Public Lands Council v. Babbitt: Tenth Circuit Decides that the Taylor Grazing Act "Breathes Discretion at Every Pore"

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Public Lands Council v. Babbitt: Tenth Circuit Decides that the Taylor Grazing Act "Breathes Discretion at Every Pore"*

I. INTRODUCTION

In *Public Lands Council v. Babbitt*,[1] the United States Court of Appeals for the Tenth Circuit reversed in part and affirmed in part the holding of the United States District Court for the District of Wyoming in *Public Lands Council v. United States Department of Interior*.[2] The Tenth Circuit held that three of four of the Secretary of the Interior's new regulations, held invalid by the District Court for the District of Wyoming, were indeed valid.[3] The Tenth Circuit affirmed the district court's findings that one of the new regulations was beyond the scope of the Secretary's authority.[4] In reversing most of the district court's holdings, the Tenth Circuit recognized the Secretary of the Interior's broad discretionary power under the Taylor Grazing Act and emphasized deference to the Secretary's decisions.[5]

II. THE CASE

The Secretary of the Interior promulgated new regulations in 1995 governing the administration of livestock grazing on the public lands managed by the Bureau of Land Management (BLM).[6] The Secretary promulgated these regulations under the Taylor Grazing Act of 1934[7] (TGA), the Federal Lands Policy and Management Act of 1976[8] (FLPMA), and the Public Rangelands Improvement Act of 1978[9] (PRIA).[10] The Public Lands Council (PLC), along with several other livestock industry groups, brought suit against the Secretary in the District Court for the District of Wyoming, challenging the facial validity of ten new regulations on the grounds that the Secretary had exceeded his statutory authority or lacked a reasoned basis for departing from the previous

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[1] 167 F.3d 1287 (10th Cir. 1999).

[2] 929 F. Supp. 1436 (D. Wyo. 1996).

[3] *See Public Lands Council*, 167 F.3d at 1289.

[4] *See id.*

[5] *See generally id.*

[6] *See id.* at 1289.

[7] 43 U.S.C. §§ 315–315r (1994).

[8] 43 U.S.C. §§ 1701–1784 (1994).

[9] 43 U.S.C. §§ 1901–1908 (1994).

[10] *See Public Lands Council*, 167 F.3d at 1289.

rules.[11] The district court held four of the challenged regulations invalid and enjoined their enforcement.[12] The four challenged regulations concerned:

> (1) the use of the terms "grazing preference" and "permitted use" to denote priorities and specify grazing use for purposes of issuing grazing permits (permitted use rule); (2) ownership of title to range improvements (range improvements rule); (3) the elimination of the requirement that applicants for permits must "be engaged in the livestock business" (qualifications rule); and (4) the issuance of permits for "conservation use" in addition to permits for the grazing of livestock (conservation use rule).[13]

The Secretary appealed the district court's decision and the Tenth Circuit reversed the district court's holding regarding "the permitted use rule, the range improvements rule, and the qualifications rule," holding them valid.[14] The Tenth Circuit then affirmed the district court's finding that the conservation use rule was invalid.[15]

A. Standard of Review

The Tenth Circuit reviewed the district court's decision de novo,[16] applying the two-part test for reviewing an agency action that the United States Supreme Court set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[17] Under *Chevron*, a court must look at whether Congress has spoken directly to the issue at hand.[18] If Congress' intent is clear, then the court and the agency must give effect to the unambiguously expressed intent of Congress and the court's inquiry is over.[19] If Congress has remained silent or is ambiguous concerning the particular issue, then the court looks to whether the agency's action is based on a permissible construction of the statute, and if so, the court must then find that the action is valid.[20] The court's standard of review was also governed by *United States v. Salerno*,[21] which set forth the test for a facial

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[11] *See id.* at 1292–93.
[12] *See id.* at 1290, 1293.
[13] *Id.* at 1289.
[14] *Id.*
[15] *See id.*
[16] *See id.* at 1293.
[17] 467 U.S. 837 (1984).
[18] *See Public Lands Council*, 167 F.3d at 1293.
[19] *See id.*
[20] *See id.* at 1294.
[21] 481 U.S. 739 (1987).

challenge to a statute or regulation.[22] In order to prevail on a facial challenge, PLC had to demonstrate that "no set of circumstances exists under which the [regulation] would be valid."[23]

B. Permitted Use Rule

PLC argued that the Secretary exceeded his statutory authority in promulgating the 1995 regulations when he changed the definition of "grazing preference" to mean "a priority position against others for purposes of permit renewal."[24] PLC also argued that the Secretary exceeded his statutory authority when he added the term "permitted use" to mean "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 expressed in [animal unit months]."[25] "[O]ne [animal unit month] represents the amount of forage necessary to sustain either one cow, one horse, five sheep, or five goats for one month."[26] The district court ruled that these changes ended the practice of "recognizing" grazing privileges, as was allegedly practiced under prior regulations, and eliminated the "right" to graze predictable numbers of stock that the TGA granted to original grazing permittees.[27] The district court also ruled that the Secretary was not "adequately safeguard[ing]" the prior grazing adjudications as required by the TGA.[28] In its analysis, the Tenth Circuit first discussed the history of the BLM's regulations governing issuance of grazing permits.[29] Afterwards, the court compared the governing statutes to the 1995 regulations[30] and concluded that the Secretary was authorized to issue the 1995 rules.[31]

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[22] *See Public Lands Council*, 167 F.3d at 1293.
[23] *Id.* (quoting Reno v. Flores, 507 U.S. 292, 301 (1993) (alteration in original)) (citations omitted).
[24] *Id.* at 1292, 1297.
[25] 43 C.F.R. § 4100.0–5 (1995).
[26] *Public Lands Council*, 167 F.3d at 1291.
[27] *See id.* at 1293.
[28] *See id.*
[29] *See id.* at 1295–98.
[30] *See* 43 C.F.R. § 4100 (1995).
[31] *See Public Lands Council*, 167 F.3d at 1298–1302.

1. The Regulatory Scheme

After Congress passed the TGA, the Secretary began to establish grazing districts and issue grazing permits.[32] The number of qualifying applicants exceeded the amount of grazing permits available; thus, the Department of the Interior engaged in a detailed adjudication process whereby it gave priority to applicants as required by the TGA.[33] The Secretary gave priority to "applicants who owned land or water, i.e. base property, in or near a grazing district."[34] In addition, the Secretary gave priority to landowners "who were dependent on the public lands for grazing," who had used their base property for livestock operations in connection with the public grazing lands for five years prior to passage of the TGA, or whose land or water required the use of public rangelands for economic livestock operations.[35] The Secretary's initial regulations promulgated under the TGA were referred to as the Federal Range Code.[36]

Congress enacted the FLPMA to address the deterioration of public rangelands and to authorize the Secretary to institute a "land use planning process."[37] The Secretary was to create land use plans and manage the lands in accordance with the principles of "sustained yield" and "multiple use."[38] As a result of the FLPMA, the Secretary issued new regulations in 1978 that "effected significant changes in the process for issuing grazing permits."[39] The 1978 regulations still recognized the priority of livestock operators who currently held grazing permits, but emphasized that all grazing permits had to be issued in accordance with land use plans.[40] Permittees or lessees seeking renewal could only be given first priority if "the permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer."[41] The regulations further made "cancellation of grazing preferences mandatory when necessary to maintain compliance with land use plans."[42] The Secretary issued regulations in 1994 that "effectively soften[ed] the requirement that

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[32] *See id.* at 1295.
[33] *See id.*
[34] *Id.*
[35] *Id.*
[36] *See id.* n.2.
[37] *Id.* at 1295 (citing Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 843, 857 (E.D. Cal. 1985)).
[38] *See id.* at 1290.
[39] *Id.* at 1295 (citations omitted).
[40] *See id.*
[41] *Id.* at 1296 (quoting 43 C.F.R. § 4130.2(e)(3) (1978)).
[42] *Id.* (quoting 43 C.F.R. § 4110.3-2(b) (1978)).

grazing preferences must at all times be consistent with land use plans."[43] However, shortly thereafter, the Secretary's implementation of the 1995 regulations returned to the strict requirement that grazing permits be subject to terms and conditions that conform to land use plans.[44]

2. The Controlling Statutes

The Tenth Circuit then assessed whether the permitted use rule was in accordance with the TGA and the FLPMA, given the history that produced the permitted use rule.[45] The TGA states that "grazing permits shall be [issued] for a period of ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior . . . [and that] grazing privileges recognized and acknowledged shall be adequately safeguarded."[46] The Tenth Circuit held that the TGA did not preclude the Secretary from issuing the permitted use rule, which simply states that "[p]ermitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases."[47] The court said that nothing in the TGA makes any references to the prior grazing adjudications, other than granting them a mere preference that is given in the Secretary's discretion: "The TGA gives no hint, much less the unambiguous direction required by *Chevron*, that the issuance of a grazing permit . . . requires permanent 'recognition' of the numbers of the stock authorized to graze in that permit."[48]

PLC argued that the purpose of the TGA was to promote stability on the grazing lands and that by disregarding the prior grazing adjudications, the Secretary was acting contrary to the TGA's mandate.[49] The Tenth Circuit responded, "[t]he Act clearly states that the need for stability must be balanced against the need to protect the rangeland."[50] The court lastly explained that the notion of maintaining grazing adjudications from the 1940s into perpetuity was contrary to the other provisions of the Act.[51] The "statute mandates that the Secretary shall specify the numbers, stock, and season of use from time to time," and another provision, which states that permit periods are not to exceed ten

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[43] *Id.*
[44] *See id.* at 1297.
[45] *See id.* at 1298–99.
[46] *Id.* at 1298 (quoting 43 U.S.C. § 315(b) (1994)).
[47] *Id.*
[48] *Id.* at 1299.
[49] *See id.* at 1298.
[50] *Id. See also* 43 U.S.C. § 315(a) (1994).
[51] *See Public Lands Council*, 167 F.3d 1299.

years, refutes the idea of permanent grazing permit preferences.[52] Thus, the court said "[t]he mandatory renewal process contemplates that the substance of the grazing privilege, as opposed to the preference right of renewal, is to be periodically adjusted in accordance with the condition of the rangeland."[53]

In addition, the FLPMA mandates "that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit."[54] The Tenth Circuit decided that the FLPMA, too, makes no reference to prior grazing adjudications and is, therefore, not in conflict with the permitted use rule.[55] The court said that since the permitted use rule provides that grazing permits shall specify numbers of stock and seasons of use, it is "easily within the scope of the Secretary's authority under the FLPMA."[56]

The Tenth Circuit lastly answered PLC's argument that the Secretary had failed to "adequately safeguard" recognized grazing privileges by noting that the Secretary provides the same procedural safeguards under the 1995 regulations that was provided under previous regulations.[57] Next, the court held that PLC's claim that the permitted use rule would undermine the stability of the livestock industry was speculative and "not ripe for consideration on a facial challenge."[58] Under *Salerno*, a facial challenge required PLC to demonstrate that no circumstances existed under which the permitted use rule could be valid, and, here, PLC could not make such an allegation until the rule was actually applied.[59]

C. Title to Permanent Range Improvements

PLC next argued that the range improvements rule was invalid because the TGA requires that range improvements be owned by the permittees who construct the improvement:

> No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.[60]

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[52] *Id.* (citing, in part, 43 U.S.C. § 315(b) (1994)).
[53] *Id.* (emphasis omitted).
[54] *Id.* at 1301 n.9.
[55] *See id.* at 1301.
[56] *Id.*
[57] *See id.* (citing, in part, 43 U.S.C. § 315(b) (1994)).
[58] *Id.* at 1302.
[59] *See id.* at 1301.
[60] *Id.* at 1303 (quoting 43 U.S.C. § 315(c) (1994)) (emphasis omitted).

The dissent argued that the TGA's use of the phrase "such improvements constructed and owned by a prior occupant" unambiguously communicates "that when a permittee constructs an authorized improvement, he or she holds title to that improvement."[61] The majority, however, disagreed and reasoned that under the second step of *Chevron*, the Secretary could still promulgate the range improvements rule within a "permissible construction" of the TGA.[62] The Tenth Circuit stated that "[w]hile the language at issue may allow the dissent's reading of it, the entire payment provision can also equally be viewed as purely conditional, operative only if the Secretary allows both construction and ownership."[63]

The Tenth Circuit also found that the FLPMA indicates that a permittee who constructs land improvements does not necessarily own them.[64] Congress states in section 1752(g) that "[w]henever a permit or lease for grazing domestic livestock is canceled . . . the permittee . . . shall receive from the United States a reasonable compensation . . . of his *interest in* authorized permanent improvements placed or constructed by the permittee."[65] The Tenth Circuit held that by using the term "interest in" rather than "ownership of" permanent improvements in the FLPMA, Congress must not have strictly required that permittees who constructed improvements on the grazing lands actually hold title to those improvements.[66] Lastly, the court found that because the permanent improvements rule is based on a permissible construction of the TGA, the court must defer to the Secretary's rule.[67] Further, the Secretary had not failed to provide a reasoned basis for departing from the previous regulations.[68] The government asserted that "management of permanent improvements according to FLPMA's multiple use and sustained-yield mandate would be simplified if BLM could avoid having to negotiate with permittees as titleholders to permanent improvements."[69]

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[61] *Id.* at 1317.
[62] *See id.* at 1303.
[63] *Id.* at 1304.
[64] *See id.*
[65] *Id.* (quoting 43 U.S.C. § 1752(g) (1994)) (emphasis added).
[66] *See id.*
[67] *See id.* at 1305.
[68] *See id.*
[69] *Id.*

D. The Qualifications Rule

PLC argued that the Secretary acted contrary to the TGA by eliminating the requirement that "in order to qualify for a grazing permit, an applicant had to 'be engaged in the livestock business.'"[70] However, the Tenth Circuit found that the TGA clearly states that "bona fide settlers, residents, and other stock owners" may apply for grazing permits and that PLC's argument failed in the face of such clear language.[71] The court held that it must give effect to the plain meaning of the words chosen by Congress.[72] Thus, the court did not need to see if the Secretary's departure from the previous regulations were supported by a reasoned basis as the agency was "simply giving effect to the unambiguously expressed intent of Congress."[73]

E. The Conservation Use Rule

Finally, PLC argued that the Secretary exceeded his statutory authority by adding "conservation use" as a permissible use of a grazing permit.[74] The court agreed with PLC and the district court in this instance, holding that under the Chevron analysis, Congress has spoken directly to this issue.[75] The plain language of the TGA provides that the Secretary may issue "permits to graze livestock on . . . grazing districts."[76] The FLPMA's and PRIA's language defines "grazing permit" as "any document authorizing use of public land . . . for the purpose of grazing domestic livestock."[77] The Tenth Circuit, therefore, concluded that Congress specifically intended grazing permits to be used only for grazing.[78] The court stated, "[t]he Secretary's assertion that 'grazing permits' for use of land in 'grazing districts' need not involve an intent to graze is simply untenable."[79]

The Secretary argued that resting the grazing lands is a perfectly acceptable practice on the rangelands and furthers the underlying purposes of the TGA by helping to preserve the rangelands from "destruction or unnecessary injury."[80] The conservation use rule would also further the FLPMA's purposes

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[70] *Id.* (quoting 43 C.F.R. § 4110.1 (1995)).
[71] *Id.* at 1306 (quoting 43 U.S.C. § 315(b) (1994)).
[72] *See id.* (citing Bartlett v. Martin Marietta Operations Support, 38 F.3d 514, 518, (10th Cir. 1994)).
[73] *Id.* (quoting *Chevron*, 467 U.S. at 843).
[74] *See id.* at 1292.
[75] *See id.* at 1307.
[76] *Id.* (quoting 43 U.S.C. § 315(b) (1994)).
[77] *Id.* at 1307-08 (quoting 43 U.S.C. §§ 1702(p), 1902(c) (1994)).
[78] *See id.*
[79] *Id.* at 1308.
[80] *Id.* at 1307 (citing 43 U.S.C. § 315(a)).

by helping to achieve the goals of multiple-use, which require the Secretary to consider the long term needs of the rangelands while managing the lands according to numerous purposes without inflicting damage.[81] However, the court responded that the TGA clearly states that "the primary purpose of a permit must be grazing: . . . [I]t is true that the TGA, FLPMA, and PRIA, [sic] give the Secretary very broad authority to manage the public lands. . . . Permissible ends such as conservation, however, do not justify unauthorized means."[82]

III. BACKGROUND

In *Chevron*, the United States Supreme Court issued a two-part test for reviewing the validity of an agency's action, drawing its ruling from a long history of precedent.[83] The Supreme Court explained its deferential policy in *Chevron* by stating that the agency's construction need not be the only permissible construction of the statute, or even a construction that the court would have reached if the court itself had interpreted the statute.[84] The Court explained that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency," and, thus, the Court will give an agency's determination legislative and controlling weight.[85]

In *Chevron*, the Supreme Court ruled that the Environmental Protection Agency's (EPA) regulations concerning "nonattainment" areas were permissible under Congress's Clean Air Act Amendment of 1977.[86] The Court accorded EPA deference, as Congress had not expressly intended that the agency use the term "stationary source" in only one manner.[87] The Court decided that EPA's interpretation of the statute was reasonable, given the technical nature of the inquiry and the policy decisions that the agency had to assess.[88] The Court concluded that "when a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[89]

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[81] *See id.*

[82] *Id.* at 1308.

[83] *See Chevron*, 467 U.S. at 842–43.

[84] *See id.* at 843 n.11.

[85] *Id.* at 843–44.

[86] *See id.* at 866. *See also* Clean Air Act, 91 Stat. 685 (1977) (codified, as amended, at 42 U.S.C. §§ 7401–7671q (1994)).

[87] *See Chevron*, 467 U.S. at 865.

[88] *See id.*

[89] *Id.* at 866.

In a case similar to *Public Lands Council*, the Nevada District Court in *Natural Resources Defense Council v. Hodel*[90] also emphasized a policy of deference. The district court acknowledged that the plaintiffs' complaints may have had factual merit in suggesting bad management or environmental insensitivity by the BLM, but ultimately did not give rise to a need for judicial intervention.[91] The judge lamented his inability "to adopt one theory of range management over another" as well as his "powerless[ness] to substitute [his] judgment for that of the BLM in these matters."[92] The plaintiffs in *Hodel* argued that the FLPMA and PRIA provide standards under which the defendants' actions may be deemed "arbitrary, capricious, or contrary to the law."[93] The court responded that the provisions held general terms and clauses that "can hardly be considered concrete limits upon agency discretion. Rather, it is language which 'breathes discretion at every pore.'"[94]

In addition, in *McLean v. Bureau of Land Management*,[95] the appellants protested when the Area Manager refused to grant the appellants forage allotments.[96] The appellants argued that the Area Manager's allocation of surplus forage violated both the Federal Range Code and the terms of the 1970 Allotment Agreement.[97] The administrative court held that the BLM's 1978 regulations made clear that "the entire basis upon which grazing preferences were determined was drastically altered."[98] The court further held that the precedential value of departmental adjudications rendered prior to the 1978 regulations was greatly reduced and "future adjudications of grazing use would be based on criteria vastly different from those provided in the Federal Range Code."[99]

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[90] 624 F. Supp. 1045 (D. Nev. 1985).
[91] *See id.* at 1047.
[92] *Id.* at 1048.
[93] *Id.* at 1058.
[94] *Id.* (quoting Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979)).
[95] 133 IBLA 225 (1995).
[96] *See id.* at 226
[97] *See id.* at 230.
[98] *Id.* at 233.
[99] *Id.* at 233–35.

IV. ANALYSIS

The Tenth Circuit strictly followed the *Chevron* test in analyzing the validity of the Secretary's regulations, deferring to the Secretary whenever possible. In analyzing the permitted use rule, the court decided that the rule "comports with the authority granted the Secretary of the Interior under the TGA and FLPMA and demands our deference under Chevron."[100] The court seemed to purport that PLC's contention that grazing permits should accord with the original grazing adjudications was in conflict with the statutes: "[p]erpetuating grazing decisions handed down in the 1940s may well be inconsistent with the ongoing statutory command that the Secretary protect the federal lands."[101] The court stated that the dissent's and PLC's suggestion that Congress meant the original grazing decisions should become "ongoing 'grazing preference[s]'" conflicted with Congress' mandate that the Secretary should grant renewal of grazing permits according to the changing state of the rangelands.[102] The court also suggested that the permitted use rule was directly in accord with the FLPMA by providing "that grazing permits shall specify the numbers of stock and seasons of use according to [the dictates of applicable] land use plans."[103] With the FLPMA, Congress first required "that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit."[104] Thus, the permitted use rule was certainly in accord with the law, the TGA, and the FLPMA, and the court must give deference to the Secretary.

In regard to the range improvements rule, the court stated that "nothing in the statutory language directs where such [permanent range improvements] title must lie."[105] The court spoke of the explicit discretionary language found in the TGA by which the Secretary may do "any and all things necessary" to accomplish the purposes of the Act.[106] The TGA also uses plain language to give the Secretary "discretionary authority to decide whether to allow necessary range improvements."[107] Conversely, the dissent found that the TGA unambiguously requires that title to structural improvements constructed by a permittee must be owned by the permittee.[108] However, the majority proposed other interpretations

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[100] *Public Lands Council*, 167 F.3d at 1294.
[101] *Id.* at 1299 (citations omitted).
[102] *Id.*
[103] *Id.* at 1301.
[104] *Id.* at 1301 n.9.
[105] *Id.* at 1302.
[106] *Id.* at 1302–03 (citing 43 U.S.C § 315(a) (1994)).
[107] *Id.* at 1303.
[108] *See id.* at 1317.

of the statute that would also allow the government to hold title to permanent improvements: "[the] . . . provision can also equally be viewed as . . . operative only if the Secretary allows both construction and ownership."[109] The court further held that "[t]he language . . . is not rendered meaningless . . . because the provision will still apply to temporary improvements."[110] The court stated that "[t]he dissent's construction is, quite simply, not the only one the language supports,"[111] implying that the dissent did not consider the second step in *Chevron*.

In applying *Chevron* to the qualifications rule, the court decided that the regulation easily passed the first part of the test because Congress' intent was clear that the Secretary could grant permits to persons other than those engaged in the livestock business.[112] The court stated that the TGA did confer preference to issuance of grazing permits to "landowners engaged in the livestock business."[113] However, this ruling does not support PLC's argument that the Secretary can issue grazing permits to only those involved in the livestock business because "landowners engaged in the livestock business are not even the only group entitled to this preferential treatment."[114] The court then decided that it need not look at the legislative history in order to ascertain Congress' intent because Congress made its intent clear with the statutory language.[115]

The court applied a similar analysis to the conservation use rule and concluded that "Congress has spoken directly to this precise question and answered it in the negative."[116] As with the qualifications rule, the court found it did not need to engage in the second step of the *Chevron* analysis. The conservation rule was facially invalid because "there is no set of circumstances under which the Secretary could issue such a permit."[117]

Although *Hodel* is not controlling precedent, it illustrates the deference that must be conferred to the Secretary within the rangeland context. The Tenth Circuit cited *Hodel* in its permitted use analysis and followed *Hodel*'s idea that "the courts are not at liberty to break the tie choosing one theory of range management as superior to another"[118] in deferring to the Secretary's decisions to issue the challenged rules. The court also followed *McLean* in its analysis of

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[109] *Id.* at 1304.
[110] *Id.*
[111] *Id.*
[112] *See id.* at 1306.
[113] *Id.* (citing 43 U.S.C. § 3156 (1994)).
[114] *Id.*
[115] *See id.*
[116] *Id.* at 1307.
[117] *Id.* at 1308 (citations omitted).
[118] *Hodel*, 624 F. Supp. at 1058 (quoting *Perkins*, 608 F.2d at 807).

the permitted use rule, striking down the concept that grazing permits issued under the Federal Range Code must exist in perpetuity.[119] In all, the Tenth Circuit reinforced the principle that grazing permit preferences will no longer have as much weight as preferences did in the past.

V. CONCLUSION

The Tenth Circuit in *Public Lands Council v. Babbitt* reversed the district court's ruling that three of the Secretary of the Interior's 1995 regulations concerning grazing permits were invalid. It found that the Secretary had acted within his authority in issuing the permitted use, range improvements, and qualifications rules and, as such, deserved complete deference. However, the court found that Congress had specifically spoken concerning the conservation use rule, and, therefore, the court was obligated to affirm the district court and find the rule invalid.

The court recognized that the judiciary should defer to an agency's decisions concerning how the agency interprets statutory commands. A court is not to substitute its judgment for the policies and decisions effected by an agency. Also, the *Babbitt* court further reduced the importance of grazing permit preference "rights" under the TGA. Because the TGA authorizes the Secretary's discretion in issuing grazing permits, the Secretary's authority in making such decisions has been greatly increased by the Tenth Circuit's reading of both *Chevron* and the TGA.

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[119] *See McLean*, 133 IBLA at 233.