

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

ORIGINAL

CAPTION: PUBLIC LANDS COUNCIL, ET AL., Petitioners v.
BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET
AL.

CASE NO: 98-1991 C.1

PLACE: Washington, D.C.

DATE: Wednesday, March 1, 2000

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PUBLIC LANDS COUNCIL, ET AL., :

4 Petitioners :

5 v. : No. 98-1991

6 BRUCE BABBITT, SECRETARY OF :

7 THE INTERIOR, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 1, 2000

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:10 a.m.

14 APPEARANCES:

15 TIMOTHY S. BISHOP, ESQ., Chicago, Illinois; on behalf of
16 the Petitioners.

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondents.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-1991, Public Lands Council v. Bruce
5 Babbitt.

6 Mr. Bishop.

7 ORAL ARGUMENT OF TIMOTHY S. BISHOP

8 ON BEHALF OF THE PETITIONERS

9 MR. BISHOP: Mr. Chief Justice, and may it
10 please the Court:

11 The preference amount of forage adjudicated
12 under the Taylor Grazing Act as necessary to the proper
13 use of a permittee's base property must be adequately
14 safeguarded by the Secretary. That's our contention.

15 QUESTION: Mr. Bishop, I think you've described,
16 and I think perhaps your opponents have described, the
17 proceeding you've brought here as a, quote, facial attack,
18 end quote, on the Secretary's regulations that are
19 challenged, and your opponents say, well, you -- except in
20 a First Amendment case you can't bring a facial challenge,
21 and are you using the term, facial challenge, in the same
22 sense we're use it in the First Amendment jurisprudence?
23 That is, that you can challenge a law even though it
24 doesn't affect you adversely if it affects someone else
25 adversely?

1 MR. BISHOP: If, in all applications, the
2 regulation is unlawful because it is not authorized by the
3 statute, then it is facially invalid, and our position
4 is --

5 QUESTION: And it affects you adversely
6 automatically.

7 MR. BISHOP: And it affects you adversely
8 automatically, that's right.

9 Our position is that we are entitled to the
10 protection, the adequate safeguarding of adjudicated
11 forage, and that by eliminating adjudicated forage from
12 the regulations it's no longer possible for the Secretary
13 to safeguard it.

14 QUESTION: But --

15 QUESTION: In other words --

16 QUESTION: -- counsel, I never saw the word
17 adjudicated forage used in any regulation. It seems to be
18 a term that you constantly use, but tell me what
19 regulation refers to adjudicated forage.

20 MR. BISHOP: It doesn't appear in the statute.
21 Let me start with the statute. It doesn't appear in the
22 statute in terms, but the concept is clearly in the Taylor
23 Grazing Act.

24 Congress recognized that in designating grazing
25 districts they would be oversubscribed. It contemplated a

1 process in which the Secretary would determine who would
2 be able to graze in those districts, and it set out some
3 parameters, and the most important one, . in section 3 of
4 the grazing act, says preference shall be given in the
5 issuance of grazing permits to persons who have base
6 property --

7 QUESTION: Well, where do we --

8 MR. BISHOP: Here's the --

9 QUESTION: Mr. Bishop, where do we find section
10 3?

11 MR. BISHOP: In the appendix to the petition,
12 Your Honor, on page 103 to 104a. The language I'm reading
13 from is 104 -- is --

14 QUESTION: Thank you, and whereabouts on page
15 104?

16 MR. BISHOP: Preference shall be given in the
17 issuance of grazing permits to people with base property
18 as may be necessary to permit the proper use of that base
19 property. There is no plausible way to read the as
20 necessary clause except as a reference to an amount of
21 forage, and the way that this worked was that the base
22 ranch could support a certain number of livestock for part
23 of the year.

24 QUESTION: Oh, yes.

25 MR. BISHOP: To enable that property to be used,

1 it was necessary for the rancher to have access to enough
2 forage on the range to support the livestock for the rest
3 of the year --

4 QUESTION: You --

5 MR. BISHOP: -- so our position is that the --
6 I'm sorry, Justice Scalia.

7 QUESTION: What I don't understand is, you
8 acknowledge that it's within the power of the Secretary to
9 reduce you below that.

10 MR. BISHOP: Oh, absolutely, Justice Scalia.

11 QUESTION: So then I don't understand what
12 you're asking for.

13 MR. BISHOP: It --

14 QUESTION: What is it the Secretary deprived you
15 of that you want to be given? You don't assert any right
16 to this --

17 MR. BISHOP: We do assert rights to the
18 adjudicated amount, preference amount of forage. Now, our
19 argument is not about freezing actual grazing use at the
20 levels that the Secretary adjudicated after 1934, but
21 there are things that the preference amount does for us,
22 and just let me mention those.

23 QUESTION: What does it do?

24 MR. BISHOP: The -- first of all, the preference
25 amount staked the permittee's claim to more forage if it

1 became available. Now, we have no dispute that the active
2 use can be reduced below the preference amount. In fact,
3 when the preference was first adjudicated the active use
4 was often below the preference amount, right from the
5 beginning.

6 We have no dispute that the preference itself
7 can be readjudicated, and we have no dispute that the
8 grazing district can be readjudicated and the use given
9 over to something else, but as long as the land is
10 designated as a grazing district, then my preference gives
11 me a claim to more forage if it becomes available, so
12 under the Range Code 4110.3-1, for example, which is at
13 page 9a to 10a of the addendum to the blue brief,
14 permanent --

15 QUESTION: Page what? Page what, Mr. Bishop?

16 MR. BISHOP: 9a to 10a of the blue brief.

17 QUESTION: Thank you.

18 MR. BISHOP: And this is reflected in earlier
19 versions of the Range Code as well in different forms, but
20 permanent increases in forage were first allocated to
21 existing permittees up to the preference amount, and if
22 you look back to the 1942 code, the language is that
23 increases in carrying capacity will be participated in by
24 existing permittees to the extent of their respective
25 qualifications, but that idea has always been in there.

1 Second, and these are all connected, the
2 preference amount --

3 QUESTION: Where was that language that you just
4 quoted, additions to -- I mean, I'm looking on 9a. I
5 don't see it. I want to underline significant passages.

6 QUESTION: What section are you reading from?

7 MR. BISHOP: Additional -- the additional --

8 QUESTION: What section are you reading from?

9 MR. BISHOP: This is 410.3-1(b), additional
10 forage available on a sustained yield basis shall be first
11 apportioned in satisfaction of grazing preferences.

12 QUESTION: Well, if I understand what you're
13 saying, you're saying, well, we had claims to these
14 things, and you -- I accept that. You did have a claim,
15 and you had a procedure to try to perfect that claim, but
16 there is no member of your association that I understand,
17 as I understand it, who at this time can say, I had a ripe
18 claim that was cut off. They're simply saying that if the
19 old regs had been left in place, I might have had a claim
20 to pursue if further forage had -- land had become
21 available, and that claim as such is gone, as I understand
22 it.

23 But I do not understand that any particular
24 member of your association can show right now that he is
25 going to be worse off in the sense of having left forage

1 right at any given time under the new regulation as
2 distinct from the old regulation. Am I wrong in that?

3 MR. BISHOP: Well, it's a facial challenge, Your
4 Honor. You're right in the sense that we don't have in
5 this record a history of the application of the 1995
6 regulations and, in fact, while the litigation has been
7 pending, and particularly because we won in the district
8 court, the agency really hasn't been doing anything under
9 the 1995 regulations.

10 QUESTION: But I thought your argument was that
11 everyone in your association is worse off --

12 MR. BISHOP: Everyone is worse off.

13 QUESTION: -- and that I don't see.

14 MR. BISHOP: Everyone is worse off because prior
15 to 1995 we had a -- we had, in our permits -- the
16 preference amount was listed in the permit. Every single
17 permit issued from 1934 until 1995 listed the adjudicated
18 amount of forage, labeled --

19 QUESTION: No, I -- I don't mean to cut you off,
20 but I think you have made that clear. But so far as the
21 forage which you are entitled to enjoy at any given
22 moment, now or a year from now, as I understand it, you
23 can't say that any member of your association is going to
24 be worse off a year from now under the new regs than he
25 would have been under the old ones, is that correct?

1 MR. BISHOP: Well, we can say that we have no --
2 we will have no entitlement to having our --

3 QUESTION: But that wasn't my question. My
4 question is, what forage are you out there actually
5 exercising, or being entitled to the benefit of, and as I
6 understand it, you can't say that you will be worse off a
7 year from now under the new regs than you were a year ago,
8 or whatever, in -- under the old ones.

9 MR. BISHOP: Well, we can't say that --

10 QUESTION: No, okay.

11 MR. BISHOP: -- and that's not the nature of our
12 challenge. The nature of our challenge is a facial
13 challenge to the regulation.

14 QUESTION: I thought you were a lot worse off if
15 you can't get lending.

16 MR. BISHOP: We -- well, we are --

17 QUESTION: We have a whole brief here saying,
18 there used to be a system, and the system was, you have
19 1,000 grazing acres, and what you do is, you give you 500
20 cows, him 300 cows, her 200 cows, and that's it, 500, 300,
21 200. Now, we have every right in the world to cut it to
22 500, but if we do, it's you 250, you 150, you 100, so you
23 keep the same proportion. Is that right?

24 MR. BISHOP: Yes.

25 QUESTION: That's what it used to be.

1 MR. BISHOP: Lenders --

2 QUESTION: Now they've changed it.

3 MR. BISHOP: Right.

4 QUESTION: Am I right?

5 MR. BISHOP: Lenders have taken into account the
6 preference amount of forage, and they've taken --

7 QUESTION: No, am I right as to how I described
8 it?

9 QUESTION: Try to answer the question.

10 MR. BISHOP: That's right.

11 QUESTION: Okay. Then you're saying that the
12 change from the new to the old one means lenders won't
13 lend you as much money.

14 MR. BISHOP: Right.

15 QUESTION: Okay. Now, my next question is this,
16 and I have three here that were related. I've gotten two
17 out. The third one is, I would have thought you might
18 have a great claim on the ground that an agency has to
19 stick to the system that it has unless it explains why
20 it's changed, all right, and I looked for the
21 explanation -- a little hard for me to find it -- but I
22 take it you have not made that claim in this Court.

23 Rather, you are arguing that the statute forbids
24 them to do it, and so it seems to me you've waived your
25 administrative law claim, you haven't raised it, and the

1 statutory claim I cannot imagine why if, on day 1, they
2 had adopted their new system, the statute would say you
3 can't.

4 MR. BISHOP: Justice Breyer, I hope we haven't
5 waived the administrative law claim.

6 QUESTION: I don't see anywhere -- you're
7 talking -- I looked at the question presented, and the
8 question is whether the Secretary of the Interior exceeded
9 his authority under the Taylor Grazing Act, the Federal
10 Land Policy and Management Act, and the Public Rangelands
11 Improvement Act --

12 MR. BISHOP: By the end of the --

13 QUESTION: -- when he promulgated the '94
14 regulations. That sounds to me like the issue you
15 raise -- and that's the one you state. You talk about it
16 being on its face, et cetera -- is, the statute prohibits
17 the Secretary from issuing regulation set 2, and on that
18 one --

19 MR. BISHOP: This is a --

20 QUESTION: -- I'm puzzled. On the first one --
21 that's what I'd like you to address.

22 MR. BISHOP: This is a Chevron stage 1
23 challenge, Your Honor.

24 QUESTION: I didn't see Chevron -- I didn't see
25 the relevant cases.

1 MR. BISHOP: Well, we do cite Chevron in the
2 brief. It's a Chevron stage 1 analysis.

3 QUESTION: Mr. Bishop, I think it's not Chevron
4 that Justice Breyer is raising. It's the State Farm
5 question --

6 QUESTION: Right.

7 QUESTION: -- which you don't raise until you
8 get to this Court. I don't know -- you didn't make this a
9 State Farm case at all below.

10 MR. BISHOP: Well, we have always argued,
11 Justice Ginsburg, that the Secretary lacks the authority
12 under plain statutory language, and also because there has
13 been a consistent administrative interpretation for 60
14 years, and because --

15 QUESTION: Did you argue that this State -- that
16 State Farm controls that the Secretary didn't give an
17 adequate explanation of changing from one system to
18 another?

19 MR. BISHOP: We did argue that below. In our
20 brief in this case, we decided that the argument to press
21 is the, what we believe is the strongest argument, that
22 there is no conceivable basis in the statute --

23 QUESTION: So you've left that other one out
24 altogether.

25 MR. BISHOP: We -- well, we have cite -- in what

1 I would hope would preserve that issue, if someone is
2 inclined to go that way, is that at the end of our brief
3 we did say that on the Chevron stage 2 we don't think that
4 there's an adequate justification.

5 QUESTION: I don't see what Chevron stage 2 has
6 to do with it. I see what State Farm has to do with it.
7 That's the agency has to provide a good reason for
8 changing its mind in an important matter, but I don't see
9 what Chevron stage 2 has to do with it.

10 MR. BISHOP: Well, what we have -- I mean,
11 the -- our argument, Your Honor, is that the statute
12 requires this, the Secretary's been doing it for a long
13 time, that Congress revisited this area without changing
14 the Secretary's regulations, that Congress in 1993
15 specifically refused to enact these regulations when the
16 affirmative defense asked them to, and that there has been
17 no -- and certainly there has been no explanation of -- as
18 to why the Secretary --

19 QUESTION: Mr. Bishop, may --

20 MR. BISHOP: -- has changed his mind after all
21 of that.

22 QUESTION: I'm very puzzled by your, Congress
23 didn't enact specifically, when you are faced with
24 something that -- with the bill, the grazing rights bill
25 that would have said specifically, these are rights that

1 you preserve, but Congress didn't enact that --

2 MR. BISHOP: Well --

3 QUESTION: -- and it seems to me that that --
4 what Congress didn't do in 1946 and 1953 is much more
5 relevant than what you're urging about a tack-on to an
6 appropriations bill.

7 MR. BISHOP: Well, now, Congress didn't need to
8 do that, because it had already provided in the Taylor
9 Grazing Act that adjudicated privileges that grazing
10 privileges, including this adjudicated amount of forage,
11 should be adequately safeguarded, and Congress was
12 concerned that that not ripen into a right to the land,
13 which is why the no right, title, or interest that the
14 Court addressed in Fuller is in there.

15 But Congress did, in saying that necessary,
16 adjudicated necessary amounts of forage should be
17 adequately safeguard, adequately safeguarded, intend that
18 the Secretary continue to recognize and provide protection
19 for those forage amounts. So --

20 QUESTION: But the amounts you conceded the
21 actual amounts you can use the Secretary not only can but
22 must -- doesn't it have the Secretary must adjust --

23 MR. BISHOP: The Secretary must adjust --

24 QUESTION: -- based on other conditions of the
25 land?

1 MR. BISHOP: The Secretary must adjust that, and
2 if I can just get back to Justice Scalia's initial
3 question, I'd just like to finish my list of what it is
4 that we think we do get from the preference.

5 I mean, first of all we get the claim to
6 additional permanent forage when it becomes available.
7 The preference amount has always been the baseline for
8 measuring suspended use, and the permit, every permit
9 preference, a line for preference, a line for suspended
10 use, a line for active use. The suspended amount is
11 listed, and that's the difference between active use and
12 the preference amount, and it becomes available under the
13 regulations to the permittee --

14 QUESTION: Does this claim --

15 MR. BISHOP: -- if the forage is increased.

16 QUESTION: Does this claim stand independently
17 of the adequately safeguard language in the statute?

18 MR. BISHOP: The -- these are -- I'm not sure I
19 understand the --

20 QUESTION: Well, part of your argument, as I
21 understand it, is that the statute requires the Secretary
22 to adequately safeguard --

23 MR. BISHOP: Right.

24 QUESTION: -- these preferences, and now you've
25 gone over all the things that you think a preference

1 conveys to your clients. Is that a separate point, or is
2 that just in --

3 MR. BISHOP: Well --

4 QUESTION: Wait till I finish my question, will
5 you.

6 Is that a separate point, or is it just
7 something that bears on the adequately safeguard?

8 MR. BISHOP: I think that those are ways in
9 which the Secretary has adequately safeguarded the
10 preference in the past.

11 Now, I'm not suggesting that all of those in
12 their detailed ways as set out in the regulations
13 necessary -- necessarily have to continue. I think that
14 adequately safeguarded doesn't have a determinate meaning,
15 but it clearly does mean that the Secretary must continue
16 to recognize and deal with the preference, so if I can
17 give one other example, the preference amount establishes
18 claims relative to the claims to forage of a permittee's
19 neighbors on the allotment and to new applicants, so it
20 prevents the BLM from shifting AUM's at will among
21 permittees and applicants.

22 In the McNeil v. Seaton case, which we cited in
23 our briefs as an example of that, where the Secretary
24 tried to give forage to a new applicant when there were
25 people with adjudicated privileges already on the range

1 who weren't raising up to the preference amount, and the
2 court said you can't do that.

3 QUESTION: But as I understand that, they
4 couldn't do that under the present regulation, either,
5 because they do say they protect their priority over other
6 rival applicants, don't they?

7 MR. BISHOP: Well, the --

8 QUESTION: Am I right about that?

9 MR. BISHOP: You're right, but -- you're right
10 in part, Justice Stevens. You're right that once the
11 permitted use is established, that there are restrictions
12 on how it can be changed. You are wrong in the sense that
13 there is no correlation between permitted use, which
14 refers only to the land use plan, forage as permitted by
15 the land use plan, and has no bearing whatsoever on the
16 adjudicated preference amounts that were previously
17 determined by the Secretary.

18 A land use plan, which is a -- permitted use now
19 is the land use allocated by the Secretary under a land
20 use plan. A land use plan operates at a high level of
21 generality. It does not allocate forage to specific
22 permittees, any more than the forest service land use plan
23 that was considered in Ohio Forestry Association permitted
24 the cutting down of trees. It's the BLM, operating under
25 the grazing regulations, that actually allocates forage to

1 individual permittees, and it's left a lot of leeway by
2 the land use plan.

3 Under the current rules, the permitted use rule
4 will allow the Secretary to set the permitted use
5 essentially in his discretion, without constraints.

6 QUESTION: Well, in a sense that's true already.
7 The Secretary has felt free to lower the number of cattle,
8 for instance, to be grazed on a particular piece of land
9 for some time.

10 MR. BISHOP: Are you talking about active,
11 active use, Justice O'Connor?

12 QUESTION: Yes.

13 MR. BISHOP: Through active use, that is true,
14 and we have no objection to that. The land use plans
15 clearly require that the -- that on an individualized
16 basis, in a site -- using a site-specific analysis, that
17 active use be varied according to the conditions.

18 Our claim is that the preference itself, the
19 preference amount that the Secretary has recognized for 60
20 years, which is always higher than the active use, and
21 which gives us certain claims, has to be recognized.

22 QUESTION: What claims would it give you? Give
23 me an example, a concrete example of how you would be
24 better off if you had this supplemental preference which
25 he didn't always give you in the past anyway?

1 MR. BISHOP: McNeil is an example. A new
2 applicant comes in --

3 QUESTION: Okay.

4 MR. BISHOP: -- and says, I want to -- I've got
5 a ranching operation. I'm just setting one up, bought
6 some land, setting up a ranching operation. I want to get
7 forage on the range here. That range is already fully
8 allocated by adjudication. The preference amounts are
9 established. No one is grazing up to their preference
10 amount. Everyone's active use is below the preference
11 amount.

12 The requirements that the preference amounts
13 establish a first choice, if you like, to obtain available
14 forage on the range means that you can't keep inviting
15 people in to reduce my active use to give it to somebody
16 else. You can't give it to my neighbor. You can't give
17 it to a new applicant.

18 If there is a suspended -- suspended use is
19 another example. Suspended use, the difference between
20 the preference amount and active use. The suspended use
21 is available, held available for the permittee to use if
22 conditions improve on the range and there is more forage.

23 QUESTION: How often is that reality, that the
24 active use gets boosted up?

25 MR. BISHOP: You know, I don't have percentage

1 figures, and I don't think we or the Government have any,
2 but range improvements, for example, if you read the PRIA,
3 the Public Rangelands Improvement Act, a lot of the
4 legislative history there in the introductory purposes of
5 the act explained how range improvements, water
6 improvements can open up new parts of the range that
7 weren't previously available for grazing because the
8 livestock had no water there, or they can -- and in
9 addition seeding, chaining, things that can be done to the
10 land to improve its condition, those sorts of
11 improvements --

12 QUESTION: Well, even if it improved, do you --
13 is it true that even under the old system the Secretary
14 perhaps wouldn't have to go up to the full original
15 adjudicated use. The Secretary could say, yes, things are
16 better, and we're going to increase the active use by so
17 many head?

18 MR. BISHOP: That's right, Justice O'Connor.
19 There's no -- no one realistically thinks that the
20 preference amounts will ever be maintained over a long
21 period of time. In fact, the preferences were
22 readjudicated in the 1950's and sixties to --

23 QUESTION: You know, I can picture lots of as-
24 applied challenges under this new scheme, but what we're
25 struggling with is how to deal with it on the facial basis

1 and without regard to consideration of whether it was just
2 arbitrary under an administrative analysis.

3 MR. BISHOP: Well, I mean, my argument is this,
4 that the statute, and a look at the history since the
5 statute was passed, mandates that preference amounts of
6 forage be adequately safeguarded. The word adequately
7 safeguarded ceases to mean anything at all if the
8 preference amounts are abolished, and that is what the
9 1995 rules do.

10 QUESTION: Why do they do that?

11 MR. BISHOP: I'm sorry.

12 QUESTION: Do you say that that theoretical
13 amount gave you an absolute right, if you had five, five
14 livestock owners whose total preference amount adds up to
15 100 percent of a particular grazing area, it in effect,
16 even though they weren't using the whole 100 percent, even
17 though they were only using 80 percent -- that was the
18 active preference, okay -- nonetheless the inactive
19 preference -- what's the --

20 MR. BISHOP: Suspended use.

21 QUESTION: Suspended preference would give them
22 an absolute right to exclude a sixth livestock owner from
23 coming in, or not? If not, then I don't know what the
24 preference means.

25 MR. BISHOP: The preference has to be adequately

1 safeguarded. Up to this point, the Secretary has
2 interpreted that to mean that you have to take account of
3 that preference and on a site-specific basis there may be
4 a particular reason, on a site-specific, individualized
5 basis, to think that you shouldn't get the increased
6 preference amount.

7 QUESTION: I'm not talking about giving you an
8 increased preference amount.

9 MR. BISHOP: And --

10 QUESTION: I'm talking about an area where, when
11 you take the total preference amount, its 100 percent
12 use --

13 MR. BISHOP: You --

14 QUESTION: -- you do have an absolute right to
15 exclude a live -- a new grazer.

16 MR. BISHOP: You have a -- an absolute right to
17 exclude a new grazer. You may not have an absolute right
18 to get all of that --

19 QUESTION: 100 --

20 MR. BISHOP: -- that forage.

21 QUESTION: To graze 100 --

22 MR. BISHOP: That 100 percent.

23 QUESTION: But he can't give it to somebody
24 else.

25 MR. BISHOP: He can't give it to someone else

1 while -- now, he can't give it to someone else without
2 doing certain other things. There are other things that
3 could be done. Always on an individualized basis the
4 Secretary can reduce the -- can reduce the preference --

5 QUESTION: The preference amount, right.

6 MR. BISHOP: -- can reduce active use, can even
7 take the land out of the grazing district altogether.

8 QUESTION: But do we know that under the new
9 regulation that the Secretary would not be able to do
10 precisely the same thing and say, I've got five people in
11 this --

12 MR. BISHOP: Yes, Your Honor.

13 QUESTION: -- and a sixth coming in, and given
14 the history, I'm not going to let the sixth one in?

15 MR. BISHOP: Yes, Your Honor. There's no such
16 thing as an adjudicated preference amount of forage any
17 more.

18 If I can reserve the remainder of my time.

19 QUESTION: Very well, Mr. Bishop.

20 Mr. Kneedler, we'll hear from you.

21 ORAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE RESPONDENTS

23 MR. KNEEDLER: Mr. Chief Justice, and may it
24 please the Court:

25 Petitioners, as has been pointed out, have

1 chosen to bring a facial challenge to these regulations,
2 and they may succeed on a facial challenge only if they
3 can show that there is no set of circumstances in which
4 the regulations would be valid. They have fallen far
5 short of doing that.

6 In fact, the regulations reflect a reasonable
7 interpretation of the Taylor Grazing Act, FLPMA, the
8 Federal Land Policy Management Act, and the Public
9 Rangelands Improvements Act, and they fall well within the
10 broad discretion that Congress necessarily conferred on
11 the Secretary to manage the vast public domain for
12 multiple use and sustained use --

13 QUESTION: If you're right on the first clause
14 of your sentence that if it can be shown that this is
15 permissible in any conceivable situation, then you don't
16 even have to get to the other parts of your sentence. It
17 was permissible under the statute, broad discretion, that
18 sort of thing.

19 MR. KNEEDLER: Right.

20 QUESTION: So do you take the position that all
21 you have to show is that perhaps in at least one or two
22 instances, that this does not respond to the challenge,
23 therefore that's good enough?

24 MR. KNEEDLER: Yes. In a facial challenge, we
25 think that's right, but I would like to respond, because

1 we think these regulations are valid across the board.
2 There may be individual situations in which a particular
3 permittee may have his active use cut back, or may --
4 during the term of the permit may --

5 QUESTION: If you're right on your first point,
6 a Court opinion would never get to the others.

7 MR. KNEEDLER: No, that -- of course, the Court
8 could write the opinion as it chose, and I suppose --

9 QUESTION: It could put it in Roman numerals.

10 MR. KNEEDLER: Right.

11 (Laughter.)

12 QUESTION: Could I just ask about your first
13 point? I take it the validity in any circumstances
14 doctrine is drawn from what, our Salerno case --

15 MR. KNEEDLER: Right.

16 QUESTION: -- which involves facial attacks on
17 statutes, often under the Constitution. Isn't this an APA
18 statute, that the regulation just doesn't implement the
19 statutory design?

20 MR. KNEEDLER: Yes, but I think that is
21 essentially --

22 QUESTION: Have we said that the Salerno rule
23 applies to APA challenges to the regulations that do not
24 properly implement a statute?

25 MR. KNEEDLER: No. If the claim is that the

1 regulation is completely beyond the statutory authority,
2 no, that is true. But --

3 QUESTION: Have we said that in a decision of
4 this Court?

5 MR. KNEEDLER: No. No, I'm agreeing with you,
6 as far as I know, if the claim is that the regulation is
7 that the regulation would be beyond the Secretary's
8 authority in all of its applications.

9 But as I understand petitioner's fundamental
10 point, it is that in the land use planning process, which
11 is based on principles of multiple use, that the grazing
12 that they have previously been permitted to engage in will
13 not be adequately respected, or taken into account, or
14 weighed into the balance. That is essentially a challenge
15 to the broad land use planning that FLPMA itself mandates
16 for grazing.

17 QUESTION: No, I though his challenge was very,
18 very specific. I thought, as I understood it, that there
19 was an old system, and the old system said if there are
20 three ranchers and 1,000 acres, the division 500, 300, 200
21 means the following. You cut it back to 500 acres, okay.
22 We divide it 250, 150, 100. That's definite.

23 You increase it by 50 acres. Those new 50 acres
24 have to be apportioned in precisely the same proportion,
25 and if a third or fourth rancher comes in, he must get

1 zero, must in all circumstances, and if one of those
2 existing ranchers tries to take 1 acre more than his
3 proportionate share, he cannot get it, in no circumstance.
4 That's the old system, and on that system they can get
5 financing.

6 Then there is a new system which more or less
7 agrees you have total right to control the amount of
8 grazing, but as to apportionment and new ranchers, it's up
9 for grabs, and that, it seems to me, is what they're
10 challenging.

11 MR. KNEEDLER: Right, and that is simply not
12 true, and I would like to refer the Court --

13 QUESTION: What is not true?

14 MR. KNEEDLER: That the --

15 QUESTION: That they're not challenging --

16 MR. KNEEDLER: No, no, excuse me -- that the new
17 regulations do not provide for an apportionment if there
18 is an increase in grazing, and that's the example the
19 petitioner --

20 QUESTION: No, he doesn't say it doesn't provide
21 for an apportionment. What he says is, it isn't clear
22 that the fourth rancher who comes in gets zero --

23 MR. KNEEDLER: It --

24 QUESTION: -- and it isn't clear that the old
25 apportionment -- the new apportionment is done in

1 precisely the same proportions.

2 MR. KNEEDLER: Okay. If I may respond, and two
3 points. First, what they are describing is a prior
4 regulatory regime, not something that the statute
5 requires.

6 QUESTION: That's correct.

7 MR. KNEEDLER: So to the extent that they are
8 claiming some inconsistency with the statute, that's not
9 this claim.

10 QUESTION: That's correct.

11 MR. KNEEDLER: This -- and with respect to the
12 new grazer coming in, those regulations are, as were
13 pointed, out in regulation 4110.3-1.

14 QUESTION: These are the '94 regulations?

15 MR. KNEEDLER: They are essentially unchanged,
16 and that's the point I wanted to make. The prior
17 regulations appear at 9a of the appendix to the brief,
18 addendum to the brief. 4110 -- excuse me -- .3-1,
19 increasing active use, the -- excuse me. Those are the
20 prior regulations.

21 The 1995 regulations appear on page 123 of the
22 petition appendix, and the title has just been changed to
23 Increasing Permitted Use, rather than Increasing Active
24 Use, but the force of the regulations is the same.

25 QUESTION: We're on 125a?

1 MR. KNEEDLER: 123a of the petition appendix.

2 QUESTION: 123, thank you.

3 MR. KNEEDLER: And if you put them side-by-
4 side, there is actually essentially no change in the
5 allocation of additional forage as it becomes available,
6 and the same is correspondingly true with respect to a
7 decrease in forage.

8 Those regulations say, for example, if you look
9 at the petition appendix under the current regulation, on
10 123a, additional forage may be apportioned to qualified
11 applicants. Paragraph (a) is essentially irrelevant.
12 That's temporarily available livestock grazing. (b) is
13 additional forage available on a sustained yield basis.

14 QUESTION: I understood the basic argument was
15 that none of this need to come about because the land use
16 program that the Secretary provided for could negate it,
17 and I thought I read the Tenth Circuit opinion which
18 upheld the program as reading that way, too. The -- I
19 thought the Tenth Circuit said we just -- nothing is ripe
20 here, not that this is just the same old regime.

21 MR. KNEEDLER: Well, with -- I think the Tenth
22 Circuit may have had that sense, but I think it is
23 important to look at the fact that existing -- people
24 holding existing permits under the priorities for
25 apportioning this, they will first be -- if additional

1 forage becomes available, any historical suspended use
2 that was referred to here will be given to the ranchers
3 who already have suspended use.

4 QUESTION: But not former adjudicated use.

5 MR. KNEEDLER: No, it is -- that is essentially
6 what it is, because the current permits carry forward the
7 amount of, the number of AUM's that a person has been able
8 to graze under a permit, and the new permitted use
9 regulation requires that the number of AUM's be specified
10 in the permit. That has not changed.

11 QUESTION: And you insist that henceforth the
12 permits that are given will still reflect the original
13 adjudicated AUM's?

14 MR. KNEEDLER: Yes, unless they are changed,
15 because what -- and this comes about as -- essentially as
16 a matter of the way the administrative process works. If
17 somebody has an existing permit for, let's say, 100 AUM's
18 on a particular parcel of land, and it comes time to renew
19 the permit, and BLM is going to say no, it should only be
20 80, well, the challenge will arise by comparing what it
21 used to be with what it now is, and therefore under the
22 APA essentially require the BLM local officer to explain
23 why the conditions on the range require a lessening of the
24 grazing that will be allowed, and in fact the regulations
25 at 4116, the procedural regulations, require the regional

1 official to give a decision, to explain why there will be
2 a reduction.

3 QUESTION: You can also reduce the suspended
4 use, you can't you, if you want to?

5 MR. KNEEDLER: Yes.

6 QUESTION: Only on renewal?

7 MR. KNEEDLER: No. Suspended use, suspended use
8 could be reduced under the land use plan, for example, if
9 there was -- if the land use plan was revised during the
10 course of the --

11 QUESTION: No, but I mean under the old system,
12 never mind under the current --

13 MR. KNEEDLER: No. Suspended use was not
14 reduced. What would happen is, active use would be put
15 into a suspended category if the range could accommodate
16 less grazing than had previously been true.

17 Now, the statute, if your question is whether
18 the statute would have allowed the Secretary to reduce
19 suspended use the answer is, absolutely.

20 QUESTION: But the regulations would not?

21 MR. KNEEDLER: No. The regulations essentially
22 worked out an accounting system to regulate -- to
23 ascertain how much grazing would be permitted year-to-
24 year, and over time, as the amount of active grazing went
25 down, AUM's were put into suspended use.

1 But as petitioners have acknowledged, it's not
2 realistic to think that those historical uses are going to
3 get up to what they had been, and one of the purposes of
4 the Secretary's new approach here not to allow new
5 suspended -- the next time there's a permanent, more or
6 less long-term reduction to put that into the suspended
7 use category is that it doesn't reflect reality.

8 QUESTION: Well --

9 MR. KNEEDLER: And it's better to have the
10 system reflect the present-day reality of what the active
11 grazing -- and lenders will know what the active -- the
12 permitted use under the permit is, the rancher will know
13 what the permitted use under the permit is, those involved
14 in the land use planning and BLM and the public will know,
15 not paper cows put into a suspended use account, but what
16 is actually going on on the range.

17 QUESTION: Well, but that's their objection. I
18 think that's their objection, and they say that the -- and
19 when I read the comments in the, you know, the rule-
20 making, they raised the objection and they said that the
21 change is going to be that this suspended use will
22 disappear and instead their potential future right, which
23 may never come about, will depend on the land use plan,
24 and the response to that I think was, the land use plan
25 allows adjustment of the AUM amount.

1 MR. KNEEDLER: Yes, it does.

2 QUESTION: Which I took it as saying they're
3 right about that change. And then you said -- or you
4 didn't, but the Interior Department, where changes in the
5 situation are major, it may be necessary to amend the land
6 use plan, thus reinitiating the process, and I wasn't
7 quite sure what that meant, but what they say, the problem
8 is that the financiers aren't quite sure either --

9 MR. KNEEDLER: Well --

10 QUESTION: -- and therefore they won't give
11 us -- you may say this is all going to work out fine, but
12 we go to the bank, and we discover that we can't borrow
13 the money, and the reason we can't borrow the money is
14 that whereas previously we had certainty about what would
15 happen to me if, suddenly, for some reason the amount that
16 was going to be foraged went up, there's no longer that
17 certainty. It depends upon some future land use plan, and
18 some future testimony, and we can't get a hold of it.

19 Now, what's -- am I right about what they're
20 saying? If I am, is that what is true?

21 MR. KNEEDLER: I think you're right about what
22 they're saying, but they're wrong, and I'd like to respond
23 in two points. One is, they're wrong about the prior
24 regime, and they're also wrong about the change that
25 happened.

1 In 1978, which was the same year that this
2 definition of grazing preference was put into the
3 regulations, which is the first time preference was in the
4 regulations that had the number of AUM's in the concept of
5 preference, in that very same year, the regulations
6 implementing FLPMA, which had just been enacted and
7 required land use plans on all -- on all grazing lands as
8 well as other lands administered by BLM, specifically
9 provided, for example, that forage will not even be made
10 available for livestock grazing, and when you talk about
11 forage becoming available, it means for livestock grazing.
12 If there's additional forage it might be for wildlife. It
13 might be for something else.

14 Those regulations in 1978 said that they were
15 dealing only with the use of forage that is available
16 after forage is allocated to other uses under the land use
17 plan. They also made clear that the amount of -- that the
18 plan could be amended, that the amount of active use could
19 be reduced.

20 QUESTION: Well, of course, you can understand
21 how that explanation causes concern, because the Taylor
22 Grazing Act did contemplate that the original adjudication
23 would allocate grazing permits based on the land base and
24 the water rights of the applicants for grazing, and that
25 that would be adequately safeguarded, that privilege would

1 be adequately safeguarded.

2 Now we come along with land use plans for
3 multiple purposes, and there is nothing in that to
4 indicate that the grazing preferences will be adequately
5 safeguarded.

6 MR. KNEEDLER: Okay. If I -- if --

7 QUESTION: I mean, they can be just, you know,
8 off for other purposes.

9 MR. KNEEDLER: Okay. First of all, the -- FLPMA
10 requires that the land use plans be done, so if
11 petitioners have a quarrel with that aspect of the
12 sensible use of the domain, that is something that
13 Congress has required.

14 QUESTION: Well, it does, but it also contained
15 a clause that indicated that the Taylor Grazing Act was
16 not to be superseded.

17 MR. KNEEDLER: Right, but the essential point
18 about the land use planning under FLPMA is that it is a
19 way of carrying out authority that the Secretary had under
20 the Taylor Grazing Act to begin with. The Taylor Grazing
21 Act was not a livestock maximization statute itself.

22 The Taylor Grazing Act was passed at a time when
23 the public domain, the public rangelands were in very bad
24 shape because of overgrazing, because of drought, and a
25 principal purpose of the Taylor Grazing Act itself -- in

1 fact, if you look at the purposes of grazing districts
2 that are set forth in section 2 of the Taylor Grazing Act
3 on page 103, the maintenance of the livestock industry is
4 not -- I'm sorry, on 103a of the petition appendix -- it
5 refers to such things as to regulate the occupancy and
6 use, to preserve the land and its resources from
7 destruction, and to provide for orderly use, improvement,
8 and development of the range. This was a range
9 restoration act as well as a regulation of grazing land.

10 QUESTION: Yes, but section 3 did say preference
11 shall be given in the issuance of grazing permits to those
12 who are landowners engaged in the livestock business,
13 necessary to permit the proper use of lands, water rights
14 owned --

15 MR. KNEEDLER: Right --

16 QUESTION: -- occupied and used by them, and
17 that that will be adequately safeguarded. Now, that's the
18 heart of their claim, as I understand it.

19 MR. KNEEDLER: Yes, and --

20 QUESTION: And this subsequent Federal Land
21 Policy and Management Act, in its contemplation and
22 requirement of land use plans, may not be in accord with
23 that Taylor Grazing Act provision.

24 MR. KNEEDLER: Well, petitioners have said that
25 they understand that the Secretary can alter preference

1 rights.

2 QUESTION: Yes.

3 MR. KNEEDLER: So whatever the initial
4 adjudication was -- and even in the early years it changed
5 from year to year, so the initial preference rights that
6 were established are an implementation of very broad
7 language. The Secretary didn't even have to do that in
8 the way in which he did.

9 But the more fundamental point is the
10 preference, as used in sentence 3 of section 3 of the
11 Taylor Grazing Act on page 104a, it talks about who among
12 qualified applicants for grazing permits will be given a
13 preference.

14 QUESTION: Yes.

15 MR. KNEEDLER: It's in terms of whatever grazing
16 is made available, how does it get apportioned among
17 people based -- and there were complicated questions of
18 somebody who was using the public rangeland before 1934,
19 and how much grazing were they doing. It was essentially
20 a way to make an equitable apportion of the land in 1934.

21 But what this sentence does not answer is how
22 much grazing will be made available in the first place.
23 This only tells you what to -- how to apportion, and even
24 that is in broad discretion, but how to apportion what
25 grazing is made available, and that is made clear if you

1 look at the next sentence, which begins in the middle of
2 page 104a.

3 It says, such permit shall be for a period of
4 not less than 10 years, subject to the preference right of
5 the permittees to renewal in the discretion of the
6 Secretary. Even the renewal, whether to renew a permit
7 was in the discretion of the Secretary. If the Secretary
8 chose to renew the permit, then the prior holder would
9 have --

10 QUESTION: Your response is that they should go
11 talk to their banks and they should say, look, these paper
12 cows never meant that much. I mean, after all, they could
13 have changed the forage, they could have brought in new
14 people, cut the -- they could have done all kinds of
15 things.

16 MR. KNEEDLER: And

17 QUESTION: And today they promised in this
18 commentary that if there's a major change in reality
19 they're going to try to do something about it. I mean, so
20 they've said it isn't going to make that much change in --

21 MR. KNEEDLER: If it's a major change for
22 improvement in increased grazing or decreased grazing,
23 but --

24 QUESTION: But am I right in thinking about how
25 to look at this?

1 MR. KNEEDLER: Well, yes, because the
2 regulations do provide for changes according to the land
3 use plan and, of course, lenders are on notice of that.

4 But if I could just respond to this point about
5 the land use plans, the Secretary determined and explained
6 in the rule-making process that it was his judgment that
7 the use of land use plans and other requirements of these
8 1995 regulations that require changes to be based on
9 increased scientific knowledge will, in fact, enhance the
10 stability of the livestock industry because people will
11 know what they can depend upon in the plan, and that there
12 won't be a change --

13 QUESTION: Mr. Kneedler, about a sentence after
14 the language that you quoted to us about the discretion of
15 the Secretary, in fact it's the next sentence, it says
16 during periods of range depletion due to severe drought or
17 other national -- natural causes, or in case of a general
18 epidemic of disease during the life of the permit, the
19 Secretary of the Interior is hereby authorized in his
20 discretion to remit, reduce, or refund in whole or in part
21 or authorize postponement of payment of grazing fees.

22 Now, do you think that the Secretary's
23 discretion is just general in the part you read?

24 MR. KNEEDLER: Right, I do, because this has to
25 do with the reduction of fees, not the direction to reduce

1 grazing, and if you look at the preceding sentence, I only
2 got to the clause that talked about renewal of permits in
3 the discretion of the Secretary.

4 The latter part of that sentence says, who shall
5 specify from time to time numbers of stock and seasons of
6 use. It says from time to time, not once and for all
7 time. The idea was that this is a dynamic situation, and
8 the Secretary could change the amount of livestock
9 permitted. Suspended use was an administrative measure.

10 QUESTION: But do you think it suggests that the
11 Secretary could simply suspend in gross, rather than case-
12 by-case?

13 MR. KNEEDLER: I think it did. I mean, for
14 example, section 7 of the Taylor Grazing Act, which is not
15 reproduced in the appendix but was enacted or revised in
16 1936, allowed the Secretary to determine that lands that
17 were put in the grazing district were in fact more
18 suitable for any other purpose besides grazing, and to
19 remove them from grazing.

20 If those lands happened to be on an allotment
21 that an individual had a permit for, the act itself
22 contemplates that those lands could be removed from
23 grazing, and if I could please respond to Justice
24 O'Connor's point about the adequately safeguard, because
25 that sentence, there are a number of words in that

1 sentence that are I think important to focus on.

2 The first thing is, it does not say grazing
3 preferences shall be adequately safeguarded. It says,
4 grazing privileges shall be adequately safeguarded. The
5 grazing privilege is what the permit gives you. It isn't
6 some antecedent interest. It's -- the privilege to graze
7 on the public lands is what the permit gives you, so what
8 this means is, during the term of the permit, the
9 privilege that the permit gives you will be adequately
10 safeguard.

11 Most fundamentally you have -- and this was the
12 central purpose of the Taylor Grazing Act. If you get a
13 permit, you have a right to graze there and to exclude
14 others. The privileges that you get to graze on the
15 public domain are an important right, and cattle ranchers
16 have grown up on that, but it is primarily a privilege to
17 exclude others, and the Secretary. The Secretary can no
18 more oust --

19 QUESTION: Well, there also are limitations on
20 the denial of renewal of a permit --

21 MR. KNEEDLER: Yes.

22 QUESTION: -- to a permittee who's obeying the
23 rules of the Secretary.

24 MR. KNEEDLER: Right, and this sentence, by the
25 way, it's not clear that it was intended to do anything

1 more than to suggest to the Secretary that in the initial
2 apportionment of the domain in 1934 the Secretary should
3 give weight to what had gone before, but to the extent it
4 has any continuing force it has the one I mentioned.

5 And it also has the effect that the Secretary,
6 as you pointed out, Justice O'Connor, cannot simply go on
7 the land or revoke a permit without following the process,
8 so the permittee is protected -- I don't know that this
9 comes from the adequately safeguard --

10 QUESTION: Would you explain to me what section
11 302 of the Federal Land Policy and Management Act means
12 when it says the Secretary shall manage the public lands
13 under principles of multiple use and sustained yield in
14 accordance with the land use plans, except that where a
15 tract of such public land has been dedicated to specific
16 uses, according to any other provisions of law, it will be
17 managed in accordance with such law? What are those
18 dedications to other specific uses?

19 MR. KNEEDLER: There could be -- there could
20 be --

21 QUESTION: Could that be for grazing?

22 MR. KNEEDLER: No, I think it could not be.
23 there could be specific stat --

24 QUESTION: Why not?

25 MR. KNEEDLER: I think the principal reason is,

1 for example, the provision of FLPMA that deals with
2 permits. There's a whole section of FLPMA that deals with
3 grazing permits, 1752, and if one looks at -- if you look
4 at page 114a of the petition appendix --

5 QUESTION: Well, then, that -- is grazing a
6 specific use in another law, specifically Taylor Grazing
7 Act? I didn't understand how to interpret that.

8 MR. KNEEDLER: Well, it is clear that Congress
9 intended to bring grazing under the multiple use
10 requirements of FLPMA, and the regulations promulgated by
11 the Secretary of the Interior in 1978, right after FLPMA,
12 the same set of regulations that petitioners wish we would
13 go back to, made clear the Secretary's understanding that
14 FLPMA required grazing to be regulated.

15 And if you look on subsection (c) on page 114a,
16 where it talks about first priority for the renewal of an
17 existing permit, so it is talking about grazing that is
18 already occurring, it says, so long as the lands for which
19 the permit is issued remain available for domestic
20 livestock grazing in accordance with land use plans
21 prepared pursuant to section 1712.

22 So it's clear that -- if it wasn't clear before
23 that the Taylor Grazing Act wasn't just a grazing statute
24 but also a multiple use statute, these provisions of FLPMA
25 make clear, and in fact this section also makes clear that

1 there is certainly no statutory right to a permanent
2 entitlement to the amount of grazing that may have been
3 adjudicated many years ago when the range was originally
4 being apportioned under very different circumstances.

5 Because it says even the right of renewal of a
6 permit, something that a person has a preference to, is
7 present after FLPMA only if the Secretary chooses to make
8 the lands available for grazing, the permittee is in
9 compliance with the rules and regulations and terms and
10 conditions, and he accepts the new terms and conditions of
11 the new permit, thereby once again making clear that the
12 Secretary of the Interior has the authority to prescribe
13 the terms an\& conditions for grazing on the public lands.

14 QUESTION: Mr. Kneedler, what has the Secretary
15 actually done with respect to land use plans following the
16 enactment of this law, or has it been in suspense because
17 of the litigation?

18 MR. KNEEDLER: No. As we -- the land use plan
19 requirement came into effect in 1978, and as we point out
20 in our brief, all grazing covered by the Taylor Grazing
21 Act is now covered by land use plans, either prior, what
22 were called framework plans, or the new resource
23 management plans, and petitioners have still not shown
24 anything to this Court that suggests that that land use
25 management process, which was designed to instill

1 stability in the areas covered by those plans, has failed
2 to take into account existing grazing.

3 And as we also point out in our brief, the
4 Taylor Grazing Act -- excuse me, FLPMA and implementing
5 regulations refer to existing uses of the range, the
6 dependence of local properties and private property and
7 local communities on the range, so the land use planning
8 process, which also has broad public participation and
9 allows for grazing permittees to participate in the
10 planning process and to appeal, affords ranchers, as
11 others who have a stake in the use of the public domain,
12 it assures them protection for their interests.

13 If I could also point out that in the rule-
14 making, in response to your question, Justice Breyer, I
15 realize it hasn't been challenge on a failure to
16 articulate, but pages 9921 to 9923 of 60 Federal Register
17 and the proposed notice at 59 Federal Register at 9928
18 explain the Secretary's reasons for what he explained was
19 essentially a change in terminology between the
20 permitted -- the new definition of permitted use, which
21 corresponds to sentence 4 of the Taylor Grazing Act
22 dealing with the numbers of livestock from time to time,
23 separating that from preference, which is governed by
24 sentence 3 of section 3 of the Taylor Grazing Act, which
25 talks about who among potential grazers would have a

1 priority.

2 That doesn't give grazers, either individually
3 or as a class, a preference over nongrazing use of the
4 forage and, as I say, increases and decreases in new
5 forage that becomes available for grazing are handled in
6 essentially the same way. Essentially the same
7 priorities --

8 QUESTION: Is there anything in the new
9 regulations, though, that links permitted use by grazers
10 to either the grazing preference or any other measure of
11 numbers needed by the permit-holders to support an
12 economically viable grazing unit in combination with their
13 own base properties and water, which is what the Taylor
14 Grazing Act contemplated?

15 MR. KNEEDLER: Well, the current -- I'm sorry,
16 the -- was there anything in the current regulations that
17 ties it to preference?

18 QUESTION: Yes, that links the --

19 MR. KNEEDLER: The permitted use, the
20 regulations provide that permitted use must be stated and
21 the number of AUM's must be stated in the permit, and it's
22 attached to the base property, just as in the prior
23 situation preference and the AUM's as they were stated
24 under preference were attached to the base property.

25 The -- your reference to sentence 3 of the

1 Taylor Grazing Act, as may be necessary, again was a way
2 of apportioning up the land at the time the act went into
3 effect, but it's important to notice that the renewal
4 permit provision of FLPMA makes it clear that there is not
5 an ongoing entitlement to a certain amount of public
6 rangeland in order to satisfy whatever the base properties
7 ranching requirements are, because all there is is a
8 preference to renewal of the permit for a particular
9 allotment, but the land use planning process or other
10 ecological determinations may conclude that that
11 particular allotment can only sustain 50 percent of the
12 grazing that it previously allowed.

13 That may be less public land than would be
14 necessary to sustain the full ranch on the base property,
15 but nothing in the Taylor Grazing Act, and certainly
16 nothing after FLPMA, would allow a rancher to say, I have
17 a right to oust other uses of the land, or a right to
18 allow grazing in a way that might damage the land in order
19 to be able to support my base property. Again, this is
20 just an apportionment among ranchers to the extent the
21 Secretary allows grazing to occur on the public domain.

22 With respect to the adequately safeguarded, I
23 wanted to make two other points about that. It says to
24 the extent consistent with the purposes of the act, which
25 as I mentioned elsewhere talk about orderly use and

1 prevent destruction of range resources, so that is an
2 important limitation.

3 It also says, grazing privileges recognized and
4 acknowledged. Whatever grazing privileges a rancher gets
5 under a permit are automatically conditioned by the
6 provisions of the Taylor Grazing Act itself and
7 regulations that allow the Secretary to reduce grazing to
8 modify the use of the land and to protect the environment.

9 There have not been any questions about the
10 other two regulations that are at issue here. On the
11 range improvements, we think that there the Secretary is
12 just exercising the authority that any landlord or any
13 landowner would have to work out by agreement in advance
14 what would be the disposition of improvements that are
15 added to the land.

16 That simplifies it. There is no reason to refer
17 to arcane rules of fixtures under property law. The
18 Secretary has simply specified in advance what the
19 ownership of improvements will be, which greatly
20 simplifies the administration of what are after all public
21 lands, so that there will not be private stakeholdings,
22 private fixtures on public lands, and after all, if they
23 were fixtures, the only right would be to remove them and
24 you certainly couldn't remove a well, probably, that had
25 been constructed by a prior owner. It wouldn't make sense

1 to renew fences. So what has happened is, there's
2 provisions for compensation rather than the removal of the
3 fixtures.

4 QUESTION: Thank you, Mr. Kneedler.

5 Mr. Bishop, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP

7 ON BEHALF OF THE PETITIONERS

8 MR. BISHOP: I just don't see the broad
9 discretion in the TGA that Mr. Kneedler does. Preference
10 was adjudicated according to what was necessary for the
11 proper use of the base property and the statute says that
12 the privileges, including that adjudicated amount of
13 forage, have to be adequately safeguarded.

14 The reason that this is a facial challenge is
15 that the 1995 regulations define permitted use by
16 reference to a land use plan, and without any reference
17 whatsoever to the preference amount adjudicated as
18 necessary. The needs of the base property have entirely
19 disappeared. The Secretary can set the permitted use
20 without any reference to those needs. Land --

21 QUESTION: But I thought you conceded that, as
22 far as the active use is concerned, there's no different
23 situation today than there was under the prior regulations
24 that --

25 MR. BISHOP: Well, I don't really concede that.

1 It may be that we have the same active use today as
2 tomorrow, the day before, and the day after the
3 regulations. What we don't have is that if the next day
4 there is an increase in the amount of forage available on
5 the range, we have no claim whatsoever to that, based on
6 the preference. The permitted use now controls, and
7 because the land use plan --

8 QUESTION: But you -- do I understand correctly
9 that the -- that what you're complaining about is the
10 absence of this suspended use, but you're not complaining
11 about what the Secretary did as far as active use is
12 concerned?

13 MR. BISHOP: That's right. I mean, active use
14 is varied according to the condition of the range. What
15 we are complaining about is the loss of a claim to more
16 active use, based on our preference, and it's not the land
17 use plan. The land use plan referred to in the permit --
18 Mr. Kneedler suggests that that has changed everything.
19 Land use planning for sustained yield and multiple use
20 started in 1964, and for years land use planning and the
21 preference amount continued side-by-side.

22 QUESTION: But they say in their -- they concede
23 that this land use plan in principle might interfere
24 sometimes with your suspended paper rights, but then they
25 say, where it's major you're going to have to go back and

1 redo the whole plan. They obviously foresee it won't
2 happen very often, if at all, so why isn't it satisfactory
3 to you that if there's some big major change in some
4 particular land use plan, which they don't foresee, you
5 challenge that?

6 MR. BISHOP: Because the change isn't taking
7 place at the land use planning level. Land use planning
8 occurs at a general level. It does not allocate the
9 privileges to individuals on the allotment. It's the
10 grazing preference -- it's the grazing regulations that do
11 that.

12 It used to be that the grazing regulations had a
13 substantive basis to them. The amount of forage necessary
14 to the proper use of the land as adjudicated. That's
15 gone. There is no standard now in the regulations
16 required by the TGA, and there is no standard in the land
17 use plan. There are no standards at all. There are no
18 claims that we have to additional forage based on the
19 needs of our property.

20 And for the Solicitor General to say that we'll
21 be okay, that our suspended use will be recognized, is
22 frankly ridiculous, because in the explanation of the
23 finer rules he says that the Secretary will not allow
24 permittees to continue to carry suspended use because that
25 suggests that they'll be able to get that suspended use

1 back as active use. That is exactly what the adequately
2 safeguard language of the TGA requires, and what we have
3 now been deprived of.

4 It's also anachronistic to have the Secretary
5 suggest that the TGA was a multiple use statute. It was
6 not a multiple use statute. It was all about grazing. It
7 was passed at the behest of the livestock industry because
8 they were in such deep trouble, and each of the purposes
9 stated in the statute for improving the condition of the
10 range is intended to improve the financial condition of
11 the livestock industry in the long term, and all of that
12 has now been lost.

13 All of our protections, all of our safeguards
14 reflected in the regulations prior to 1995 have now
15 completely disappeared, and it's not the land use plan
16 that's responsible for that. It's a permitted use
17 definition that now writes adjudicated forage completely
18 out of existence.

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bishop.
21 The case is submitted.

22 (Whereupon, at 12:10 p.m., the case in the
23 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

PUBLIC LANDS COUNCIL, ET AL., Petitioners v. BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

CASE NO: 98-1991

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

Richard M. Sumbur