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Public Lands Council v. Babbitt: Herding Ranchers Off Public Land?

I. INTRODUCTION

Ranching is the backbone of many rural communities throughout the West and an occupation and way of life for many families. Ranchers, who have often run livestock in the same area for decades, depend on public rangeland for grazing.¹

Ranchers have grazed their livestock on public land since the 1800s.² During the infancy of the ranching industry, any rancher could graze his livestock on any part of the public land. The enactment of the Taylor Grazing Act (“TGA”) in 1934 began the regulation of grazing on public land by allowing individual ranchers to obtain a permit for exclusive grazing on a portion of the federal range. Under the TGA, ranchers who needed public rangeland in order to make use of private property were to be given grazing permits before ranchers who did not have private property. Adjudications were done to determine how many animals each rancher could graze on public land.

Today there are about 177 million acres of federally owned rangeland controlled by the Bureau of Land Management (“BLM”)³ on which ranchers can graze their livestock, if they hold a grazing permit issued by the BLM. Without the federal grazing permits, many ranchers would not have a place to graze their livestock and could no longer ranch.⁴ In addition, ranchers depend on loans secured by grazing permits to finance their operations.⁵ Because of their dependence on the federal rangeland, ranchers, lenders, and

1. See, e.g., Hannah Wolfson, *Ranchers Gain a Hearing in Top Court on Grazing Rights*, DESERET NEWS, Oct. 14, 1999, at A8.

2. See generally Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513 (1997).

3. See *id.* at 522 (citing BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR, PUBLIC LAND STATISTICS 1991, at 6 (1992)).

4. See Wolfson, *supra* note 1, at A8.

5. See *infra* notes 153-70 and accompanying text.

entire rural communities want assurance that the range will be available for grazing in the same way it has been in the past.⁶

On the other hand, environmental groups, arguing that grazing is causing environmental damage, want livestock removed from public land or at least reduced.⁷ In 1995, the Secretary of the Interior promulgated new regulations that substantially decreased the value and stability of current BLM grazing permits.⁸ These changes leave ranchers feeling like they are being herded off public land.

This Note examines the Supreme Court's decision in *Public Lands Council v. Babbitt*,⁹ which investigated the Secretary of the Interior's power to instigate rangeland reform through new regulation. In *Public Lands Council*, the Court upheld the Secretary's decision to alter the way that grazing permits will be issued.

The 1995 regulations replaced the term "grazing preference" with the term "permitted use."¹⁰ Grazing preference, which was determined by the adjudication process, provided a constant maximum number of animals that could be grazed under a grazing permit, assuming ideal range conditions. Following the enactment of the TGA, the Department of the Interior engaged in a lengthy adjudication process to determine the "grazing preference" for each rancher. The adjudication process focused on the amount of public forage that ranchers would need to make use of their private property. On the other hand, "permitted use," which will be determined through land use planning, will change the number of animals grazed from year to year with no constant maximum number of animals allowed under the grazing permit.¹¹ Under "permitted use" there is no constant maximum number of animals that can be grazed given ideal range conditions. The new regulations completely ignore the adjudication process and, instead, provide that the Secretary of the Interior ("the Secretary") will decide ranchers' grazing privileges with

6. See Clint Peck, *Ranging the West: There Are Broader Issues*, WESTERN FARMER-STOCKMAN, Dec. 1997, at WB4.

7. See, e.g., LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING (1992); Edward Abby, *Even the Bad Guys Wear White Hats*, HARPER'S, Jan. 1986, at 51, 51-55.

8. See 43 C.F.R. §§ 4100.0-4170.2 (1995).

9. ___ U.S. ___, 120 S. Ct. 1815 (2000).

10. Compare 43 C.F.R. §§ 4110.2-2, 4110.3-2 (1994), with 43 C.F.R. §§ 4110.2-2, 4110.3-2 (1995).

11. The distinction between "grazing preference" and "permitted use" is more fully discussed *infra* Part II.C.

reference only to land use plans, considering recreation, conservation, and other interests.¹²

Although the Secretary maintains that the change is purely semantic, the change violates the TGA's mandate that the Secretary "safeguard grazing privileges."¹³ Additionally, one of the TGA's purposes was to stabilize the livestock industry. The substitution of permitted use for grazing preference will destabilize the livestock industry by making it difficult for ranchers to predict how many animals they will be allowed to graze from year to year. The instability will reduce the value of a grazing permit and make it more difficult for ranchers to use their grazing permits as collateral for new loans. Furthermore, it will hurt lenders who already hold grazing permits as security by reducing the value of that security.

Part II of this Note provides general background on grazing statutes and regulations. Part III briefly outlines the facts and holding in *Public Lands Council v. Babbitt*. Part IV analyzes the Supreme Court's reasoning. This Note concludes that elimination of the grazing preference will destabilize the livestock industry by making it difficult for ranchers to use their grazing permits as collateral. Consequently, the Supreme Court should have held that the regulation was beyond the scope of the Secretary's authority under the TGA and invalidated the regulations.

II. BACKGROUND

Although "[d]omestic livestock have grazed rangelands in some parts of the southwestern United States since the 1500s, and much of the rest of the western United States since the 1800s,"¹⁴ the substantial growth of the livestock industry was seen mostly during the period of western expansion beginning with the California gold rush.¹⁵ As people moved west, many settled along the banks of rivers or near other sources of water and started grazing livestock on adjoining land. The livestock industry was initially very profitable. "Livestock associations developed in every western state, and by the

12. *Public Lands Council*, 120 S. Ct. at 1823.

13. See 43 U.S.C. § 315(b) (1994).

14. Pendery, *supra* note 2, at 515 (footnotes omitted).

15. See WAYNE HAGE, *STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS* 13-15 (1994).

early 1880s, there were even several rival national associations.”¹⁶ Unusually high rainfall between 1910 and 1920 contributed to good grazing conditions and led many ranchers to believe that they had found the American Dream.¹⁷

The honeymoon period ended quickly. By the 1930s, the weather patterns returned to normal, and only the hearty ranchers survived.¹⁸ The dry weather, compounded by the Great Depression, increased financial pressure on ranchers.¹⁹ In an attempt to compensate, many ranchers increased the size of their herds.²⁰ Ranchers began to realize that the system of common ownership was ruining much of the rangeland.²¹ “Without controls on use [of the rangelands], the benefits of sound [grazing] practices would not accrue to any one rancher. Indeed, each rancher’s incentive was to maximize the number of his own cattle. If each rancher followed this incentive, the result would be severe over-grazing.”²²

A. *The Taylor Grazing Act*²³

Given the tenuous economic state of the ranching industry, Congress felt compelled to act. In 1929, Congress created, as an experiment, the Mizpah–Pumpkin Creek grazing district in southeastern Montana.²⁴ The Mizpah–Pumpkin Creek experiment gave the

16. *Id.* at 11.

17. See ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 30 (1995).

18. See *id.* at 30-31.

19. See *id.*

20. See *id.*

21. See *id.*

22. *Id.* at 30. Many contemporary writers have identified the pre-Taylor Grazing Act condition of the rangeland with Garret Hardin’s description of a “Tragedy of the Commons.” See, e.g., George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and The Taylor Act*, 13 ENVTL. L. 1 (1982). It is interesting that Hardin suggested several methods to prevent the tragedy, including “sell[ing the grazing commons] off as private property [or] keeping them as public property, but allocat[ing] the right to enter them.” Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). In 1934, Congress gave only limited consideration to the option of converting the public rangeland to private property, determining that it was “not a viable option” and instead adopted a regulatory scheme that would bring headaches to ranchers and government administrators for years to come. See CHRISTOPHER MCGREGORY KLYZA, WHO CONTROLS PUBLIC LANDS? MINING, FORESTRY, AND GRAZING POLICIES, 1870-1990, at 112 (1996).

23. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315(r) (1994)).

24. See 45 Stat. 1430 (1929).

Secretary supervisory power over the grazing district but allowed the local ranchers substantial control in the allocation of grazing rights and administration of the district.²⁵ It was largely successful in improving the environmental condition and carrying capacity of the range.²⁶ “[S]oon applications for an extension of the system were being received from all over the West.”²⁷

On June 28, 1934, Congress passed the Taylor Grazing Act (“TGA”) to regulate grazing on most non-Forest Service federal land.²⁸ The TGA states, “the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts.”²⁹ The Secretary was further “authorized to issue . . . permits to graze livestock on such grazing districts.”³⁰ Congress realized that the demand for grazing permits would likely be larger than the amount of domestic livestock that the federal rangeland could support.³¹ To ensure that ranchers who had been using the public rangeland prior to the TGA would still be able to graze on these lands,³² Congress provided that grazing permits were to be allocated with

[p]reference . . . given . . . 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 the lands, water or water rights owned, occupied, or leased by them.³³

Thus, preference was to be given to those who needed the permit to make use of the private land or water rights they already owned or leased. Finally, the TGA instructs the Secretary that “grazing privi-

25. *See id.*

26. *See* PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 50 (1960).

27. E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-50*, at 215 (1972).

28. *See* Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315(r) (1994)). Prior to the TGA, the federal government had some control over grazing under the Forest Service Reserve Act, but the Forest Service range management was unpopular with many ranchers and covered only land designated as National Forests. *See generally* James L. Huffiman, *A History of Forest Policy in the United States*, 8 *ENVTL. L.* 239 (1978).

29. 43 U.S.C. § 315 (1994).

30. *Id.* § 315(b).

31. *See* H.R. REP. NO. 73-903, at 1 (1934).

32. *See* 78 CONG. REC. 5372 (1934).

33. 43 U.S.C. § 315(b).

leges recognized and acknowledged shall be adequately safeguarded."³⁴

Immediately following the enactment of the TGA, the Secretary allocated one-year grazing licenses to ranchers.³⁵ These licenses let ranchers graze their livestock temporarily—until the Secretary could develop regulations and adjudicate forage allotments.³⁶ These regulations came to be known as the Federal Range Code.³⁷ The Federal Range Code prescribed an adjudication process that allocated forage in accordance with the TGA's preference requirement.³⁸ Thus, forage was first allocated to property owners in amounts sufficient to allow owners to make proper use of their private land and water.³⁹

The adjudication process was time consuming and was not complete until the 1960s.⁴⁰ The process itself was cumbersome.

Each application for grazing use for each season was first considered by the advisory board. The recommendation made at the initial meeting of the board was sent to the applicant with an opportunity afforded to meet with the board at a subsequent meeting (protest meeting) to protest the original recommendation and offer new or additional information. The advisory board then made its final recommendation to the District Manager, who issued a decision to the applicant. The applicant was then afforded the right of appeal to a Hearings Examiner and a further appeal to the Director.⁴¹

Following the adjudication of forage, ten-year grazing permits were issued.⁴² The permits measured the number of livestock allowed to graze under a particular permit in animal unit months ("AUMs").

34. *Id.*

35. See WILLIAM VOIGT, JR., *PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT* 263 (1976).

36. See *id.*

37. See 43 C.F.R. §§ 501.2-501.27 (Supp. 1938).

38. See JAMES MUHN & HANSON R. STUART, *OPPORTUNITY AND CHALLENGE: THE STORY OF BLM* 38 (1988) ("With the creation of grazing districts, rules and regulations to control grazing use had to be promulgated. In granting grazing permits to ranchers, the first priority was to those who had adequate private land to support their herds when not using the public range . . .").

39. See 43 U.S.C. § 315(b) (1994).

40. See Paul Herndon, *History of Grazing on the Public Lands*, in *THE TAYLOR GRAZING ACT: 50 YEARS OF PROGRESS* 1, 4 (1984).

41. William Mathews, *Management of Grazing Use*, in *THE TAYLOR GRAZING ACT: 50 YEARS OF PROGRESS* 14, 14-15 (1984); see also FOSS, *supra* note 26, at 63-66.

42. See VOIGT, *supra* note 35, at 263.

An AUM is the amount of forage it takes to feed one cow or horse or five sheep or goats for one month.⁴³

While there were mixed verdicts on whether the TGA and the accompanying regulations improved the conditions of the rangeland, the TGA was undoubtedly successful in promoting and establishing rural communities in the West.⁴⁴ Income from ranching fueled the economy in many rural areas. Lenders financed local ranching operations, and rural main streets developed to provide products and services to the ranchers.⁴⁵

B. Federal Lands Policy and Management Act of 1976⁴⁶ and Public Rangelands Improvement Act of 1978⁴⁷

Although there were several minor amendments to the TGA,⁴⁸ the first major changes and additions to grazing statutes came with

43. See 43 C.F.R. § 501.2(i) ("Animal-unit month. That amount of natural, cultivated, or complementary feed necessary for the complete subsistence of one cow for a period of one month. For the purpose of this definition, one horse or five goats or five sheep will be considered the equivalent of one cow.").

44. See FOSS, *supra* note 26, at 72 ("The system has without doubt accomplished one of the major objectives of the Taylor Grazing Act: the stabilization of the livestock industry dependent on the public range."); Peter B. McIntyre, *The Road to Rangeland Reform: A History, Review, and Prospectus* (visited Nov. 26, 1999) <<http://www.nets.com/fguardians/mcin-tyre/reform.htm>>.

[The TGA did] produce small, stable communities in the west based on feeding, supplying, and financing ranchers. Employment could be found either on a ranch or with a public agency addressing ranch issues, and many ranch families added generation upon generation of stockmen who managed the family ranch, including both the private base ranch and the public range leases.

Id.

45. See 139 CONG. REC. 14,169 (1993) (statement of Sen. Campbell).

Every western ranching job creates as many as four jobs on Main Street. If ranchers go under, so will the tractor, truck and automobile dealers, the gas, grocery and feed store owners, the veterinarians, doctors, and dentists, and many others who make up the commercial and social fabric of rural western towns.

Id.

46. Federal Land Policy and Management Act, Pub. L. No. 97-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701-84 (1994, Supp. I 1995, Supp. II 1996, & Supp. III 1997)).

47. Public Rangelands Improvement Act, Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified as amended at 43 U.S.C. §§ 1901-08 (1994)).

48. See, e.g., Act of June 26, 1936, ch. 842, 49 Stat. 1976 (increasing the area that could be included in grazing districts to forty-two million acres); Act of Aug. 6, 1947, ch. 507, 61 Stat. 790 (allowing the Secretary to set separate grazing fees and range-improvement fees); Act of May 28, 1954, ch. 243, 68 Stat. 151 (eliminating the acre limit of lands that could be included in grazing districts).

the passage of the Federal Lands Policy and Management Act ("FLPMA") in 1976. The enactment of FLPMA was prompted, at least in part, by a desire to give the BLM authority to manage its rangeland similar to the Forest Service's authority to manage Forest Service land.⁴⁹ Additionally, FLPMA was Congress's response to growing public interest in the aesthetic benefits and recreational opportunities afforded by BLM land.⁵⁰

FLPMA provides that public lands should be managed "under principles of multiple use and sustained yield"⁵¹ in such a way as to protect "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values."⁵² FLPMA requires a closer scrutiny of the use of BLM land by stating, "Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses."⁵³ Although FLPMA recognizes new interests that must be weighed in the management of grazing districts, it "does not repeal the major Taylor Act provisions."⁵⁴ Thus, the Secretary is still statutorily required to provide for stabilization of the livestock industry when formulating rangeland policy.

Even following the enactment of FLPMA, Congress was unsatisfied with the condition of the public rangelands.⁵⁵ Consequently, Congress enacted the Public Rangelands Improvements Act ("PRIA") in 1978.⁵⁶ "PRIA . . . gave [the] BLM a substantive congressional mandate: improve range condition[s]."⁵⁷ With PRIA, Congress also implemented a new grazing fee system that it had

49. See George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 3-4 (1983) [hereinafter Coggins IV]. The BLM had been given authority to manage grazing on land covered by the TGA in the Classification and Multiple Use Act of 1964, but that authority expired in 1970. See Pub. L. No. 88-607, 78 Stat. 986 (1964) (expired 1970).

50. See R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* 61-64 (1993).

51. 43 U.S.C. § 1732(a) (1994).

52. *Id.* § 1701(a)(8).

53. *Id.* § 1712(a).

54. Coggins IV, *supra* note 49, at 5 (citations omitted).

55. See 43 U.S.C. § 1901 ("[V]ast 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 . . .").

56. *Id.* §§ 1901-08.

57. Pendery, *supra* note 2, at 552.

been unable to agree on when FLPMA was enacted.⁵⁸ Like FLPMA, PRIA did not repeal the TGA. Instead, PRIA provides that it should “be construed as supplemental to and not in derogation of the purposes for which public rangelands are administered under other provisions of law.”⁵⁹

The enactment of FLPMA and PRIA led to many revisions in the Federal Range Code.⁶⁰ These changes applied to the way grazing permits would be assigned when additional land was available for grazing but did not change the AUM amounts that had been set by adjudication prior to the passage of FLPMA and PRIA.⁶¹

The preamble to the 1978 amendments noted that “[s]erious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands,” but asserted that “[t]heir adjudicated grazing use, their base properties and their areas of use (allotments) will be recognized under these grazing regulations.”⁶²

The post-1978 adjudication process for newly available rangeland took into account a wider range of environmental concerns after FLPMA and the 1978 regulations.⁶³

In 1978, the Secretary, for the first time, introduced the term “grazing preference” (a term that was commonly used to refer to the adjudicated grazing privileges). The “grazing preference” was measured in AUMs and included “active use” and “suspended use.”⁶⁴ “Active use” designated the actual number of livestock that the rancher could graze.⁶⁵ “Suspended use” was the difference between the grazing preference and the active use. The allocation of the grazing preference between active use and suspended use could vary depending upon the range conditions.⁶⁶ Thus, the active use (the number of animals actually allowed on the range) equaled the full grazing preference under ideal forage conditions. While the holder of

58. See 43 U.S.C. § 1905.

59. *Id.* § 1901(c).

60. See *McLean v. Bureau of Land Management*, 133 IBLA 225, 233 (1995); see also *Pendery*, *supra* note 2, at 556.

61. See *McLean*, 133 IBLA at 233.

62. *Id.* (quoting 43 Fed. Reg. 29,058 (1978)) (emphasis added).

63. See *id.* at 233-35.

64. 43 C.F.R. § 4110.2-2(a) (1994).

65. *Id.* §§ 4110.2-2, 4110.3-2.

66. See § 4110.3-2.

a grazing permit was unable to utilize the part of the preference classified as suspended use during poor range conditions, the suspended use was valuable because it would be converted to active use if range conditions improved.

C. The Permitted Use Rule

PRIA, and the resulting regulations, were not the end of the debate over grazing. President Bill Clinton made grazing reform a part of his agenda when he took office in 1993. He appointed Bruce Babbitt Secretary of the Department of Interior, and together they promoted recreation and conservation use of BLM land, instead of traditional uses like grazing and mining. Encouraged by environmental groups, the Clinton administration spearheaded legislation that would have substantially changed grazing on public lands.⁶⁷ Western congressmen believed that the proposed grazing reform was “determined to drive those who earn a living on the public land into bankruptcy.”⁶⁸ As Senator Bob Dole summarized: “Through a series of redefinitions and preference changes,” this legislation will “raise the cost of doing business for ranch families in the western States [C]osts will go up and some of these businesses will fail.”⁶⁹ The legislation was ultimately defeated.

However, the Clinton administration, and Secretary Babbitt in particular, has demonstrated a willingness to rely on executive rule making when legislative reform has been ineffective. For example, after Congress failed to pass mining reform legislation,⁷⁰ Secretary Babbitt reinterpreted the Mining Act of 1872 by approving a Solicitor’s Opinion.⁷¹ The Opinion changed the way the Mining Act had

67. See H.R. 2520, 103d Cong. (1993).

68. 139 CONG. REC. 14,085 (1993) (statement of Sen. Campbell); see 139 CONG. REC. 14,090 (1993) (statement of Sen. Wallop) (“[The legislation] would have accomplished . . . what generations of blizzards, droughts, recessions, and disease failed to do—drive people off the land.”).

69. 139 CONG. REC. 11,654 (1993). As one commentator concluded, the “strategy was to place high enough hurdles in the paths of . . . cattle growers to make . . . cattle grazing on arid and easily damaged public lands unprofitable. Then the land could be taken out of production, and set aside for conservation.” Carl M. Cannon, *The Old-Timers*, 1999 NAT’L J. 1386, 1390.

70. See H.R. 322, 103d Cong. (1993); S. 257, 103d Cong. (1993).

71. See Memorandum from John D. Leshy, Solicitor, United States Department of the Interior, to Director, Bureau of Land Management, M-36988, *Limitations on Patenting Mill-sites Under the Mining Law of 1872*, at 2 (Nov. 7, 1997).

been interpreted for 125 years.⁷² Another example is the creation of the Grand Canyon–Parashant National Monument. Although Congress considered legislation designed to protect the area eventually included in the monument, Secretary Babbitt did not support the legislation because it did not ban mining in the area.⁷³ Instead, Babbitt recommended that President Clinton set aside the area as a national monument under the Antiquities Act, without congressional approval.⁷⁴ President Clinton readily complied.⁷⁵

Similarly, Secretary Babbitt decided that he did not need new congressional authorization to implement the grazing policy changes he wanted.⁷⁶ After grazing reform legislation had been defeated in Congress, the Department of the Interior promulgated new grazing regulations that were substantively very similar to some of the grazing reform measures contemplated by the failed legislation.⁷⁷ Under the previous regulations, “grazing preference” was the maximum number of AUMs that could be grazed given ideal range conditions.⁷⁸ This was the AUM amount set by the adjudication process, taking into account the forage necessary to make proper use of private land and water.⁷⁹ The new regulations reduced “grazing preference” to mean “a superior or priority position against others for the purpose of receiving a grazing permit or lease.”⁸⁰ This priority is attached to “base property owned or controlled by the permittee or lessee.”⁸¹ As even the Secretary emphasized, “[t]he [new] definition [of grazing preference] omits reference to a specified quantity of forage, a practice that was adopted . . . during the adjudication of

72. See generally Patrick Garver & Mark Squillace, *Mining Reform—Administrative Style*, 45 ROCKY MTN. MIN. L. INST. §§ 14.01-14.07 (1999).

73. See Matt Kelley, *Babbitt Wants More Land Under Federal Protection: New National Monuments Proposed In Arizona and Along California Coast*, MILWAUKEE J. SENTINEL, Dec. 15, 1999, available in 1999 WL 21558115.

74. See *id.*

75. See Proclamation No. 7265, 65 Fed. Reg. 2825 (2000).

76. See Cannon, *supra* note 69, at 1390-91. Babbitt stated: “When I got to town, what I didn’t know was that we didn’t need more legislation . . . We’ve switched the rules of the game. We’re not trying to do anything legislatively.” *Id.* at 1391.

77. See 43 C.F.R. §§ 4100.0-4170.2 (1995).

78. See *id.*

79. See *supra* notes 39-46 and accompanying text.

80. 43 C.F.R. § 4100.0-5 (1995).

81. *Id.*

grazing privileges.”⁸² In other words, the Secretary removed from the regulations any reference to the adjudicated AUM amounts.

Instead of determining the AUMs with reference to the grazing preference (i.e. the original forage determination eliminated from regulatory recognition) and range conditions, the Secretary adopted a new approach and a new term—“permitted use.” “*Permitted use* means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs.”⁸³ The regulation elaborates that:

(a) Permitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases. Permitted use shall encompass all authorized use including livestock use, any suspended use, and conservation use, except for permits and leases for designated ephemeral rangelands where livestock use is authorized based upon forage availability, or designated annual rangelands. Permitted livestock use shall be based upon the amount of forage available for livestock grazing as established in the land use plan, activity plan, or decision of the authorized officer under § 4110.3-3, except, in the case of designated ephemeral or annual rangelands, a land use plan or activity plan may alternatively prescribe vegetation standards to be met in the use of such rangelands.⁸⁴

The “permitted use” regulation differs from the previous regulation in that the AUMs specified in the grazing privilege now vary depending on the forage amount available for livestock grazing, whereas previously the AUMs in the grazing privilege (i.e. the “grazing preference”) remained constant although the “active use” numbers varied depending on the forage available.⁸⁵ Furthermore, under the “permitted use” regulation, the Secretary has the sole discretion within the land use planning process to determine the maximum number of AUMs available to a permit holder without any reference to the amount of forage “necessary to permit the proper use of the

82. Administration of Livestock Grazing on Public Rangelands, 60 Fed. Reg. 9894, 9921 (1995) (to be codified at 43 C.F.R. pt. 4).

83. 43 C.F.R. § 4100.0-5.

84. *Id.* § 4110.2-2.

85. It should be noted that the permitted use definition is not merely a reincarnation of “active use” under the pre-1995 regulations because permitted use includes suspended use and conservation use. See 43 C.F.R. § 4110.2-2 (2000). Unlike active use under the pre-1995 regulations, permitted use does not show the actual number of animals that a rancher can graze.

lands, water or water rights owned occupied, or leased”⁸⁶ by the rancher and to the adjudication process that determined that figure.

III. PUBLIC LANDS COUNCIL V. BABBITT⁸⁷

A. Nature of the Case and Course of Proceedings

On July 27, 1995, the Public Lands Council, National Cattleman’s Association, American Sheep Industry Association, American Farm Bureau Federation, and Association of National Grasslands (collectively “PLC”) filed a complaint in the district court in Wyoming against Interior Secretary Babbitt and the BLM (collectively “the Secretary”). The complaint challenged the Secretary’s authority to eliminate the “grazing preference” and substitute “permitted use.” In addition, PLC challenged the Secretary’s authority to implement nine other 1995 regulations.⁸⁸ The district court invalidated four regulations, including the regulation that replaced the term “grazing preference” with the term “permitted used.”⁸⁹ District Judge Brimmer concluded that “‘permitted use’ does not enjoy the same protection that an adjudicated ‘grazing preference’ [enjoys]. . . . The Secretary’s substitution of a right of renewal provides

86. 43 U.S.C. § 315(b) (1994).

87. ___ U.S. ___, 120 S. Ct. 1815 (2000).

88. Specifically, PLC sought reversal of the parts of the regulations that (1) eliminated the grazing preference; (2) broadly defined the term affiliate; (3) gave title to future structural range improvements to the government; (4) allowed for the issuance of conservation use permits; (5) imposed a three-year time limit on temporary use permits; (6) removed the requirement that the holder of a grazing permit must be “engaged in the livestock business;” (7) provided that permittees did not have an exclusive right to use water diversions; (8) allowed for the suspension of a grazing permit if the lessee is convicted of violating certain environmental laws; (9) imposed a surcharge on a permittee that allows livestock that are not his to graze on his permitted area; and (10) adopted management standards called the Fundamentals of Rangeland Health. See generally *Public Lands Council v. United States Dep’t of the Interior Secretary*, 929 F. Supp. 1436 (D. Wyo. 1996), *rev’d sub nom. Public Lands Council v. Babbitt*, 154 F.3d 1160 (10th Cir.), *aff’d on reh’g*, 167 F.3d 1287 (10th Cir. 1998), *aff’d* ___ U.S. ___, 120 S. Ct. 1815 (2000).

89. See *id.* at 1450-51.

The Court finds that the following portions of the 1995 regulations are unlawful and violate the Taylor Grazing Act: (1) the elimination of the grazing preference and replacement with the term “permitted use”; (2) the regulations providing that the United States shall have full title to all future range improvements; (3) the regulations providing for conservation use permits; and (4) the regulations reducing the mandatory qualifications for a grazing permit.

Id.

less protection and violates the Taylor Grazing Act because it fails to adequately safeguard the recognized grazing preferences.”⁹⁰

In a two to one opinion, the Tenth Circuit reversed the district court’s holding that the permitted use rule exceeded the Secretary’s authority.⁹¹ The majority concluded that the TGA allowed the Secretary to replace “grazing preferences” with “permitted use” because permitted use would still allow current permit holders preference over other ranchers when renewing the permit.⁹² The majority further held that the permitted use rule was within the Secretary’s power under FLPMA because the permitted use rule is consistent with a FLPMA provision that allows the Secretary to “reexamine the condition of the range at any time.”⁹³ Finally, the majority reasoned that, because the permitted use rule provides the same procedural safeguards as the appeals process under the grazing preference rule and the Secretary could choose to administer the permitted use rule much the same as he did the grazing preference, the permitted use rule was consistent the TGA’s mandate to “adequately safeguard” grazing privileges.⁹⁴

The Supreme Court granted certiorari⁹⁵ and, on May 15, 2000, in a 9-0 decision, held that the permitted use rule was a permissible exercise of the Secretary’s authority.⁹⁶ The majority opinion was written by Justice Stephen Breyer. Justice Sandra Day O’Connor and joined by Justice Clarence Thomas noted in a concurring opinion

90. *Public Lands Council*, 929 F. Supp. at 1441.

91. *See Public Lands Council*, 154 F.3d at 1162-63. In addition, the Tenth Circuit reinstated the regulations that gave title to future range improvements to the United States and eliminated the requirement that a person must be “engaged in the livestock business” in order to hold a grazing permit. *Public Lands Council*, 167 F.3d at 1309. The Tenth Circuit did, however, affirm the district court’s holding that invalidated the regulation allowing grazing permits to be issued for conservation use. *Id.* The court of appeals granted the Secretary’s petition for rehearing and made a minor amendment to its opinion. *See id.* at 1289. In an unreported opinion, the court of appeals denied PLC’s petition for rehearing. *See* Petition for Writ of Certiorari at 1, *Public Lands Council v. Babbitt*, (filed June 9, 1999) (No. 98-1991). With a vote of 5-5, the Tenth Circuit also denied PLC’s petition for rehearing *en banc. Id.*

92. *See Public Lands Council*, 154 F.3d at 1298-1303.

93. 43 U.S.C. § 1752(e) (1994); *see Public Lands Council*, 167 F.3d at 1299.

94. *See id.* at 1301-02.

95. *Public Lands Council v. Babbitt*, ___ U.S. ___, 120 S. Ct. 320 (1999) (granting cert.).

96. *Public Lands Council v. Babbitt*, ___ U.S. ___, 120 S. Ct. 1815 (2000). The Supreme Court also upheld the Tenth Circuit’s decision that it was within the Secretary’s power to vest title to future range improvements in the United States and remove the requirement that a grazing permit holder be engaged in the livestock business. *See id.* at 1825-28.

that the Court's decision was a response to facial challenge and that ranchers could still potentially challenge the way the regulations are implemented.

B. The Supreme Court's Reasoning

The Supreme Court held that the permitted use rule was an allowable use of the Secretary's power for three reasons. First, the Court held that the TGA does not require that the grazing privilege be safeguarded in this instance. Second, the Court reasoned that even under the pre-1995 regulations, the grazing privileges were not secure. Finally, the Court concluded that the 1995 regulations did not necessarily diminish the security of grazing privileges.

1. The Taylor Grazing Act

The Supreme Court found that the permitted use rule was consistent with the TGA. It reasoned that a complete reading of the text of the TGA did not require that the grazing preference be safeguarded. It cited the language in the TGA that provides:

*So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest or estate in or to the lands.*⁹⁷

The Court first pointed out that the Congress had several purposes in mind when enacting the TGA. It reasoned that because Congress wanted to "stop injury to" and "provide for th[e] orderly use, improvement, and development" of public grazing land in addition to "stabilizing the livestock industry," the Secretary was free to determine "how, and the extent to which 'grazing privileges' shall be safeguarded."⁹⁸

The Court also emphasized the fact that the TGA did not create "any right, title, interest or estate in or to the lands."⁹⁹ If the ranchers did not have a title to the land, the Court reasoned, the "ranchers' interest in permit stability cannot be absolute."¹⁰⁰ Because the

97. *Id.* at 1823 (citing 43 U.S.C. § 315(b)) (emphasis added).

98. *Id.*

99. *Id.*

100. *Id.*

Court concluded that the ranchers' interest was not absolute, the Court allowed the Secretary considerable leeway in promulgating grazing regulation.

2. *Security under the pre-1995 regulations*

Following the idea that the TGA did not require that grazing privileges be stable, the Court noted that grazing privileges have never been absolutely safeguarded even under the pre-1995 regulations.¹⁰¹ Under the Range Code, the Secretary retained the power to reduce grazing numbers if a rancher violated the terms of his permit. The TGA and FLPMA authorize the Secretary to reclassify public land to make it unavailable for grazing. Finally, under FLPMA, the Secretary has the power to formulate land use plans for administration of public land. The Court concluded that “[g]iven these well-established pre-1995 Secretarial powers to cancel, modify, or decline to review individual permits, including the power to do so pursuant to the adoption of a land use plan, the rancher’s diminishment-of-security point is at best a matter of degree.”¹⁰²

3. *Facial challenge*

The Court concluded by noting that *Public Lands Council* was a facial challenge to the 1995 regulations. The Court cited the Secretary’s argument that the 1995 regulations were only clarifications of existing policy and noted that the 1995 regulations are more rancher friendly than regulations originally proposed by the Secretary. The Court then criticized the Public Lands Council and the Farm Credit Institutions for failure to thoroughly explain how ranchers will be hurt by the new regulations. Because the case was decided on a facial challenge, “affected permit holder[s] remain[] free to challenge . . . an individual effect on grazing privileges.”¹⁰³

IV. ANALYSIS

The issue in *Public Lands Council* was whether the permitted use rule is consistent with relevant statutory provisions and congressional intent or whether the Secretary failed to “adequately safeguard”

101. *Id.* at 1824.

102. *Id.*

103. *Id.* at 1825.

grazing privileges as required by the TGA. This Note concludes that the permitted use rule does not adequately safeguard grazing privileges or stabilize the livestock industry.

A. Adequate Safeguards

The TGA requires that “[s]o far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be *adequately safeguarded*.”¹⁰⁴

1. The grazing privilege

Whether grazing privileges have been adequately safeguarded turns in large part on what a recognized and acknowledged grazing privilege is.¹⁰⁵ The TGA did not define grazing privileges, but it did authorize the Secretary to “issue permits to graze livestock on . . . grazing districts.”¹⁰⁶ A grazing permit granted the holder the privilege to use forage on the public land. However, the fact that the TGA did not mandate safeguarding grazing *permits* leads to the conclusion that a grazing privilege is something distinct from a grazing permit. This distinction is understood by focusing on the words “grazing privileges *recognized and acknowledged* shall be adequately safeguarded.”¹⁰⁷

104. 43 U.S.C. § 315(b) (1994) (emphasis added). For a discussion of the “purposes” of the TGA, *see infra* Part IV.B.1.

105. There has been much debate over whether ranchers grazing on public lands have a grazing privilege or a vested property right. *See generally* Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505 (1993–94). That is not the issue in this case. The grazing privilege does not have to be a property right in order for it to be protected. It should make no difference whether the grazing preference is viewed as a right or a privilege. *See* Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938), stating:

We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress.

Id. at 315. *See also* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (“[T]he court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.”).

106. 43 U.S.C. § 315(b).

107. *Id.* (emphasis added).

While the TGA did not provide the method for recognizing grazing privileges, it did give some guidance in determining which ranchers should receive grazing permits. It mandated that

preference shall be given in the issuance of grazing permits to those . . . 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.¹⁰⁸

Thus, the TGA provided that private landowners would be given sufficient grazing permits to allow them to make proper use of their private land before itinerant grazers and others were given grazing permits.

It was the adjudication process that initially determined the allocation of forage under the TGA.¹⁰⁹ As mandated by the TGA, adjudication first determined the number of AUMs that landowners needed to make proper use of their private property and then allocated AUMs to other applicants. The adjudicated AUM amount represented the maximum amount of forage available, given ideal range conditions.¹¹⁰ This adjudication of AUMs available was the process that “recognized and acknowledged” the privilege to graze.¹¹¹ After the AUMs had been adjudicated, the rancher was entitled to a grazing permit.¹¹² Because the adjudication of forage was the process that “recognized and acknowledged” ranchers’ grazing privileges, the language of the TGA requires that the AUMs adjudicated, i.e. the grazing preference,¹¹³ be adequately safeguarded. Whether this origi-

108. *Id.*

109. *See supra* notes 39-46 and accompanying text.

110. *See* 43 C.F.R. § 4110.2-2 (1994).

111. The Tenth Circuit majority criticized Judge Tacha’s dissent for “[w]ithout citation to any authority” describing “at length a process whereby the Secretary made permit renewal decisions by ‘reference to’ or in ‘recognition of’ the original grazing adjudication.” *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1297 (10th Cir.), *aff’d*, ___ U.S. ___, 120 S. Ct. 1815 (2000). The Tenth Circuit majority then concluded, without citation to any authority, that “[t]o the extent the original adjudications affected the substance of future grazing permits, they were not ‘recognized’ in the manner asserted by the dissent under any regulations promulgated since the enactment of FLPMA.” *Id.* at 1298.

112. *See* VOIGT, *supra* note 35, at 263. Even the Tenth Circuit found that “[o]nce the Secretary issued a favorable grazing decision regarding an individual applicant, the applicant received a ten-year permit which specified the maximum number of livestock, measured in AUMs, that the permittee was entitled to place in a grazing district.” *Public Lands Council*, 167 F.3d at 1295.

113. *See* 43 C.F.R. § 4110.2-2 (1978).

nal AUM adjudication is called a “grazing preference” or the “recognized and acknowledged” grazing privilege, or some other name, the basic point is that the forage that the rancher needed to make proper use of his private land was to be safeguarded.

The Supreme Court’s opinion did not discuss how the adjudication process recognized and acknowledged grazing privileges; it merely noted that ranchers with base property should be allowed to graze on public land first and then stated that “grazing allocations were determined.”¹¹⁴ The Court instead focused on the fact that the Secretary has always had power to modify permits and reduce grazing numbers depending on the condition of the range.¹¹⁵ Because the Secretary has always had this power, the Court concluded that the Secretary should be given considerable deference in promulgating the new regulations.¹¹⁶ But the Court should not have given deference to the Secretary’s construction when “the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress.”¹¹⁷ The TGA’s legislative history shows that Congress intended forage available for grazing to remain constant.¹¹⁸

114. *Public Lands Council*, 120 S. Ct. at 1820.

115. *Id.*

116. *Id.* at 1824.

117. *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 233 (1986) (citations omitted).

118. The Supreme Court placed great emphasis on the fact that the TGA did not create “any right, title, interest or estate in or to the lands.” *Public Lands Council*, 120 S. Ct. at 1823. The Secretary made a similar argument in his brief to the Supreme Court. The Secretary argued that Congress did not intend to allow for a constant amount of forage available because an early version of the house resolution that became the TGA provided that “grazing rights recognized and acknowledged by the local customs, laws, and decisions of the court” would be “adequately safeguarded,” but, prior to passage, “grazing rights” was changed to “grazing privileges” and “local customs, laws, and decision of the courts” was eliminated. Respondent’s Brief at 32, *Public Lands Council v. Babbitt*, ___ U.S. ___, 120 S. Ct. 1815 (filed Jan. 10, 2000) (No. 98-1991). While this amendment illustrated Congress’ hesitation to create a property right, it does not mean that Congress wanted forage availability to fluctuate. Congress was reluctant to recognize a property right because it did not want to stir up litigation similar to that caused by the creation of the Forest Service’s grazing program.

The Forest Service, from the beginning of their grazing program, had granted some grazing permits to parties with no prior rights. These permittees often competed to the detriment of the permittees with prior rights or preference. They had sometimes attempted to establish rights by use on the water and range of the preference permittee. Expensive and bitter litigation had often resulted.

HAGE, *supra* note 15, at 183. Looking at other portions of the legislative history shows that, while Congress did not want to create a right, they did intend for forage availability to remain constant. See *infra* notes 149-153 and accompanying text.

Congress wanted to provide ranchers with “some 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 the way of pasturage.”¹¹⁹ It wanted to give “stockmen whose operations are dependent upon grazing . . . assured grazing privileges, on the basis of which [they could make] definite plans.”¹²⁰ As then Interior Secretary Harold L. Ickes summarized, the TGA provided “those engaged in the livestock industry” with “certainty of tenure in their grazing use of the public lands.”¹²¹

2. *Facial challenge*

The Supreme Court ultimately concluded that “the new definitional regulations by themselves do not automatically bring about a self-executing change that would significantly diminish the security of granted grazing privileges.”¹²² This conclusion was based on the premise that the Secretary could choose to administer the permitted use rule the same way he administered the grazing preference rule.¹²³ If this were the case, then the Court believed that the grazing privilege would be adequately safeguarded.¹²⁴ The Supreme Court suggested that the ranchers should wait until they are actually harmed and then bring action individually.¹²⁵ As Justice O’Connor explained in her concurrence: “Petitioners have not shown how the new regulations themselves—rather than specific actions the Secretary might take pursuant to those regulations—violate the Taylor Grazing Act’s requirement that ‘grazing privileges recognized and acknowledged . . . be adequately safeguarded.’”¹²⁶

119. 78 CONG. REC. 5371 (1934).

120. H.R. REP. NO. 73-903 at 2 (1934).

121. *Id.* at 7. Congress wanted grazing preferences to remain constant so that ranchers would be able to use their grazing permits to secure loans. *See infra* notes 162-165 and accompanying text.

122. *Public Lands Council*, 120 S. Ct. at 1824.

123. To succeed on a facial challenge of an administrative agency regulation, a plaintiff must show “that no set of circumstances exists under which the [regulation] would be valid.” *Public Lands Council v. Babbitt* 167 F.3d 1287, 1293 (1998), *aff’d* 120 S. Ct. 1815 (2000) (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993) (quoting *United States v. Salerno*, 481 U.S. 739 (1987) (alteration in original))).

124. *Public Lands Council*, 120 S. Ct. at 1825.

125. *Id.*

126. *Id.* at 1828.

The Court's conclusion that the ranchers did not show that the regulations themselves would harm the ranchers is based on the faulty reasoning that the TGA does not require that *adjudicated forage levels* be adequately safeguarded. If the adjudicated forage levels must be recognized, then, as Judge Tacha's dissent to the Tenth Circuit opinion concluded, it is irrelevant that "permittees will not immediately lose their right to graze on the public lands."¹²⁷ Judge Tacha continued:

When the Secretary undertook to allocate privileges to various applicants to graze a particular allotment on [sic] the public range, he made a series of determinations Then, he awarded a successful applicant a grazing preference to graze up to a certain amount of forage, not just for the life of the permit, but for as long as the Secretary allowed the permittee to graze on the public lands.¹²⁸

There is no possible way that the Secretary could administer the permitted use rule and still preserve the adjudicated grazing preference. The initial adjudication determined the AUMs that the rancher required in order to make proper use of his private land. Under the permitted use rule, the AUMs are determined through land use planning.¹²⁹ Neither FLPMA nor the Secretary's regulations allow the Secretary to consider the AUMs that the rancher needs to make proper use of his private land. Furthermore, there is no way for permitted use under a land use plan to recognize the AUM levels set by the adjudication process. Simply put, either the maximum forage available is determined by the adjudicated level, or it is determined by land use planning, but it cannot be determined by both.

127. *Public Lands Council*, 167 F.3d at 1315-16 (Tacha, J., dissenting).

128. *Id.*

129. A land use plan is "developed through public participation in accordance with the provisions of the Federal Land Policy and Management Act of 1976." 43 C.F.R. § 4100.0-5 (1995). FLPMA requires that

public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). FLPMA also requires that land use planning will be "on the basis of multiple use and sustained yield." *Id.* § 1701(a)(7).

*B. Stabilizing the Livestock Industry**1. The purpose of the TGA*

The preamble of the TGA states that it was enacted “[t]o 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.”¹³⁰ The TGA also provides that the purpose of grazing districts is to “regulate [range] 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.”¹³¹

The Supreme Court used this language to conclude that permit stability is not absolute.¹³² The Court suggests that because the TGA had numerous purposes, the Secretary is now allowed almost limitless authority to decide how Congress intended these purposes to interact with one another. However, the legislative history and historical context show that the 1934 Congress never intended that the Secretary be allowed to drive ranchers out of business under the auspices of improving range conditions. In considering the purpose of enacted legislation, a court “may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.”¹³³ According to a House committee, “the whole purpose of the [TGA] is to conserve the public range in aid of the livestock industry.”¹³⁴ The TGA was a “[d]epression measure to avert the imminent collapse of both the range and the associated livestock industry.”¹³⁵ Congressman Edward T. Taylor of Colorado, who rep-

130. Taylor Grazing Act Preamble, ch. 865, 43 Stat. 1269 (1934) (uncodified) (emphasis added); 78 CONG. REC. 5371 (1934). “While it is true that the title is only a formal part of an act, the United States Supreme Court . . . reaffirmed the principle that resort may be had to the title as an aid to the construction of the act.” *The Nature and Extent of the Department’s Authority to Issue Grazing Privileges Under the Taylor Grazing Act*, 56 Interior Dec. 62, 66 (1937) (citation omitted).

131. 43 U.S.C. § 315(a) (1994).

132. *See supra* notes 97-98 and accompanying text.

133. *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) (quoting *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875)).

134. H.R. REP. NO. 73-903, at 2 (1934).

135. George Cameron Coggins, *The Law of Public Rangeland Management V: Prescrip-*

resented a large constituency of ranchers, sponsored the TGA.¹³⁶ Ranchers, hearing about the success of the Mizpah–Pumpkin Creek grazing district, also supported the TGA.¹³⁷ It is unlikely that Congressman Taylor and these ranchers supported the TGA primarily as a conservation measure and were only secondarily concerned with their livelihood. As Secretary Ickes summarized, “[w]e wanted to protect the range in the interest of the stock industry.”¹³⁸

Similarly, courts have concluded that stabilizing the livestock industry was one of the principal purposes of the TGA. For example, in *Faulkner v. Watt*,¹³⁹ the Ninth Circuit observed that “[t]he purpose of the Taylor Grazing Act is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference.”¹⁴⁰ The Tenth Circuit came to a similar conclusion in *Chournos v. United States*,¹⁴¹ stating, “[t]he purpose of the Taylor Grazing Act 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.”¹⁴²

While both FLPMA and PRIA were partly products of growing concern for the environment, neither statute repealed the TGA. As FLPMA states, “[n]othing in this Act shall be deemed to repeal any existing law by implication.”¹⁴³ The regulations promulgated in furtherance of FLPMA and PRIA also show the intention not to disturb privileges recognized by the TGA. The preamble to the 1978

tions for Reform, 14 ENVTL. L. 497, 503 (1984) (footnote omitted); see also *supra* Part II.A.

136. See HAGE, *supra* note 15, at 182.

Congressman Edward T. Taylor of Colorado[, the sponsor of the TGA,] had a background close to the livestock industry. He had been a major opponent of the forest reserves and a strong proponent of privatization. Faced with the reality of northern core resistance to any action that would expose the questionable legality of the forest reserves, Taylor opted for what he thought would be a bill adequately protecting the rancher’s property rights.

Id.

137. See PEFFER, *supra* note 27, at 215.

138. *To Provide for the Orderly Use, Improvement, and Dev. of the Pub. Range, Hearings on H.R. 2835 and H.R. 6462 before the House Comm. on the Pub. Lands*, 73d Cong., 1st & 2d Sess. 133 (1933 & 1934).

139. 661 F.2d 809 (9th Cir. 1981).

140. *Id.* at 812 (citations omitted).

141. 193 F.2d 321 (10th Cir. 1951).

142. *Id.* at 323; see also *Oman v. United States*, 195 F.2d 710, 711 (10th Cir. 1952) (“[T]he purpose of the Taylor Grazing Act [is] to stabilize the livestock industry . . .”).

143. Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 274 (1976) (uncodified portion).

amendments to the Federal Range Code states that “[s]erious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands” but reassured ranchers that “[t]here [sic] adjudicated grazing use, their base properties and their areas of use (allotments) [would] be recognized under [the 1978] regulations.”¹⁴⁴ Because neither FLPMA nor PRIA changed the TGA’s requirement to safeguard the livestock industry, the Secretary still has a congressional mandate to safeguard the industry so long as he can do so while satisfying the requirements of FLPMA and PRIA. The Secretary can stabilize the livestock industry while complying with FLPMA and PRIA, as evidenced by the pre-1995 regulations.¹⁴⁵

2. *The lack of stability under the permitted use rule*

The livestock industry depends on the availability of forage on federal rangeland.¹⁴⁶ While the permitted use rule does not require the immediate removal of all livestock from public land, it does leave the certainty of the availability of federal forage in question. Because the livestock industry is so dependent on the federal rangeland, the possibility that forage may not be available in the future is sufficient to destabilize the livestock industry. The instability is caused because neither ranchers nor those who lend to ranchers will be able to predict with certainty whether sufficient federal range will be available in the future. The Supreme Court dismisses the loss of stability as minor because the “diminishment-of-security point is at best a matter

144. Range Code of 1978, 43 Fed. Reg. 29,058 (1978).

145. The Secretary is not arguing that the permitted use rule is necessary to comply with FLPMA and PRIA. FLPMA and PRIA both provide for a variety of activities on public land. *See supra* Parts II.B–II.C. The underlying rationale for the rule appears to have been a concern for the environment. Environmental concerns should be addressed in a way that will not destabilize the livestock industry. *See infra* note 170 and accompanying text. Furthermore, it is not clear that the permitted use rule will improve the environment. The TGA sought to improve range conditions by eliminating the grazing “commons” and creating stability in the ranching industry. By giving use of a portion of the range to only one rancher and assuring that rancher that he would be able to use the range in the future, that rancher had an incentive to preserve the environmental condition of the range because he would not be able to spread future losses associated with over-grazing among other ranchers. *See supra* note 22 and accompanying text. The permitted use rule provides exactly the opposite incentive. By making grazing privileges less stable and less certain, the Secretary gives ranchers less incentive to maintain the environment because the ranchers cannot be certain that they will be able to realize future benefits associated with using environmentally sound grazing practices today.

146. *See* Wolfson, *supra* note 1.

of degree.”¹⁴⁷ The Court also seems to question whether there will be any loss in stability because the Farm Credit Institutions’ amicus brief did not explain why they would change their lending policies towards ranchers. It is unfortunate that the Supreme Court did not understand what Congress has understood for almost seventy years.

Congress understood that for the livestock industry to be stable the adjudicated preference would have to remain constant so that ranchers could use their grazing permits as collateral. As one Senator noted, part of the reason ranchers needed the TGA was that the uncertainty created by a grazing commons left the rancher “lacking the assurance of feed for his animals,” therefore making it “more difficult to procure necessary loans.”¹⁴⁸ Congressman Taylor knew that the grazing privilege needed to be “definite and sufficient.”¹⁴⁹

Otherwise, 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.¹⁵⁰

Even the language of the TGA recognizes that grazing permits would be used as collateral.¹⁵¹

Congress still understands and values the stability of the livestock industry. As recently as 1993, Congress considered the issue of grazing reform. Senator Reid from Nevada, who sponsored the reform legislation, did not include changes to the grazing preference because “eliminating th[e] preference would devalue the permit in the eyes of lending institutions.”¹⁵²

147. *Public Lands Council v. Babbitt*, ___ U.S. ___, 120 S. Ct. 1815, 1824 (2000).

148. 78 CONG. REC. 11,140 (1934) (statement of Sen. Adams).

149. 78 CONG. REC. 5371 (1934).

150. *Id.*

151. *See* 43 U.S.C. § 315(b) (1994).

[N]o permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan.

Id.

152. 139 CONG. REC. 14,087 (1993).

The livestock industry, like most commercial industries, requires credit to operate.¹⁵³ Ranchers typically engage in two types of borrowing. First, many ranchers borrow a large sum initially to purchase the private land that is the base ranch for the grazing operation. Second, because income from ranching is cyclical, ranchers use a line of credit or short-term loans to meet operating costs. Both of these types of loans are often secured by grazing permits.¹⁵⁴

Lenders have been willing to accept grazing permits as collateral in part because the AUMs in the grazing preference remain the same from year to year. When there is uncertainty in whether forage on federal rangeland will be available in the future, lenders are less willing to use the permits as collateral.

One question always in lenders' minds as they decide the amount of money to lend on a given amount of collateral is: "What will I have if I repossess the collateral upon default?" Under the grazing preference system prior to 1995, lenders knew that they would get the AUMs specified in the grazing preference and that the AUM would be divided between active use and suspended use permits. Lenders also knew that some of the AUMs were in suspended use because of poor grazing practices, harsh weather conditions, or natural disasters. If poor grazing practices had resulted in reduced AUMs, then lenders could still get the value of the loan secured by the collateral by selling the permit to someone else who, through better ranching practices, could convert the suspended use permits to active use permits up to the amount of the grazing preference. Similarly, if weather conditions or natural disasters were the cause of the suspended use permits, the lender could be reasonably certain that the immediate emergency would pass and that the active level of permits could eventually be restored to the historical level determined by the grazing preference.¹⁵⁵

153. See Mark Taugher, *Suit Over Grazing Permits Worries Ranchers*, ALBUQUERQUE J., June 4, 1999, at A1 ("For . . . public lands ranchers, access to credit sometimes a lot of credit [sic] is a necessity.").

154. See Falen & Bud-Falen, *supra* note 105, at 523 n.103 ("Agricultural lenders, including banks backed by the Federal government, loan money on grazing preferences. The liens against such preference are attached to the grazing permit in . . . BLM files.").

155. Cf. Brief of Amici Curiae Farm Credit Institutions in support of Petitioners, Public Lands Council v. Babbitt (filed Dec. 3, 1999) (No. 98-1991).

Under the permitted use rule, the answer to the lenders' question, "What will I have?" is less clear. The historical level is no longer recognized or safeguarded. Instead, under the permitted use rule, permits indicate the current amount of AUMs that the rancher is allowed to graze at a particular moment in time. This level of AUMs may or may not be the same when the bank takes the grazing permits. The president of one community bank explained, "[t]he value of a permit has fallen as a result of these changes in rangeland regulations and uncertainties about the future."¹⁵⁶ Hence, lenders have reason to approach loans secured by grazing permits with greater caution.

"The issue of collateral is one of great economic importance. When borrowers cannot use their assets as collateral for loans [or when the value of the collateral is significantly less than its historical value] interest rates on loans tend to be higher to reflect the risk to lenders."¹⁵⁷ If grazing permits are not stable enough to be used for collateral, ranchers will be unable to get new loans. Even assuming that some lenders will still be willing to lend on grazing permits, the interest rates on these loans will be higher to reflect a greater risk to the lender. Consequently, ranchers will be constrained, not only by the willingness of lenders to provide loans, but also by their own ability to pay higher interest rates.

Beyond the issue of collateral, the devaluation of the grazing permit caused by the uncertainty of forage availability under the permitted use rule could affect the amount that a rancher is able to borrow. "Whether a rancher's grazing permits are formally put up as collateral or merely included in a banker's cold-eyed calculation of a rancher's financial health, they are necessary to ensure the fiscal stability of Western cattle interests, which has long been a stated goal of government officials."¹⁵⁸

Even ranchers grazing on private land would be destabilized by the public-land ranchers' inability to borrow. If ranchers are unable to maintain sufficient cash flow to finance their obligations, they will

156. Doug McInnis, *A Change of Heart*, BEEF, Feb. 28, 1998, available in 1998 WL 28549143 (quoting John Hay III, president of Rock Springs National Bank in Rock Springs, Wyoming).

157. Heywood Fleisig, *Secured Transactions: The Power of Collateral*, FIN. & DEV., June 1996, at 44.

158. Jim Nesbitt, *Environmentalists Battle with Ranchers, Bankers; Loans Tied to Grazing are Blasted*, NEW ORLEANS TIMES—PICAYUNE, Nov. 5, 1995, at A16.

be forced to liquidate their herds. Increased liquidation of livestock would cause the market price for livestock to drop.¹⁵⁹ Ranchers who graze livestock on private land and feedlot operators would face these lower prices when taking their livestock to market. Thus, even the ranchers not using public land would face lower rates of return. Because, “[o]n average, ranchers make only a two percent return on their operations,”¹⁶⁰ price fluctuations are particularly hazardous to the livestock industry.

Ranchers would not be the only ones hurt by devaluation of the grazing permit. Lenders that have already made loans secured by grazing permits would be injured if the value of the grazing permits fell below the outstanding loan balance.¹⁶¹ While the purpose of the TGA and other grazing legislation was not to protect lenders, Congress did not want lenders holding grazing permits to be subjected to unnecessary risk.¹⁶² This is evidenced by the TGA’s statement that

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 such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan.¹⁶³

Secretary Babbitt said that change from grazing privileges to permitted use is inconsequential because, “[i]n the absence of a major change in the overall situation and where [land use plan] objectives are being met, changes in permitted use through BLM initiative

159. See Perri Knize, *Winning the War for the West*, ATLANTIC MONTHLY, July 1999, at 54.

160. *Id.* at 55.

161. See Taugher, *supra* note 153. This fact has not been lost on farm credit lenders. They have filed an amicus brief in this case. See Brief of Amici Curiae Farm Credit Institutions in support of Petitioners, Public Lands Council v. Babbitt (filed Dec. 3, 1999) (No. 98-1991).

162. Congress has directed lenders to engage in lending to the ranching industry. Lenders in the Farm Credit System (an independent agency of the federal government) are required to “improv[e] the income and well-being of . . . ranchers by furnishing sound, adequate, and constructive credit.” 12 U.S.C. § 2001(a) (1994). Privately owned community banks “have [a] continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.” *Id.* § 2901. For banks in rural communities where ranching plays a significant economic role, this includes lending to ranchers. It is unfair to penalize lenders who have lent to ranchers in compliance with these congressional mandates by reducing the value of the assets held as security.

163. 43 U.S.C § 315(b) (1994).

are unlikely. This provides a high level of security, stability and predictability from year to year.”¹⁶⁴ The Secretary continues:

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.¹⁶⁵

The Secretary contends that “[t]he change is merely a clarification of terminology.”¹⁶⁶ If, however, the change were simply semantic, why would Secretary Babbitt go to the trouble of changing from grazing preference to permitted use in the first place? And why has the Secretary gone to so much effort to defend the permitted use rule in court? Given other Interior regulations and policies implemented during Secretary Babbitt’s tenure,¹⁶⁷ it is likely, regardless of what the Secretary says, that the changes are for more than “clarification.”

Even groups opposed to grazing on public lands have recognized that the stability of the ranching industry is dependant upon ranchers’ ability to use grazing permits as collateral. In June 1999, Forest Guardians, a conservation group, filed suit seeking to “end the practice of ranchers using public land grazing permits as collateral for bank loans.”¹⁶⁸ In discussing the attempt to tighten lending to ranchers, Forest Guardians’ John Horning admitted, with an interesting choice of words, “*It’s another way to destabilize the livestock industry, frankly.*”¹⁶⁹

Regardless of the Secretary’s motive, the fact remains that the Department of the Interior does not lend to ranchers. Although the Secretary may intend to provide for stability, it is ultimately the lenders that calculate risk and determine whether to lend to ranchers.

164. Administration of Livestock Grazing on Public Rangelands, 60 Fed. Reg. 9894, 9922-23 (1995) (to be codified at 43 C.F.R. pt. 4).

165. *Id.* at 9928.

166. *Id.* at 9922.

167. See *supra* notes 65-78 and accompanying text.

168. Mike Taugher, *Bank Backs Graze-Permit Collateral*, ALBUQUERQUE J., Oct. 28, 1999, at 1. See *Forest Guardians v. United States Forest Service*, No. CIV-99-615 LCS/KBM (D.N.M. filed June 2, 1999).

169. Taugher, *supra* note 153 (emphasis added).

Even if the Secretary enforced the permitted use rule in exactly the same way as the pre-1995 regulations, ranchers would still suffer the effect of uncertainty. The Secretary's opinion on the stability of grazing permits, especially in the absence of formal regulations requiring stability, matters less to ranchers who want to borrow than the opinions of potential lenders.

This is not to suggest that the stability of the livestock industry must be pursued with complete disregard to the condition of the rangeland. It is true that both interests must be balanced, but they must be balanced in such a manner as to allow stability in the livestock industry while maintaining an acceptable quality of rangeland. There are numerous ways that the Secretary could accomplish this goal.¹⁷⁰ Eliminating grazing preferences in favor of permitted use is not one of them.

V. CONCLUSION

The Supreme Court was mistaken in holding that the 1995 regulations were consistent with the TGA for two reasons. First, the TGA requires that recognized and acknowledged grazing privileges should be safeguarded. The adjudication process recognized and acknowledged the grazing privileges by determining the number of AUMs necessary for a landowner to make proper use of his private property. The permitted use rule does not safeguard grazing privileges because it ignores the prior adjudication and allows the maximum number of AUMs to be set by land use plans. Second, a primary purpose of the TGA is to stabilize the livestock industry. By changing from a system of "grazing preferences" to "permitted use," the regulations move from a regulatory scheme where ranchers and lenders know what to expect to a scheme where there can be no reasonable expectations. The lack of certainty will destabilize the livestock industry by making it difficult for ranchers to get credit. Although some consideration must be given to balancing economic interests and environmental

170. For example, pre-1995 regulations balanced environmental and grazing interests. The BLM conceded: "Rangeland conditions have improved on many upland areas since the 1930s." BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR, RANGELAND REFORM '94 FINAL ENVIRONMENTAL IMPACT STATEMENT 73 (1994).

concerns, the Secretary, the BLM, and the courts should not have ignored Congress's mandate to stabilize the livestock industry.

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