knew and understood that there would be year-to-year fluctuations in available forage and changes in the overall conditions of the range, and the Secretary had full authority under the TGA to make individual adjustments in active use." Pet. App. 54a. But that does not mean that a permittee's "permitted use" changes on an annual basis. Rather, as explained in the final rulemaking:

> Permitted use is not subject to yearly change. Permitted use will be established through the land use planning process, a process which requires data collection and detailed analysis, the completion of appropriate NEPA documentation, and multiple opportunities for public input. Establishing permitted use through this planning process will increase, not decrease, the stability of grazing operations. The rule clearly defines preference to be a superior or priority position for the purpose of receiving a grazing permit. * * * The concept of assigning first priority to certain persons is well-established in TGA and is an appropriate way to contribute to the stability of dependent livestock operations and the western livestock industry. The redefinition of preference is intended to resolve the confusion and misinterpretation of the concept that has developed over the years.

1 C.A. App. 265; 60 Fed. Reg. at 9928.[14] There is no statutory impediment to the Secretary's issuance of

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[14] Like "grazing preference" in the prior rules, "permitted use" in the amended rules does not change from year to year. It has long been the case, however, that the ratio between active use and suspended use may change annually, depending on range and other conditions. Under both the prior and the new rules, and consistent with the Secretary's authority in issuing permits to "specify from

those amended rules, and the court of appeals properly accorded deference to the Secretary's considered judgment on the basis of extensive rulemaking proceedings.

2. The court of appeals correctly upheld the Secretary's authority to issue the amended rule governing ownership of title to future permanent range improvements. By its terms, Section 4 of the TGA, 43 U.S.C. 315c, provides that improvements may be constructed on the public lands either "under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve." Section 4 further states:

> 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.

43 U.S.C. 315c. The amended rule implementing that provision states:

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time to time numbers of stock and seasons of use," 43 U.S.C. 315b, BLM had and continues to have the ability and the duty periodically to review the use specified in a grazing permit and make changes as needed. 43 C.F.R. 4110.3 (1994); *ibid.* (1995). Under both sets of rules, BLM could decrease grazing use by suspending it. *Id.* § 4110.3-2 (1994); *ibid.* (1995). The provisions for increasing permitted use under the amended rules (*id.* § 4110.3-1 (1995)) are essentially the same as the provisions for increasing active use under the prior rules (*ibid.* (1994)). Under the prior and amended rules, the AUMs not in active use were (and are) not available to permittees, and the same mechanism was (and is) provided for seeking an increase in active use.

> Subject to valid existing rights, 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.

43 C.F.R. 4120.3-2(b) (1995).

Petitioners argue that this amended rule "is plainly inconsistent with the TGA." Pet. 20. In doing so, however, they mistakenly assume that, because Section 315c uses the phrase "improvements constructed and owned by a prior occupant," all permanent range improvements constructed by permittees must be owned by them. The court below correctly rejected petitioners' contention that the quoted phrase obligates the Secretary to furnish permittees with title to any and all range improvements that the permittee may construct, in whole or in part in the future. See Pet. App. 34a-41a.

Nothing in Section 315c limits the Secretary's discretion to determine prospectively what improvements, if any, may be both "constructed *and* owned" by a permittee. 43 U.S.C. 315c (emphasis added). Consistent with Section 315c, the amended rules provide that permittees may hold title to some range improvements. See 43 C.F.R. 4120.3-3(b) (1995) ("The permittee or lessee may hold the title to authorized removable range improvements used as livestock handling facilities such as corrals, creep feeders, and loading chutes, and to temporary structural improvements such as troughs for hauled water."). But the fact that permittees may own some range improvements does not mean that the TGA requires that permittees obtain title to any or all *permanent* range improvements. Section 315c confers broad discretion on the Secretary to restrict title to permanent range improvements on federal rangelands in the federal government.

Moreover, by its terms Section 315c obligates a new permittee to provide compensation to prior occupants for those improvements that both were constructed and are owned by the prior occupant. That provision thus addresses a relationship between private parties—compensation from a new permittee to a prior occupant. It does not support petitioners' contention that grazing permittees have outright ownership of permanent improvements subsequently constructed by permit on the public lands. The amended rule, although prospectively according the United States *title* to future permanent range improvements, continues—like the prior rule—to provide full compensation to permittees for both past and future investments in permanent improvements. 43 C.F.R. 4120.3-5, 4120.3-6(c) (1995). The only change in the rule is a prospective restriction on ownership of permanent range improvements, not a restriction on compensation to permittees for their relative investments in such improvements.

Petitioners incorrectly suggest (Pet. 27-28) that federal ownership of future permanent range improvements under the amended rule will adversely affect investment in such range improvements. Under the amended rule, permittees continue to receive compensation for the reasonable value of permitted permanent range improvements. 43 C.F.R. 4120.3-5, 4120.3-6(c) (1995). As the Secretary observed, "[t]he Forest Service [a component of the Department of Agriculture] has long had a policy of retaining title to permanent improvements and has not observed that private contribution has been discouraged." 1 C.A. App. 272; 60 Fed. Reg. at 9935. Harmonizing the Interior and Agriculture Departments' approaches to ownership of permanent range improvements will simplify regulatory compliance for the large number of federal opera-

tors who hold both Forest Service and BLM permits. 2 C.A. App. 736; J.M. Fowler et al., *Economic Characteristics of the Western Livestock Industry* 3, Tab. 5 (Jan. 1994).[15] It also will achieve consistency in the management of federal lands.

3. Petitioners assert (Pet. 21-24) that the court of appeals erred in upholding the Secretary's deletion in the 1995 mandatory qualifications rule of the prior rule's requirement that applicants for grazing permits be "engaged in the livestock business." That contention is incorrect. Although the TGA explicitly provides a "preference" for permit applicants engaged in the livestock business, it does not impose a mandatory qualification that a permittee be engaged in the livestock business.

The TGA directs that grazing permits be granted only to stock owners:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, *and other stock owners* as under his rules

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[15] The amended range improvements rule at most reinstates a policy on ownership of permanent range improvements that was in place before 1984 regulatory changes left the ownership question unclear. BLM data on pre- and post-1984 range improvement investment by permittees further show that there is no empirical basis for a belief that the amended rule will discourage such investments. See 2 C.A. App. 458; DOI, Bureau of Land Mgmt., *Total Funds Spent by Ranchers for Improvements Through Section 4 (RI) Permits 1978 to 1993* (July 11, 1994). The data show an annual average of $1.7 million in range improvements from 1978 to 1983, and $1.9 million from 1984 to 1993. *Ibid.* In any event, the Secretary has the authority to reconsider and modify the rules, if petitioners' concerns become realized. Those concerns, however, properly have no place in this facial challenge to the amended rule.

> and regulations are entitled to participate in the use of the range.

43 U.S.C. 315b (emphasis added). That passage authorizes the Secretary to issue grazing permits only to stock owners – bona fide settlers, residents, and other types of stock owners. But the statute does *not* require that all permittees be "engaged in the livestock business." Rather, the TGA uses the phrase "engaged in the livestock business" only in relation to the "preference" given in issuing permits within grazing districts:

> Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, *or* owners of water or water rights.

Ibid. (emphasis added). Thus, *preference* in the issuance of grazing permits shall be given to those who are "within or near a district" *if* they are either landowners engaged in the livestock business, *or* bona fide occupants or settlers, *or* owners of water or water rights. If the latter two groups are to receive a preference, they necessarily must be qualified to receive permits.

Petitioners' insistence that permittees must – as a mandatory qualification – be engaged in the livestock business thus improperly reads out of the statute the independent clauses in the preference provision giving preference to "bona fide occupants or settlers" or "owners of water or water rights." See *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).[16]

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[16] Nothing in the TGA indicates a different congressional intent. Indeed, petitioners' construction of the provision necessitates

Moreover, both the text of the TGA and its legislative history show that Congress's chief concern was that applicants possess nearby base property, not that they be engaged in the livestock business. Congress required all permit applicants seeking a preference to own or control base property "within or near a district." 43 U.S.C. 315b. The legislative history shows that Congress was most concerned about migrant grazers,[17] and therefore wished to give permits to those who owned, controlled, or had improved, nearby base property.[18] Likewise, the Department of the Interior's early rules and administrative decisions were con-

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reading "and" for "or," but the consequence of that interpretation is that applicants would have to be both "bona fide occupants or settlers" *and* "owners of water or water rights" in order to receive a preference. The TGA and its implementing rules have never been interpreted to require that applicants possess both land and water rights before they may receive grazing permits. 2 C.A. App. 808; DOI, *Rules for Administration of Grazing Districts* (Mar. 2, 1936); 2 C.A. App. 817, DOI, *Rules for Administration of Grazing Districts* (June 14, 1937); 43 C.F.R. 4110.2-1 (1994) (allowing owners of *either* land *or* water rights to apply for grazing permits). To the contrary, Section 4 of the TGA, 43 U.S.C. 315b, plainly gives a preference in the issuance of grazing permits to applicants in any of the three categories.

[17] 4 C.A. App. 1595; 78 Cong. Rec. 6356 (1934) (expressing concern over "[s]ome foreigner who * * * travels from one place to another, camping first at one watering hole or spring and then another until the grasses are all destroyed"); 4 C.A. App. 1597-1598; 78 Cong. Rec. at 6358-6359.

[18] 4 C.A. App. 1595; 78 Cong. Rec. at 6356 ("preference shall be given occupants and settlers on land within or near the grazing district"); 4 C.A. App. 1597; 78 Cong. Rec. at 6358 (preference shall be given to "the person owning or having rights to land adjacent to the public domain"); 4 C.A. App. 1598; 78 Cong. Rec. at 6359 (preference shall be given to "[t]hose who have made improvements in the public range and the water holes").

sistent with the language of the statute that mentioned this group of applicants only in the context of preference, not as a mandatory qualification.[19] After nearly a decade of such a regime, in the early 1940s the Department of the Interior substituted the words "engaged in the livestock business" for "owns livestock" in the mandatory qualifications regulations. See 3 C.A. App. 1179; *Ralph E. Holan*, 18 Interior Bd. Land App. 432, 434 (1975). Accordingly, the requirement that applicants be "engaged in the livestock business" came not from the TGA, but from an administrative decision that the Secretary has the discretion to remove, especially given the demonstrable anachronisms of the old rule.[20]

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[19] For example, the 1937 Rules of Grazing Administration stated that a stock-owner applicant is preferred if "he is a member of *any one* of the following four classes:

1. Landowners engaged in the livestock business.
2. Bona fide occupants.
3. Bona fide settlers.
4. Owners of water or water rights."

2 C.A. App. 817 (emphasis added). See also 2 C.A. App. 842; DOI, Division of Grazing, *Federal Range Code* § 3, at 4 (Mar. 16, 1938) (same). For early administrative decisions that did not impose any "engaged in the livestock business" requirement, see 3 C.A. App. 1182; *Joseph Livingston*, 56 Interior Dec. 305, 306 (1938) (citing 1936 rules for the proposition that a "qualified applicant will be considered in a *preferred* classification if he is a member of any one of the following four classes: 1. Landowners engaged in the livestock business. 2. Bona fide occupants. 3. Bona fide settlers. 4. Owners of water or water rights."); 3 C.A. App. 1189; *Willis J. Lloyd*, 58 Interior Dec. 779, 787 (1944) (business of parties dismissed as unimportant).

[20] The old rule created uncertainties for legitimate applicants under the TGA "where the livestock operator is in an initial devel-

4. Petitioners argue (Pet. 29-30) that the Court should grant certiorari notwithstanding the absence of a circuit conflict because this lawsuit is the only vehicle to consider the rules at issue in this case due to the financial constraints on affected persons mounting similar challenges. They cite no case for that proposition. Yet it is clear from their own submission that the issue affects other western States, such as those in the Eighth and Ninth Circuits. See Pet. App. 3a; 1 C.A. App. 212; DEIS 1-7. Petitioners chose to bring this lawsuit as a facial challenge to the rules, rather than to build a factual record to demonstrate the effects of the amended rules in practice.[21] The petition thus asserts

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opmental stage and is not yet ready to run cattle on the range." 1 C.A. App. 263; 60 Fed. Reg. at 9926. See 3 C.A. App. 1179; *Holan*, 18 Interior Bd. Land App. at 434 (application denied to possessor of livestock who was not yet "a recognized livestock operator"); 3 C.A. App. 1190-1191; *John F. MacPherson*, Interior Grazing Dec. 566, 567-568 (1952) (application denied to livestock owner on basis that he was not engaged in the livestock business). In at least two cases, the Interior Board of Land Appeals affirmed the denials of an application from livestock owners who indicated that they "would be in the livestock business if BLM were to grant them the desired lease or permit." 3 C.A. App. 1178; *Holan*, 18 Interior Bd. Land App. at 433; 3 C.A. App. 1190; *MacPherson*, Interior Grazing Dec. at 567 (applicant sought to graze 500 cattle).

[21] The revised regulations allow the Secretary to issue grazing permits to start-up operators, banks, and conservation organizations that own livestock and wish to run cattle on the range but may not have an established record in the livestock business at the time they apply for a permit. See 1 C.A. App. 263; 60 Fed. Reg. at 9926. Petitioners' stated fear that non-owners of livestock will use the new rule to end livestock grazing on the public lands is without foundation. The Secretary has indicated that "[d]ecisions to retire grazing allotments are considered through BLM's land use planning process," 1 C.A. App. 277, and those decisions are subject to administrative challenge, see 43 C.F.R. 4160.4 (1995).

grave harm to petitioners as a result of the rule changes without any record to support those claims. In our view, the amended rules will not produce the harms about which petitioners speculate. But if such consequences do occur in the application of the amended rules, the issues presented by the certiorari petition in this case will likely arise in other circuits. There accordingly is no reason for this Court to abandon its normal standards for granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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