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### Recommended Citation

22 Pub. Land & Resources L. Rev. 147 (2001)

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## ***Public Lands Council v. Babbitt: Another Nail in the Coffin for Ranchers' Claims to Semi-Ownership of Federal Lands?***

**Mark Epperson\***

### I. INTRODUCTION

The Taylor Grazing Act (TGA), passed in 1934, gave the Secretary of the Interior (Secretary) the authority to establish grazing districts on federal land.<sup>1</sup> The object of the grazing districts was to regulate the occupancy and use of the public lands; to protect those lands from destruction or injury; and to provide for “the orderly use, improvement, and development of the range.”<sup>2</sup> The TGA authorized the Secretary to issue permits to graze livestock on the districts, with preference given to landowners engaged in the livestock business, legitimate occupants or settlers, or owners of water rights, who are within or near the districts, “as may be necessary to permit the proper use” of the land or water rights the permit recipient owned.<sup>3</sup> A permit is valid for a maximum of ten years, and the permit holder has priority over others upon renewal, but the Secretary can specify “from time to time numbers of stock and seasons of use.”<sup>4</sup> The permit holder’s recognized grazing privileges are to be “adequately safeguarded,” but only “[s]o far as consistent with the purposes of this subchapter.”<sup>5</sup> The issuance of a permit does not create any “right, title, interest, or estate” to federal land.<sup>6</sup>

The Federal Land Policy and Management Act (FLPMA), enacted in 1976, directs the Bureau of Land Management (BLM), the federal agency entrusted with managing the public lands, to manage its lands for multiple uses and sustained yield.<sup>7</sup> Basically, this means that all resources derived from BLM lands be produced at high levels on a consistent basis, without permanent damage to the land’s productivity or environmental quality. The BLM must consider the present and future needs of the American people, including the country’s need for domestically produced commodities like food, when drawing up land use plans.<sup>8</sup> These resources do not necessarily need to be managed to produce the greatest economic return.<sup>9</sup> FLPMA was passed partly in response to inadequate protection of the land under the TGA. “Congress finds that a substantial amount of the Federal range is

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\* J.D. expected 2002 University of Montana School of Law, Missoula, Mont.

1. 43 U.S.C. § 315(a) (1934).

2. *Id.*

3. 43 U.S.C. § 315(b) (1934).

4. *Id.*

5. *Id.*

6. *Id.*

7. 43 U.S.C. § 1732(a) (1976).

8. 43 U.S.C. § 1702(c) (1976), 43 U.S.C. § 1701(a)(12) (1976).

9. 43 U.S.C. § 1702(c).

deteriorating in quality”<sup>10</sup>

The Secretary is empowered under FLPMA to incorporate an allotment management plan (AMP) into a grazing permit. AMPs are to be tailored to the condition of the range in the area they cover, and must be reviewed periodically to determine their effectiveness in improving range conditions.<sup>11</sup> Where an AMP is not incorporated into a grazing permit, the Secretary is required to specify in the permit: 1) the number of animals to be grazed and seasons of use; and 2) the Secretary’s right to reexamine range conditions at any time and adjust grazing use if needed.<sup>12</sup> Grazing permits shall be issued “consistent with such terms and conditions” the Secretary believes are required by governing law, and he can cancel, suspend, or modify the permit, in whole or in part, “pursuant to the terms and conditions” of the permit.<sup>13</sup>

The Public Rangelands Improvement Act (PRIA) clarified the BLM’s management goals for grazing lands. Improving range conditions is the highest priority, due to its unsatisfactory condition over vast areas.<sup>14</sup> In passing PRIA Congress stated that “grazing cutbacks or rest periods” could be useful to promoting range recovery, and that it was aware overgrazing occurred in many areas and had to be curtailed.<sup>15</sup>

In regulations promulgated in 1978, the BLM defined the term “grazing preference” to mean “the total number of animal unit months [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by the permittee.”<sup>16</sup> An AUM is the amount of forage necessary to sustain for one month, one cow, one horse, five sheep, or five goats.<sup>17</sup> The grazing preference included “active use,” the current authorized grazing level, based on the amount of forage available for livestock specified in a land use plan, and “suspended use,” which could be converted to active use if the allotment’s forage production increased.<sup>18</sup>

This definition remained unchanged until 1995, when BLM redefined “grazing preference” as a “superior or priority position against others for

10. *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1163-1164 (10th Cir. 1998), cert. granted, 528 U.S. 926, (1999), aff’d 529 U.S. 728 (2000) (hereinafter *Public Lands Council II*) (citing H.R. Rep. No. 94-1163, at 1 (1976)).

11. 43 U.S.C. §1752(d) (1934).

12. 43 U.S.C. § 1752(e) (1934).

13. 43 U.S.C. § 1752(a) (1934).

14. 43 U.S.C. § 1901(a)(4) (1978).

15. George C. Coggins, *The Law of Public Range Management IV: FLPMA, PRIA, and the Multiple Use Mandates*, 14 ENVTL. L. 1, n. 916 (1983-84) (citing H.R. Rep. No. 95-1122, at 11 (1978)).

16. *Public Lands Council II*, 154 F.3d at 1164 (citing 43 C.F.R. § 4100.0-5 (1994)).

17. *Id.*

18. *Id.*

the purpose of receiving a grazing permit.”<sup>19</sup> The term “permitted use,” defined as the forage allocated by the applicable land use plan for grazing in an allotment, including active and suspended use, was added.<sup>20</sup>

The 1995 regulations also changed the requirement, dating from a 1942 regulation, that only those persons actually “engaged in the livestock business” were eligible for grazing permits.<sup>21</sup> The 1995 regulations eliminated the phrase “engaged in the livestock business” from its definition of those qualifying for a grazing permit (the qualifications rule).<sup>22</sup>

The TGA stipulated that permit owners could make range improvements - such as building fences, drilling wells, or spraying for weeds - on BLM lands, provided they did so in accordance with either a cooperative agreement with the federal government or a range improvement permit.<sup>23</sup> Prior to 1995, BLM regulations pertaining to cooperative agreements gave the United States full title to “nonstructural improvements” like weed spraying and “non-removable” improvements like wells.<sup>24</sup> But structural and removable improvements like stock tanks, fencing, or pipelines were to be shared between the permit holder and the United States “in proportion to the actual amount of the respective contribution to the initial construction.”<sup>25</sup> The 1995 regulations changed the rules regarding title to range improvements made pursuant to a cooperative agreement. The new regulations state that title to all permanent range improvements built in the future “such as fences, wells, and pipelines” shall belong to the United States.<sup>26</sup>

The Public Lands Council (PLC) and several livestock associations brought suit in federal court challenging the new regulations. In *Public Lands Council v. Babbitt*, the PLC appealed the Tenth Circuit Court of Appeals’ ruling that the permitted use rule,<sup>27</sup> the permanent range improvements rule, and the qualifications rule did not violate the TGA.<sup>28</sup> The PLC argued the new regulations violated the TGA’s requirement that recognized and acknowledged grazing privileges be adequately safeguarded.<sup>29</sup> In par-

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19. *Id.* at 1165 (citing 43 C.F.R. § 4100.0-5).

20. *Id.* (citing 43 C.F.R. § 4110.2-2 (1995)).

21. *Public Lands Council v. Babbitt*, 529 U.S. 728, 745 (2000) (hereinafter *Public Lands Council III*) (citing 1942 Range Code § 3(a)).

22. 43 C.F.R. § 4110.1(a) (1995).

23. 43 U.S.C. § 315(c) (1934).

24. 43 C.F.R. § 4120.3-2 (1994).

25. 43 C.F.R. § 4120.3-3(b) (1994).

26. 43 C.F.R. § 4120.3-2(b) (1995).

27. “Permitted use rule” includes the redefinition of “grazing preference” and the term “permitted use” in the 1995 regulations.

28. *Public Lands Council III*, 529 U.S. at 745.

29. *Id.* at 739-41.

ticular, the PLC claimed the permitted use rule was inconsistent with Congress's goal of stabilizing the livestock industry expressed in the TGA preamble.<sup>30</sup> The permitted use rule was also challenged on the grounds that it represented a break with an established and contemporaneous agency interpretation of the TGA and FLPMA.<sup>31</sup>

The PLC asserted the qualifications rule violated section 315(b) of the TGA.<sup>32</sup> In the PLC's interpretation, that subsection limited the eligibility for grazing permits to "stock owners."<sup>33</sup> The PLC believed that in 1934 a "stock owner" referred only to persons "engaged in the livestock business," not those who merely owned livestock.<sup>34</sup> The PLC feared the qualifications rule would allow people or organizations owning minimal numbers of livestock to acquire a grazing permit, and, intending to graze few or no animals, use the permit for conservation purposes, thereby excluding grazing from those allotments.<sup>35</sup>

The PLC also claimed the range improvements rule violated TGA section 315(c), which requires that before new permit applicants can receive their permit, they must compensate prior occupants for the reasonable value of range improvements constructed and owned by the prior occupant.<sup>36</sup> In the PLC's view, the word "owned" anticipated that the prior occupant owned some of these improvements; an interpretation they say was denied by the new rule, under which all future permanent range improvements will be owned by the United States.<sup>37</sup> The Secretary claimed the rules did not conflict with the plain language of either the TGA, FLPMA, or PRIA, so the courts must defer to the Secretary's rulemaking authority.<sup>38</sup>

The U.S. Supreme Court affirmed, holding that: 1) the permitted use rule does not violate the TGA's mandate that grazing privileges be adequately safeguarded because the Act gives the Secretary a great deal of discretion to determine how those privileges will be protected;<sup>39</sup> 2) the permitted use rule does not automatically reduce the security of existing grazing privileges;<sup>40</sup> 3) the qualifications rule is valid because the TGA does not

30. *Public Lands Council II*, 154 F.3d at 1184 (citing Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (uncodified)).

31. Brief for Petitioners at 9-14 (No. 98-1991).

32. *Public Lands Council III*, 529 U.S. at 746.

33. *Id.*

34. *Id.* at 745.

35. *Id.* at 747 (citing Brief for Petitioners at 47-48 (No. 98-1991)).

36. *Id.* at 749.

37. *Id.*

38. *Id.*

39. *Id.* at 741-42.

40. *Id.* at 743.

expressly require that grazing permits should only be issued to those engaged in the livestock business;<sup>41</sup> 4) few grazing permits will be issued to stock owners who are not in the livestock business because other BLM regulations mandate permit holders substantially graze their allotments;<sup>42</sup> and 5) nothing in the TGA prohibited the Secretary from changing the rules on ownership of some range improvements constructed pursuant to a cooperative agreement.<sup>43</sup>

In upholding the permitted use rule, the Supreme Court recognized that by mandating the land be protected and managed for multiple uses, the TGA and FLPMA give the Secretary the power to disregard adjudications that determined the maximum amount of forage each permittee could utilize in optimal conditions. By upholding the qualifications and range improvements rules, the Court affirmed the Secretary's clear authority under the TGA to adjust grazing regulations to changing times and circumstances.

## II. FACTS

Before the TGA was passed, anyone could graze livestock on federal lands, and there were no limits on the numbers of animals allowed to graze.<sup>44</sup> As a result, the land was severely overgrazed; causing erosion, damage to native grass ecosystems, and the spread of noxious weeds.<sup>45</sup> Immediately after the TGA's passage, the Interior Department began the process of determining who was eligible for a grazing permit.<sup>46</sup>

When a rancher was awarded a grazing permit, the Secretary identified in the permit the property owned or controlled by the permit recipient that served as the base for his ranching operation, and the maximum amount of forage (expressed in AUMs) the permit holder's livestock was entitled to graze on the public lands.<sup>47</sup> That maximum amount of forage was known as the grazing preference.<sup>48</sup> This amount was not based on the carrying capacity of the public land, however, but on the historic and present forage production of the rancher's privately owned base property.<sup>49</sup> The period used in determining the base property's historic forage production was usually the five years before 1934.<sup>50</sup>

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41. *Id.* at 746.

42. *Id.* at 747.

43. *Id.* at 750.

44. Coggins, *supra* note 15, at 2.

45. *Id.*

46. *Public Lands Council III*, 529 U.S. at 734.

47. *Public Lands Council II*, 154 F.3d at 1183 (Tacha, J., dissenting).

48. *Id.*

49. *McLean v. BLM*, 133 I.B.L.A. 225, 232 (1995).

50. *Id.* 232 n.9.

The grazing preference did not guarantee the right to graze the adjudicated amount of forage every year, but could be fully utilized only when that amount of forage was available.<sup>51</sup> The grazing preference itself could only be reduced (or increased if the forage production of the *federal* land permanently increased<sup>52</sup>) on a case-by-case basis.<sup>53</sup> In the 1978 regulations, the grazing preference could be reduced if a reduction was "supported by rangeland studies conducted over time," or the change was "specified in an applicable land use plan or necessary to manage, maintain, or improve rangeland productivity."<sup>54</sup> Banks and other lenders based their loans to public lands ranchers on the amount of the grazing preference because it was an indication of the value of the permit holder's ranching operation.<sup>55</sup>

### III. DISCUSSION OF PRIOR LAW

In *Natural Resources Defense Council, Inc. v Hodel*, an environmental group sued to stop enforcement of new BLM regulations creating "co-operative management agreements" with some owners of grazing permits.<sup>56</sup> The agreements contained no terms or conditions specifying how livestock were to be grazed, such as numbers of stock and seasons of use, and did not give the BLM authority to modify or cancel the agreements as conditions on the range warranted.<sup>57</sup> The court ruled the agreements violated FLPMA because "the dominant message and command" of that statute is that the Secretary "shall prescribe the extent to which livestock grazing shall be conducted on the public land,"<sup>58</sup> and added that "the statutes cannot be reasonably interpreted" to tie the BLM's hands regarding its authority "to modify, adjust, suspend, or cancel permits."<sup>59</sup> While the TGA and FLPMA were not the statutes at issue, *Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.* provided the standard for judicial review of administrative regulations.<sup>60</sup> According to *Chevron*, a court reviewing an administrative regulation must first ask whether Congress, in the statute the agency is charged with enforcing, has directly spoken to the precise question at

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51. *Public Lands Council II*, 154 F.3d at 1183 (Tacha, J., dissenting).

52. See generally *McLean* 133 I.B.L.A. 225.

53. *Public Lands Council II*, 154 F.3d at 1183 (Tacha, J., dissenting).

54. *Id.* at 1184 (citing 43 C.F.R. § 4110.3 (1994)).

55. See *Public Lands Council v. Babbitt* 929 F.Supp. 1436, 1441 (D. Wyo. 1996) (hereinafter *Public Lands Council I*).

56. 618 F.Supp. 848 (E.D. Cal. 1985).

57. *Id.* at 853.

58. *Id.* at 869.

59. *Id.* at 871.

60. 467 U.S. 837 (1984).

issue.<sup>61</sup> If the intent of Congress is clear, then the court must give effect to that intent, because the courts must carry out the unambiguously expressed will of Congress.<sup>62</sup> But if Congress has not directly spoken to the precise question at issue, the court must determine whether the regulation is a permissible interpretation of the governing statute.<sup>63</sup>

However, in *Alcoa v. Central Lincoln People's Utility District*, the U.S. Supreme Court ruled that a new regulation conflicting with the agency's established interpretation of a statute is afforded considerably less deference by the courts, especially if the earlier interpretation was a "contemporaneous construction" of the statute; meaning the interpretation was made soon after the statute's passage.<sup>64</sup>

#### IV REASONING

In *Public Lands Council*, the Supreme Court affirmed the legality of the permitted use rule by pointing out that the TGA qualifies the Secretary's duty to safeguard grazing privileges; the Act says those privileges must be safeguarded only "so far as consistent with the purposes and provisions of this subchapter."<sup>65</sup> This language, together with the fact a grazing permit does not create any "right, title, interest, or estate" in federal lands, makes it "clear" that a rancher's "interest in permit stability cannot be absolute; and that the Secretary is reasonably free to determine just how" grazing privileges will be safeguarded in accordance with the purposes of the TGA.<sup>66</sup> The Court added that these purposes include preventing injury to the public lands by preventing overgrazing, as well as stabilizing the livestock industry.<sup>67</sup> The Court also found that Congress's directive in section 1701(a)(2) and section 1712 of FLPMA, that land use plans be created for grazing lands in order to improve their condition, amply supported what the Court believed to be the permitted use rule's mere "definitional change" affecting the potential use of such plans.<sup>68</sup>

The Court also found the permitted use rule valid because prior to 1995 the Secretary routinely reduced individual permit AUMs or cancelled them entirely, pursuant to his authority to withdraw land from grazing.<sup>69</sup>

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61. *Id.* at 842.

62. *Id.* at 842-43.

63. *Id.* at 843.

64. *Hodel*, 618 F.Supp. at 870 n. 41 (citing *Aluminum Co. of America v. Cent. Lincoln People's Dist.*, 467 U.S. 380 (1984)).

65. *Public Lands Council III*, 529 U.S. at 741 (citing 43 U.S.C. § 315(b)).

66. *Id.* at 741-42.

67. *Id.* at 742 (citing Taylor Grazing Act, 48 Stat. 1269 (1934)).

68. *Id.*

69. *Id.* at 742-43.

Section 315(f) of the TGA permits withdrawal of lands from grazing use when they are deemed suitable for other uses, and sections 1712 and 1752(c) of FLPMA state that a permit will be renewed only so long as the land is available for grazing.<sup>70</sup> Thus the Secretary, long before 1995, had the power to lawfully change the conditions of a permit to a rancher's detriment.<sup>71</sup>

The Court's final reason for upholding the permitted use rule derived from the belief that the Secretary's decision to continue to recognize "suspended use" would not significantly diminish the security of grazing privileges.<sup>72</sup> The Secretary explained in the Federal Register that the definitional change wrought by the permitted use rule would not cancel "preference," and the Secretary's brief maintained that the rule preserves "all elements of preference."<sup>73</sup> In 1995, the Secretary considered, then abandoned the idea of eliminating suspended use after receiving comments from the public.<sup>74</sup> In its "Final EIS on Rangeland Reform" the BLM stated suspended use will not only be recognized but given "priority for additional grazing use within an allotment."<sup>75</sup>

The Court conceded that the permitted use rule appears to subject grazing privileges to the dictates of land use plans more directly than before, but pointed out that the Secretary had the authority to make adjustments since FLPMA was passed in 1976.<sup>76</sup> Furthermore, Justice Breyer recognized that since 1976, all BLM lands have been covered by land use plans, yet the PLC could not provide a single instance in which grazing privileges have been jeopardized by a land use plan.<sup>77</sup> In the event a land use plan diminishes a long-standing forage allocation to a rancher as a result of the new rule, the opinion stated that the affected rancher could challenge the new allocation in court.<sup>78</sup>

The Court next addressed the qualifications rule, and stated its belief that the deletion of the phrase "engaged in the livestock business" would

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70. *Id.*

71. *Id.* at 742.

72. *Id.* at 743.

73. *Id.* (citing Rangeland Reform '94, 60 Fed. Reg. 9922 (1995) (codified at 43 C.F.R. pts. 4, 1780, 4100)).

74. *Id.* (citing Rangeland Reform '94, 59 Fed. Reg. 14323 (1994) (codified at 43 C.F.R. pts. 4, 1780, 4100)).

75. *Id.* at 743-44 (citing Bureau of Land Management, Rangeland Reform '94: Final Environmental Impact Statement 144 (1994)).

76. *Id.* at 744.

77. *Id.*

78. *Id.*

not have the dire consequences the ranchers feared.<sup>79</sup> The regulation could not change the TGA, which limits the issuance of grazing permits to “settlers, residents, and other stock owners,” so the new rule would not allow the Secretary to issue grazing permits to persons who did not fit the statutory definition.<sup>80</sup> Because the regulation and the statute must be read together when determining the Secretary’s authority, and since the qualifications rule did not by its terms contradict the statute, the Court upheld the regulation as valid.<sup>81</sup> The Court reasoned that the change would not cause a great many grazing permits to be issued to persons not engaged in the livestock business because those already holding permits, all of whom are engaged in the livestock business, receive a preference for renewal of their permits.<sup>82</sup>

As for the PLC’s claim that “stock owner” means only those engaged in the livestock business, the Court responded that “stock owner” and “stock owner engaged in the livestock business” are not obvious synonyms, “and there is no convincing evidence Congress intended they be considered as such.”<sup>83</sup> Parsing the language of section 315(b), the Court pointed out that two sentences after using “stock owner” in listing those eligible for a grazing permit, the statute says that among those eligible (including “stock owners”) preference would be given to “landowners engaged in the livestock business.”<sup>84</sup> Why, the Court asked, would Congress add “engaged in the livestock business,” when, using the PLC’s interpretation, it would add nothing if “stock owner” referred only to one engaged in the livestock business?<sup>85</sup> Quoting a rule of statutory interpretation, the Court then stated “a statute must be construed in such fashion that every word has some operative effect.”<sup>86</sup> The Court said the statutory history of the TGA showed that Congress “expected that ordinarily permit holders would be ranchers, who do engage in the livestock business,” but did not show any absolute requirement.<sup>87</sup> Congress may have intended that those involved in the livestock business be granted a preference in the granting of permits, but did not intend to absolutely exclude others from receiving them.

Concerning the PLC’s belief the qualifications rule would allow grazing permits to be used for primarily conservation purposes, the Court found

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79. *Id.* at 745.

80. *Id.*

81. *Id.*

82. *Id.* at 746 (citing 43 U.S.C. §315(b)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

87. *Id.* (citing H.R. Rep. No. 903, 73d Cong., 2d Sess., 2 (1934); Hearings on H.R. 2835).

the BLM regulations prohibit a permit holder from failing to make substantial grazing use of his permit for 2 consecutive years.<sup>88</sup> If a permit holder failed to make substantial grazing use for 2 consecutive years, the Secretary could permanently cancel the unused portion of the permit.<sup>89</sup>

Finally, the Court addressed the PLC's challenge to the range improvements rule. The Court found that nothing in the TGA prevents the Secretary from vesting title in the United States to all future permanent range improvements constructed pursuant to a cooperative agreement.<sup>90</sup> The Secretary's reasons for doing so, said the Court, are administrative efficiency, and the fact that the original purpose of section 315(f) (ensuring that ranchers compensate nomadic shepherders) was no longer important.<sup>91</sup> In any event, the Court believed that despite the range improvements rule, the subsection retained the meaning the PLC gave it (that ranchers must own some improvements), because ranchers would still have title to removable range improvements.<sup>92</sup>

The Supreme Court was clearly right, given the Secretary's decision that all elements of preference (including, apparently, the old grazing adjudications) will continue to be recognized and protected, to find that the permitted use rule did not contradict the plain language of either the TGA, FLPMA, or PRIA. But even if the Secretary *had* decided that the permitted use rule would effectively eliminate the grazing preference, the law gave him ample authority to do so. No language in the TGA or FLPMA specifically directs the Secretary to determine the maximum amount of forage each permittee is entitled to when available, or to protect established grazing preferences. Nor do those statutes expressly prohibit adjudicating and recognizing in perpetuity the fixed amount of forage to be allocated to each permit holder.

In this sense, the Court may have been incorrect in assuming, as it appeared to do, that Congress spoke directly to this issue in the TGA or FLPMA. The Supreme Court implied that the TGA, by granting the Secretary the authority to determine (pursuant to the TGA's goals, which include protecting the rangelands from overgrazing) how to protect grazing privileges, gave the BLM express authority to eliminate grazing preferences, even if the Secretary ultimately elected not to.<sup>93</sup> The Court suggested FLPMA, which directs the Secretary "to specify the numbers of animals to

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88. 43 C.F.R. § 4140.1(a)(2) (1998).

89. 43 C.F.R. § 4170.1-2 (1998).

90. *Public Lands Council III*, 529 U.S. at 750.

91. *Id.*

92. *Id.*

93. *Id.* at 741-42.

be grazed either directly or by reference to an appropriate allotment management plan,” also gave the Secretary this express authority<sup>94</sup> But this language does not specifically and unambiguously address the issue of whether the Secretary is to establish and permanently recognize the maximum amount of forage each permit holder may utilize in optimal conditions, based on the historic forage production of the permit holder’s property

The statutory language can be interpreted to mean, as the BLM’s 1978 definition of “grazing preference” and its clarification between “active” and “suspended” use suggest, that the Secretary could specify livestock numbers lower than the grazing preference temporarily (due to changing range conditions); but that he must allow use up to the adjudicated maximum when enough forage is available, and can only change a permit holder’s adjudicated forage level on a case-by-case basis.<sup>95</sup> Because there is more than one reasonable interpretation of the statutes, Congress’s intent cannot be considered unambiguous. The first step in the two-part *Chevron* test for review of agency rulemaking, which asks whether Congress’s intentions regarding the precise issue at hand are clear, would not apply to elimination of the grazing preference.

Because Congress’s intent was arguably unclear, the Supreme Court could have (again, if the Secretary *had* decided to eliminate grazing preferences) applied the *Chevron* test to see whether such a rule was a permissible construction of the TGA and FLPMA. But even then, the permitted use rule passes legal muster. The TGA is explicit that permits be issued for ten year periods, and that permit holders will have a preferential right of renewal.<sup>96</sup> In light of this specificity, the TGA’s failure to also require permits to specify a maximum, unvarying forage amount lends support to the belief the TGA does not mandate that permits do so.

The pre-1978 grazing preferences probably were “recognized and acknowledged” grazing privileges, even after the 1978 regulations were promulgated, but the privilege was created by administrative action rather than by statute. The privilege required adequate protection only if that was consistent with the TGA’s purposes, one of which is protection of the land from injury or destruction.<sup>97</sup> During the decades in which grazing preferences were recognized, the condition of the public range remained poor, mostly because of overgrazing.<sup>98</sup> In 1978, a BLM study reported that more

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94. *Id.* at 742.

95. *Public Lands Council II*, 154 F.3d at 1189 (Tacha, J., dissenting).

96. 43 U.S.C. § 315(b) (1934).

97. 43 U.S.C. § 315(a) (1934).

98. Coggins, *supra* note 15 at 112.

than eighty percent of the public range was in less than satisfactory condition.<sup>99</sup> Given these facts, the permitted use rule, had it eliminated the old grazing preferences, would have been more than a “permissible” construction of the TGA - it was probably the most reasonable one. The grazing preference was likely the principal cause of the rangelands’ poor condition.

A rule that eliminated recognition of the old grazing adjudication would certainly have been a more reasonable interpretation of FLPMA’s mandate to manage the public lands for multiple uses and sustained yield, via land use planning, than continuing to recognize grazing preferences dating from before FLPMA’s passage. Among the values FLPMA seeks to protect are “the quality of scientific, scenic ecological, environmental” and water resources.<sup>100</sup> Principal uses the BLM must manage in combination to meet the present and future needs of the American public include outdoor recreation and wildlife development as well as livestock grazing.<sup>101</sup> The permitted use rule, had it eliminated the grazing preference, would, unlike grazing adjudications made before 1978, be consistent with these policies because the old grazing preferences were created when the principal consideration was the need of the livestock owners for forage.

Considering the increase in outdoor recreation and wildlife “utilization” (meaning wildlife watching as well as hunting and fishing) on the public lands since the time the grazing preferences were adjudicated, those preferences no longer accurately reflect the changed needs of the American public. Allowing their continued use threatens some of the values listed in section 1701(a)(8),<sup>102</sup> especially the quality of ecological, environmental, and water resources. Excessive livestock grazing leaves less forage for wildlife, leads to the introduction of non-native plants and the extirpation of native ones, and damages water quality.<sup>103</sup> FLPMA, by permitting the Secretary to create AMPs which prescribe “the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained yield” objectives of the Act, expressly allows grazing to be regulated for multiple use, sustained yield management.<sup>104</sup>

As for the effects on the stability of the livestock industry from eliminating the grazing preference, the Tenth Circuit Court of Appeals (assuming, erroneously, the rule eliminated the grazing preference) pointed out that only twenty-two percent of western cattlemen, and nineteen percent of

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99. Brief of Amici at 26 (No. 98-1991) (citing H.R. Rep. No. 95-1122 at 10 (1978)).

100. 43 U.S.C. § 1701(a)(8) (1976).

101. 43 U.S.C. § 1702(l) (1976).

102. 43 U.S.C. § 1701(a)(8) (1998).

103. Brief of Amici at 26 (No. 98-1991) (citing National Research Council, *Rangeland Health: New Methods to Classify, Inventory and Monitor Rangelands* 25 (1994)).

104. 43 U.S.C. § 1702(k)(1) (1998).

western sheep producers, have federal grazing permits.<sup>105</sup>

The permitted use rule, if it had eliminated the grazing preference, would have conflicted with the BLM's established practice of recognizing grazing preferences adjudicated before its 1978 regulations.<sup>106</sup> Even if this practice, mentioned explicitly by the BLM only in the Federal Register (it was never codified in the C.F.R.), rises to the level of an "interpretation," an "initial agency interpretation is not instantly carved in stone the agency must consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>107</sup>

In upholding the qualifications rule, the Court pointed to BLM regulations mandating that permit holders make substantial grazing use on their allotments for two consecutive years or else face cancellation of the unused forage.<sup>108</sup> While the Court believed this regulation would prevent grazing permits from being used by persons who intended to allow little grazing,<sup>109</sup> the regulation still leaves open the possibility that conservation groups could obtain grazing permits, then graze their lands every other year. From the environmentalists' standpoint, the land would still benefit from the lack of grazing in alternating years. In the years when grazing must occur, conservationist permit holders would certainly try to test the limits of what constitutes "substantial use" by grazing as few animals as possible without getting their permit revoked. The "substantial use" threshold could be met by levels of grazing use that, while not minimal, are well below what a stock owner "engaged in the livestock business," would ordinarily reach. This, of course, would depend on future courts' determination of what constitutes "substantial use."

## V CONCLUSION

The permitted use rule, even without the Secretary's decision to protect the old adjudicated grazing levels, is a more reasonable interpretation of the TGA and FLPMA than the BLM's practice of recognizing the right of each permit holder to graze up to the amount of forage determined in a decades-old adjudication. These adjudications were largely made before FLPMA was passed, when, under the TGA, "the BLM emphasized accommodation of ranchers' desires, rather than improvement of range condi-

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105. *Public Lands Council II*, 154 F.3d at 71-72 n.5, (citing Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management Based Standards & Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 523 (1997)).

106. *Id.* at 1185 (Tacha, J. dissenting).

107. *Chevron*, 467 U.S. at 863-864.

108. 43 C.F.R. §§ 4130.2(a), 4130.2 (g) (1998).

109. *Public Lands Council III*, 529 U.S. at 747.

tions.”<sup>110</sup> Recognition of grazing preferences failed to protect the rangeland from deterioration, as section 1901(a)(1) of PRIA implicitly acknowledged.<sup>111</sup> Furthermore, grazing preferences reflected priorities that were drastically altered by FLPMA, which requires management of the public lands for multiple uses, not all of them compatible with the levels of livestock grazing granted by grazing preferences. Ranchers would still have been able to challenge any reduction in their grazing use had the permitted use rule eliminated the grazing preference, as the Supreme Court pointed out.<sup>112</sup> The creation of AMPs by the BLM under section 1752(d) of FLPMA<sup>113</sup> provided permit holders with a sufficiently individualized “adjudication” of the amount of forage they are permitted to graze, because AUMs have to be tailored to the particular area they encompass. Also, permit holders must be consulted during the creation of an AMP.<sup>114</sup> The process of creating AMPs thus would not have materially departed from the BLM’s prior practice of changing grazing preferences only on a case-by-case basis.

The Court was possibly mistaken in assuming that the qualifications rule, by eliminating the requirement that permit holders be engaged in the livestock business, would not result in grazing permits being acquired by conservation-minded organizations and individuals who will then use them to reduce grazing on their allotments. The BLM regulations the Court relied upon for this assumption would still permit grazing use to be substantially curtailed by the permit holders.

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110. Coggins, *supra* note 15, at 2.

111. 43 U.S.C. § 1901(a)(1) (1998).

112. *Public Lands Council III*, 529 U.S. at 744.

113. 43 U.S.C. § 1752(d) (1978).

114. 43 U.S.C. § 1702(k) (1976).