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Federal Grazing Regulations: Public Lands Council v. Babbitt

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Summary

New regulations on livestock grazing on lands managed by the Bureau of Land Management became effective August 21, 1995. Many aspects of the new regulations were challenged in *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000). A federal district court upheld many of the regulations, but struck down four of them and enjoined their implementation. At the appellate level, only the new regulation allowing "conservation use" of a grazing allotment to the exclusion of livestock grazing for the full term of a permit was held invalid. In a unanimous opinion, the Supreme Court on May 15, 2000, upheld the remaining regulations. This report will not be updated.

Introduction

New regulations on livestock grazing on lands managed by the Bureau of Land Management in the Department of the Interior[1] became effective August 21, 1995.[2] The regulations were controversial in several respects. Supporters contended that the new rules were a step forward toward sound resource and rangeland management, but that they should have provided more protection. Many others opposed the new rules, believing they reduced the scope and security of grazing rights and would result in increased operating costs and ultimately reduce private livestock activity on federal lands. The new regulations and litigation raised fundamental issues as to the proper interpretation of the relevant statutes.

[1] For background on federal livestock grazing see Archived CRS Issue Brief IB96006, *Grazing Fees and Rangeland Management*, available from the authors, (name redacted) and Betsy Cody.

[2] 60 Fed. Reg. 9894 (February 22, 1995).

District Court and Appellate Decisions

Many aspects of the new regulations were challenged in *Public Lands Council v. Babbitt*, a case known as the "Brimmer decision" for Judge Brimmer who decided it.[3] The case was a challenge to the regulations on their face, as opposed to as applied in a particular instance, a procedural posture that imposed the burden on plaintiffs to show that there were no circumstances in which the regulations would be valid. On June 12, 1996, the federal district court upheld the new regulations relating to permittee and lessee affiliates, 3-year temporary non-use, and non-exclusive use of water-related range improvements, but struck down several others. The district court upheld the constitutionality of the regulations in two respects, finding that: 1) the regulation on suspension or cancellation of a grazing permit or lease if a permittee or lessee is convicted of violating certain environmental laws does not violate the double jeopardy clause of the Constitution; and 2) the regulation imposing a surcharge on a permittee if the permittee allows livestock not owned by him or his children to graze on public lands does not violate due process. The district court also upheld the government's processing of comments on, and its adoption of, the rangeland management standards called "Fundamentals of Rangeland Health," and determined that the Final Environmental Impact Statement that accompanied the final regulations was adequate.

The district court struck down the new BLM regulations that: 1) separated "grazing preference" (a priority to receive a permit) from "permitted use"(Animal Unit Months (AUMs) allowed on an allotment); 2) required the titling of permanent structural range improvements in the name of the United States; 3) eliminated the requirement that a permittee be engaged in the livestock business; and 4) allowed "conservation use" that excludes livestock grazing for the full term of a grazing permit.

The district court affirmed in part the Secretary's decision to implement the 1995 regulations and reversed in part, enjoining the Secretary from enforcing the regulations the court set aside.

The 10th Circuit Court of Appeals reviewed the district court's decision de novo.[4] Because the case was a facial challenge to the regulations, the court could not set aside any agency action unless it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or was in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right.[5] Using this standard, the Tenth Circuit upheld all of the regulations, except the one allowing conservation use. The United States did not appeal that part of the ruling; the Public Lands Council again appealed the other aspects.

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[3] 929 F. Supp. 1436 (D. Wyo. 1996).

[4] Public Lands Council v. Babbitt, 154 F. 3d 1160 (10th Cir. 1998); *amended, on reh'g*, 167 F. 3d 1287, (10th Cir. 1999); *aff'd* 529 U.S. 728 (2000).

[5] 167 F. 3d at 1293, citations omitted.

Supreme Court Decision[6]

Grazing preference. The most fundamental issues related to the redefinition in the new regulations of "grazing preference." The regulations separated the concepts of 1) priority of preference and 2) amount of permitted grazing use. The district court had found that the Secretary's action in changing the regulations failed to "adequately safeguard adjudicated grazing preferences" and that the 1995 regulations lacked a reasoned basis in this regard. The appellate court reversed, and the Supreme Court affirmed the appellate court.

The Supreme Court reviewed the history of the use of the federal rangelands and the purposes, intent, and language of the Taylor Grazing Act (TGA)[7] and subsequent enactments. The enactment of the TGA in 1934 was a turning point for the federal rangelands, which went from being grazed as commons areas to a system of allotments grazed by particular permittees. The Court noted that the TGA was enacted in response to the deterioration of the rangelands and the goals of the Act were to "stop injury" to the lands, "to provide for their use, improvement and development," and "to stabilize the livestock industry dependent on the public range."[8] After enactment of the TGA, the Department prioritized the many applications for grazing authorizations based on statutory and other factors related to base property,[9] giving highest priority to applicants who both had base property and had grazed the public range during the five years before the enactment of the TGA. The carrying capacity for areas of the federal rangelands was established and allocated among the top priority applicants. The two concepts of priority of preference and amount of allocated permitted use became known as the "grazing preference" afforded individual ranchers. The pre-1995 regulations defined the term "grazing preference" to mean the total number of animal unit months (AUMs) of livestock grazing on the federal lands allocated to qualifying base property owned or controlled by the permittee or lessee.[10] This number of AUMs could include "active use" — the total number of animals authorized to graze — and "suspended use" — which were potential AUMs not currently being grazed.[11]

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[6] Public Lands Council v. Babbitt, 529 U.S. 728 (2000).

[7] Act of June 28, 1934, ch. 865, 48 Stat. 1269, codified at 43 U.S.C. §§ 315 et seq. The TGA also authorizes grazing under leases on some lands, but to simplify matters, this report will speak only of permits.

[8] 48 Stat 1269, quoted by the Court at 733.

[9] Base property is land or water owned or controlled by an applicant that can serve as a base for a livestock operation that uses public lands.

[10] 43 C.F.R. § 4100.0-5 (1994).

[11] See, 43 C.F.R. §§ 4110.2-1 through 2-3 (1994). 43 C.F.R. § 4110.2-2 stated that grazing preference shall be specified in all grazing permits or grazing leases and include both active use and suspended use. Active use was to be based on the amount of forage available as established in the land use plan. The grazing preference was attached to the base property supporting the grazing permit.

The new regulations define "grazing preference" as the priority position vis a vis others for the purpose of receiving a grazing permit or lease.[12] The authorized number of AUMs is now provided by the term "permitted use," which is defined as the forage [expressed in AUMs] allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease.[13] As before, permitted use could encompass active and suspended use, is specified in permits, is attached to base property, and is basically transferable with the base property. As before, an existing permittee is given first priority for a new permit upon acceptance of any new terms and conditions.[14]

Plaintiffs saw the changes as significant, claiming that the security of their "historical adjudicated" preferences in terms of numbers of AUMs was lost. Although the granting of grazing privileges was discretionary, the TGA directed that privileges be "adequately safeguarded." The district court found that the new regulations on permitted use eliminated a "right" of permittees to graze predictable numbers of stock from permit to permit, and that by eliminating this right, the Secretary necessarily failed to "adequately safeguard" grazing rights.[15] The dissent at the appellate level agreed, emphasizing that, *in practice*, the original adjudicated amounts were essentially renewed from permit to permit and gave more stability to the ranchers than is true under the new regulations, and that this change would destabilize the livestock industry, a result contrary to a purpose of the TGA.

However, the majority at the appellate level, and the Supreme Court held to the contrary. The Supreme Court noted that under the TGA, grazing was to be allowed only to the extent consistent with the purposes of the TGA, and that grazing regulations had consistently provided since 1937 that permits could be modified or cancelled.[16] In addition, the Court noted that Congress had enacted several statutes since the TGA,

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[12] 43 C.F.R. § 4100.0-5 (1996).

[13] *Id.*

[14] 43 C.F. R. § 4130.2(e)(3).

[15] 43 U.S.C. § 315b requires that: "So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands." Although not quoted by the court, the 1938 regulations discuss the elements of preference in the sense of priority among applicants, the rating and classification of base property, and also address the rating and classification of the available federal range. 43 C.F.R. § 501.5(a) (1939) states: "Carrying capacity; seasons and maximum annual period of use. For the purpose of determining what use of the Federal range will be *most consistent with conservation purposes*, the carrying capacity of each administrative unit or area in a grazing district will be rated, and each will be classified for the proper season or seasons, if necessary, of its use and for the maximum period of time for which any licensee or permittee will be allowed to use the Federal range lying therein during any 1 year." (Emphasis added.) This carrying capacity then was allocated among the top priority applicants, as far as was available.

[16] Slip opinion at 6-7.

notably the Federal Land Policy and Management Act of 1976 (FLPMA),[17] which left the TGA in effect but also expanded the other recognized uses of the public lands, provided for land use planning, and provided new management authorities and duties to further protect the lands.

More specifically, the new regulation refers to forage allocated under the guidance of an "applicable land use plan." Ranchers were concerned that this language reduced the security of their privileges because such plans were easily changed. The Court found the ranchers' position unpersuasive for three reasons. First, the TGA qualifies the duty of the Secretary to safeguard grazing privileges by requiring that duty to be exercised consistent with the goals of the Act. Therefore, the ranchers' interest in permit stability cannot be absolute and the Secretary may reasonably determine how and the extent to which, grazing privileges shall be safeguarded. Furthermore, Congress itself directed the development of land use plans and their use in the allocation process in order to preserve, improve, and develop the public rangelands.[18]

Second, the pre-1995 system did not offer ranchers anything like absolute security because the Secretary had long had the discretion to cancel or modify permits or to remove lands from grazing in accordance with land use plans, and to direct the use of the lands for purposes other than grazing. Lastly, the new regulations do not automatically bring about a self-executing change that would significantly diminish the security of granted grazing privileges. Although the new definitions seem to tie grazing more explicitly to land-use plans, the Secretary has had that authority since 1976, yet, the Court noted, not a "single example" was provided in which interaction of a plan and a grazing permit jeopardized security. Also, the Court noted, affected permit holders remain free to challenge effects on particular grazing privileges as the regulations are applied. Justice O'Connor, in a concurring opinion joined in by J. Thomas, reiterated this point.

Requiring permittees to be engaged in the livestock business. The district court had found that a new regulation[19] eliminating the requirement that a permittee be engaged in the livestock business lacked a reasoned basis, violated the Taylor Grazing Act, and frustrated its purposes. The appellate court disagreed, concluding that even non-livestock owners could qualify for permits. However, the language of 43 U.S.C. § 315b mentions settlers, residents and "other" stock owners in authorizing the Secretary to:

> issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range .... Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them ....

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[17] Pub. L. No. 94-579, 90 Stat. 2744.

[18] 43 U.S.C. §§ 1701(a)(2), 1712.

[19] 43 C.F.R. § 4110.1 (1994).

The Supreme Court upheld the new regulation since in the Court's view the regulation merely failed to repeat statutory language that nonetheless pertains. The Court noted that the statutory language limits the Secretary's authority to issue permits to "bona fide settlers, residents, and *other stock owners*,"[20] with persons in the livestock business continuing to enjoy a preference in the issuance of grazing permits. Therefore, even if some "stock owners" who might own only a few head of stock might apply for a permit, applicants who are in the livestock business would have a preferred status. The Court also noted that the regulations prohibit failure to make substantial grazing use as authorized for 2 consecutive fee years, with cancellation of the permit as a possible remedy.[21] Under other regulations, even if temporary nonuse is approved for one permittee, the Secretary may allocate the forage to the use of another permittee. Therefore, the Court concluded that the new regulations do not undermine the TGA's requirement that permits be "to graze livestock."[22]

Titling of permanent range improvements. The last challenge was to the new regulations that require that title to all new permanent range improvements developed under a cooperative agreement be in the name of the United States, a change from previous regulations. The ranchers argued that this change violated TGA language in 43 U.S.C. § 315c that provides for compensation of a permittee for improvements "owned" by the permittee when a new occupant grazes an allotment. The Secretary argued that because the TGA gives him the power to *authorize* improvement, he also has the lesser power to set the terms of ownership and the statutory language refers to payment of compensation *if* ownership is allowed. The Court held that nothing in the statute prevented the Secretary from setting the terms of title to range improvements, and that nothing in the statute or regulations prevents a permittee from negotiating compensation for work done on improvements, either from the Government or from subsequent permittees.[23]

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[20] The Court emphasized this phrase at 745.

[21] 43 C.F.R. § 4110.1 (1994).

[22] 529 U.S. at 747-748.

[23] 529 U.S. at 750.