FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

K. JOHN CORRIGAN; M. MARTHA CORRIGAN; HANLEY RANCH PARTNERSHIP; MICHAEL F. HANLEY IV; LINDA LEE HANLEY, *Plaintiffs-Appellants*, v. DEB HAALAND,* Secretary of the U.S. Department of the Interior; WILLIAM PERRY PENDLETON, Director of the BLM; JOHN RUHS, Idaho State Director of the BLM; LARA DOUGLAS, Boise District Manager in her capacity as manager for the Boise District of the BLM; DONN CHRISTIANSEN, Owyhee Field Office Manager in his official capacity as manager for the Owyhee FO of the Boise District of the BLM, *Defendants-Appellees*, and	No. 20-35393 D.C. No. 1:18-cv-00512-BLW OPINION

* Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, the Court substitutes as defendant the current Secretary of the U.S. Department of the Interior, Deb Haaland, for the former Secretary, David Bernhardt.

WESTERN WATERSHEDS PROJECT,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted May 3, 2021
Seattle, Washington

Filed September 2, 2021

Before: Morgan Christen and Mark J. Bennett, Circuit Judges, and Paul L. Friedman,** District Judge.

Opinion by Judge Friedman

** The Honorable Paul L. Friedman, United States District Judge for the District of Columbia, sitting by designation.

SUMMARY[***]

Grazing Permits

The panel affirmed the district court's grant of summary judgment in favor of the Department of the Interior and Intervenor Western Watersheds Project in appellants' action challenging the Bureau of Land Management's denial of their request to transfer a "preference" to receive a permit to graze on certain federal land allotments.

Appellants Michael Hanley, IV, Linda Hanley, and Hanley Ranch Partnership sought to transfer to Appellants K. John Corrigan and M. Martha Corrigan the preference. The BLM denied the preference transfer application based on its conclusion that Hanley Ranch Partnership did not hold any preference that it could transfer. The Department of the Interior's Interior Board of Land Appeals ("IBLA") upheld the BLM's denial.

The panel upheld the IBLA's decision at step one of the *Chevron* framework because the IBLA correctly applied the clear and unambiguous language of the Taylor Grazing Act of 1934 and the Federal Land Policy and Management Act of 1976, which established that a grazing preference could not be exercised after the corresponding grazing permit was not renewed for bad behavior. The panel rejected the ranchers' contention that a grazing preference remains attached to base property until separately cancelled. Because the IBLA correctly interpreted and applied the

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

statutory authorities, and therefore did not act "contrary to law," the decision was not arbitrary and capricious in violation of the Administrative Procedure Act. The panel noted that it was clear that the ranchers would fare no better under the Grazing Regulations, which were wholly consistent with the statutes they implemented.

COUNSEL

W. Alan Schroeder (argued), Schroeder Law, Boise, Idaho; Laura A. Schroeder, Schroeder Law Offices P.C., Portland, Oregon; for Plaintiffs-Appellants.

Christine G. England (argued) and Robert B. Firpo, Assistant United States Attorneys; Bart M. Davis, United States Attorney; United States Attorney's Office, Boise, Idaho; for Defendants-Appellees.

Talasi B. Brooks (argued), Western Watersheds Project, Boise, Idaho; Paul D. Ruprecht, Western Watersheds Project, Reno, Nevada; for Intervenor-Defendant-Appellee.

OPINION

FRIEDMAN, District Judge:

Appellants Michael F. Hanley, IV, Linda Lee Hanley, and Hanley Ranch Partnership sought to transfer to Appellants K. John Corrigan and M. Martha Corrigan a "preference" to receive a permit to graze on certain federal land allotments. The Bureau of Land Management ("BLM") denied the preference transfer application, concluding that Hanley Ranch Partnership did not hold any preference that

it could transfer. The Interior Board of Land Appeals ("IBLA"), an appellate tribunal within the Department of the Interior, upheld the BLM's denial, concluding that after Hanley Ranch Partnership's grazing permit expired, and the BLM declined to issue a new permit due to unsatisfactory performance, Hanley Ranch Partnership did not hold any residual preference. The district court agreed.

Appellants now ask us to reverse the district court's decision, arguing that a grazing preference survives the expiration of a corresponding permit and continues to exist until the BLM cancels it. Because the BLM never canceled their grazing preference through any formal process, Appellants ask us to conclude that they retained a preference even after their grazing permit expired.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's grant of summary judgment in favor of Appellee the Department of the Interior and Intervenor-Appellee Western Watersheds Project ("WWP").

I. FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1934, Congress has passed laws that govern grazing privileges on the public rangelands. The Taylor Grazing Act of 1934 ("TGA"), 43 U.S.C. § 315 *et seq.*, seeks to "promote the highest use of the public lands" and "stop injury" from "overgrazing and soil deterioration." 43 U.S.C. § 315; *see generally Pub. Lands Council v. Babbitt*, 529 U.S. 728, 731–33 (2000). Under the system established by the TGA, the Secretary of the Interior is authorized to divide public rangelands into grazing districts and to issue permits to private parties to graze livestock on the land. The TGA and its companion statute, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, provide that individuals who

control land within or near a grazing district may receive a "preference" or "priority" to stand first in line in applying for a grazing permit. *See Pub. Lands Council*, 529 U.S. at 733–38.

Since at least 1988, Hanley Ranch Partnership ("HRP") received a series of ten-year permits to graze on two allotments in southwestern Idaho: the Trout Springs Allotment and the Hanley Fenced Federal Range Allotment. HRP also held preferences based on its control of private land adjoining the two allotments. On March 12, 2002, the BLM issued HRP's last ten-year permit, which authorized HRP to graze on the allotments through February 28, 2012.

In 2009, the BLM informed HRP that it would not renew HRP's permit pursuant to 43 C.F.R. § 4110.1(b), explaining that it had "identified numerous and continuous instances of non-compliance with the terms and conditions of the existing federal grazing permit, as well as a number of violations (trespasses) in the Trout Springs Allotment." HRP appealed the BLM's decision to two appellate tribunals within the Department of the Interior, first to the Departmental Cases Hearings Division ("Hearings Division"), and next to the IBLA. Both tribunals affirmed, and HRP did not seek review in federal court.

On August 1, 2013, HRP leased several plots of "base property" attached to the Trout Springs and Hanley Fenced Federal Range Allotments to K. John and M. Martha Corrigan, for a period extending through February 28, 2024.[1] Relying on this lease, the Corrigans submitted an application to the BLM to transfer a grazing preference from

[1] Ms. Corrigan is the daughter of Michael F. Hanley, IV, one of the partners in HRP.

HRP to the Corrigans. The BLM denied the application on November 22, 2013, explaining that HRP no longer possessed any grazing preference. The Hanleys and the Corrigans (collectively, "Ranchers") appealed the BLM's decision to the Hearings Division, which affirmed on January 25, 2016. Ranchers subsequently appealed to the IBLA.

On August 10, 2017, the IBLA issued the opinion that is the subject of this appeal, affirming the ruling of the Hearings Division and the underlying decision by the BLM to deny the preference transfer application. The IBLA analyzed the TGA, the FLPMA, and the Department of the Interior's grazing regulations, codified at 43 C.F.R. 4100 *et seq.* ("the Grazing Regulations").[2] The IBLA concluded that "there is no basis in law supporting appellants' view that Hanley Ranch's grazing preference . . . can exist in a vacuum, without a grazing permit." The IBLA determined that once a permit expires and the BLM declines to renew it, the BLM need not separately cancel the associated preference, which expires alongside the permit. As a result, the IBLA concluded that the BLM correctly rejected the Corrigans' preference transfer application.

Ranchers sought judicial review of the IBLA's decision. On February 26, 2020, the U.S. District Court for the District

[2] The Department of the Interior last amended the Grazing Regulations in 2006. 71 Fed. Reg. 39402, 39503 (July 12, 2006). In 2008, however, the U.S. District Court for the District of Idaho enjoined those amendments from taking effect. *See W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part, vacated in part, remanded*, 632 F.3d 472 (9th Cir. 2011). All citations in this opinion to the Grazing Regulations are to the version in effect prior to the 2006 amendments. *See* Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894, 9901 (Feb. 22, 1995).

of Idaho denied Ranchers' motion for summary judgment and granted summary judgment in favor of the Department of the Interior and WWP. This appeal followed.

II. STANDARDS OF REVIEW

A. Summary Judgment

"We review de novo a challenge to a final agency action decided on summary judgment and pursuant to Section 706" of the Administrative Procedure Act ("APA"). *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 903 (9th Cir. 2020). "De novo review of a district court judgment concerning a decision of an administrative agency means the court views the case from the same position as the district court," *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003), and "review[s] directly the agency's action under the Administrative Procedure Act's [] arbitrary and capricious standard," *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) (quotation marks omitted). The Court "may affirm on any ground supported by the record." *Lima v. U.S. Dep't of Educ.*, 947 F.3d 1122, 1125 (9th Cir. 2020).

Under the APA, we "will reverse the IBLA's decision only if that decision is arbitrary, capricious, not supported by substantial evidence, or contrary to law." *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999). An agency decision construing a statute is not in violation of the APA where the agency accurately applies an unambiguous statute, or permissibly construes an ambiguous statute, and its conclusion is "well supported by substantial evidence in the record." *Akootchook v. United States*, 271 F.3d 1160, 1168 (9th Cir. 2001); *see also W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 986–87 (9th Cir. 2010).

B. *Chevron* Framework

Ranchers' argument calls into question the IBLA's interpretation of the TGA and the FLPMA. When a party challenges agency action as inconsistent with the terms of a statute, courts apply the familiar analytical framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In step one, a court must determine "whether Congress has directly spoken to the precise question at issue," or, instead, whether the statute is ambiguous. *Chevron*, 467 U.S. at 842. In determining whether Congress has directly spoken, a court uses "traditional tools of statutory construction," including an examination of the statute's text, the structure of the statute, and (as appropriate) legislative history. *Id.* at 843 n.9. "Whether statutory language is sufficiently plain or not is 'determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.'" *W. Watersheds Project*, 624 F.3d at 987 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 903 (9th Cir. 2014) (quoting *Chevron*, 467 U.S. at 842–43).

If a court determines that the "statute is silent or ambiguous with respect to the specific issue," *Chevron*, 467 U.S. at 843 – that is, if the disputed language is "reasonably susceptible of different interpretations," *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n.27 (1985) – the court must proceed to step two. At step two, "the question for the court is whether the agency's [action] is based on a permissible

construction of the statute." *Chevron*, 467 U.S. at 843. At this step, a court need not determine that an agency's construction is "the best interpretation of the statute," *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (quoting *Atl. Mut. Ins. Co. v. Comm'r*, 532 U.S. 382, 389 (1998)), or that it is "the only [construction that the agency] permissibly could have adopted," *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (quoting *Chevron*, 467 U.S. at 843 n.11). Instead, courts defer to an agency's construction "if it is a reasonable one," even if "it is not the [construction the court] would arrive at." *Dep't of Treasury, I.R.S. v. Fed. Lab. Rels. Auth.*, 494 U.S. 922, 928 (1990).

III. STATUTORY FRAMEWORK

Two statutes at issue in this case govern grazing privileges on public lands: the TGA and the FLPMA.

A. Taylor Grazing Act of 1934

The TGA authorizes the Secretary of the Interior "to divide the public range-lands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits 'to graze livestock,' and to charge 'reasonable fees' for use of the land." *Pub. Lands Council*, 529 U.S. at 733 (quoting 43 U.S.C. §§ 315, 315a, 315b). It provides in relevant part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts . . . . 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 . . . . Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior.

43 U.S.C. § 315b.

B. Federal Land Policy and Management Act of 1976

The FLPMA reinforced the Department of the Interior's authority "to remove or add land from grazing use . . . while specifying that existing grazing permit holders would retain a 'first priority' for renewal so long as the land use plan continued to make land 'available for domestic livestock grazing.'" *Pub. Lands Council*, 529 U.S. at 738 (quoting 43 U.S.C. § 1752(c)). At the time HRP sought to transfer its grazing preference to the Corrigans, the relevant portion of the FLPMA provided:

> So long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 1712 of this title or section 1604 of title 16, (2) the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned, and (3) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, the holder of the

> expiring permit or lease shall be given first priority for receipt of the new permit or lease.

43 U.S.C. § 1752(c).[3] The FLPMA did not eclipse the previously enacted TGA but rather "strengthened the Department[of the Interior]'s existing authority" under the TGA. *Pub. Lands Council*, 529 U.S. at 738. The two statutes are therefore consistent and should be read together.

IV. DISCUSSION

Ranchers ask us to conclude that a grazing preference does not automatically expire when an associated permit

[3] Congress amended the FLPMA in 2014, after the BLM denied Ranchers' preference transfer application. *See* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3023, 128 Stat. 3229, 3762–63. Ranchers' contention that the IBLA and the district court should have considered this revised version of the FLPMA is misguided. "A reviewing court must review the administrative record before the agency at the time the agency made its decision." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). The 2014 amendments to the FLPMA include no indication that they were intended to apply retroactively to the BLM's 2013 decision. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). We therefore analyze the pre-2014 version of the FLPMA, and all references in this opinion are to the FLPMA as it was in effect in 2013.

Even if the amended version of the FLPMA applied, this would not alter the outcome. The revised language still limits the "first priority" for renewal to the "holder of the expiring permit or lease" who "is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease." 43 U.S.C. § 1752(c)(1) (2014). As discussed *infra* in part IV(A), this unambiguously precludes Ranchers' theory that a former permittee's preference continues to exist indefinitely until it is formally canceled.

expires, and therefore, that the IBLA's decision upholding the denial of the Corrigans' preference transfer application contravenes applicable law. They maintain that the TGA, the FLPMA, and the Grazing Regulations unambiguously support their position, but that if we find ambiguity, we should not defer to the IBLA's interpretation. The government and WWP counter that the IBLA correctly interpreted the unambiguous statutes and regulations in reaching its conclusions, but that if we find ambiguity, we should defer to the IBLA.

We agree with the government and WWP. The facts are undisputed and the IBLA's decision rests on its interpretation of the TGA, the FLPMA, and the Grazing Regulations.[4] Whether to uphold the IBLA's decision therefore depends in the first instance on whether the IBLA correctly interpreted and applied the statutes, which we evaluate under the *Chevron* framework. Here, our analysis begins and ends with *Chevron* step one. The TGA and the FLPMA are unambiguous and are consistent with the IBLA's conclusions.

[4] The parties' briefs raise a single point of factual dispute. The government and WWP assert that the Corrigans submitted an invalid permit with their preference transfer application, which they say shows that the Corrigans believed a valid permit must accompany any preference. Ranchers respond that the Corrigans attached this document only "to show the terms that they would likely need to accept should their Grazing permit application be approved." The Corrigans' true motive for attaching this document is immaterial; it does not alter the outcome of this case when the statutes are properly construed and applied to the other, undisputed facts.

A. *Chevron* Step One: The Statutes are Unambiguous

The "precise question at issue" in this case, *Chevron*, 467 U.S. at 842, is whether a former permittee's preference continues to exist after the associated grazing permit expires and is not renewed due to bad behavior. The TGA and the FLPMA unambiguously answer this question in the negative. After a permit expires, a former permittee does not retain any preference to stand first in line for a future permit.

1. Plain Text

In construing "what Congress has enacted," a court must "begin, as always, with the language of the statute." *Navajo Nation v. HHS*, 325 F.3d 1133, 1136 (9th Cir. 2003) (en banc) (quoting *Duncan v. Walker*, 533 U.S. 167, 172 (2001)). The TGA provides that "[p]reference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business," and that "permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior." 43 U.S.C. § 315b. This language neither states nor implies that a preference may exist as a stand-alone interest or be held by a former permittee. Instead, it describes a preference as something that informs the agency's decision concerning issuance of a grazing permit, suggesting that a preference is first and foremost a means by which the agency determines a permittee's relative place in line.

This language also indicates that, following the very first round of permits issued upon passage of the TGA, Congress anticipated that "preference" would be a privilege exercised in conjunction with the renewal process and alongside a valid permit. The TGA provides that "permits shall be for a

period of not more than ten years, subject to the preference right of the *permittees* to *renewal*." 43 U.S.C. § 315b (emphasis added). This statutory language supports the IBLA's conclusion, because applicants are only "permittees" and only have something to "renew[]" if they hold valid permits at the time they seek to exercise their preferences.

The text of the TGA becomes even clearer when read in conjunction with the subsequently enacted FLPMA, which reinforces Congress's intent to limit renewal preferences to existing permit holders. The FLPMA sets forth three requirements for the exercise of a preference or "first priority": (1) the lands for which a permit was previously issued "remain available for domestic livestock grazing"; (2) "the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease"; and (3) "the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease." 43 U.S.C. § 1752(c). If these conditions are satisfied, "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease." *Id*.

The second and third requirements of Section 1752(c) of the FLPMA make explicit that only an *existing* permittee may exercise a preference right as part of the permit renewal process. Both refer in the present tense to "the permittee or lessee," underscoring that Congress expected renewal priority to be exercised by individuals who hold valid permits or leases at the time of application. The second requirement refers to "the terms and conditions in the permit or lease," pointing to the existence of a still-valid permit or lease. The second requirement also mandates that an applicant be "in compliance" with the terms of the permit,

underscoring that a former permittee such as HRP, whose permit was not renewed after the BLM determined it was *not* in compliance with the terms and conditions of its permit, is ineligible to exercise a priority for renewal. Finally, the language that follows the three requirements confirms that the priority for renewal may be exercised by "the holder *of the expiring permit or lease*." 43 U.S.C. § 1752(c) (emphasis added).

Ranchers fail to offer any textually grounded explanation of how a former permittee whose permit expired and was not renewed for bad behavior could exercise a preference. Ranchers make much of the fact that the statutes do not explicitly state that a preference expires upon non-renewal of a permit. Yet the statutes also do not require the agency to formally cancel a preference, separate and apart from its non-renewal decision. This latter omission is more significant, because the other statutory language discussed above supports the conclusion that a preference cannot be exercised after a permit expires.

Ranchers' view "would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994). The Supreme Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law," *United States v. Wells*, 519 U.S. 482, 496 (1997) (citations, brackets, and quotation marks omitted), and we "avoid reading in unstated statutory requirements" concerning cancellation of a preference, *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1153 (9th Cir. 2019).

2. Statutory Structure

In making the threshold determination under *Chevron* step one, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (citations, brackets, and quotation marks omitted). Here, the statutory scheme that the TGA and the FLPMA establish further supports the IBLA's conclusion that a preference does not survive non-renewal of a permit.

The TGA introduces the concept of "preference" in a section entitled "Grazing permits; fees; vested water rights; permits not to create right in land." 43 U.S.C. § 315b. This title reinforces the view that a preference is not a stand-alone entitlement, but instead a concept that has meaning only as part of the permitting process. The FLPMA refers to "first priority" for renewal, a term which is interchangeable with the term "preference" in the TGA. *See Pub. Lands Council*, 529 U.S. at 738. As the Supreme Court has explained, the FLPMA expanded upon the framework in the TGA by "specifying that *existing* grazing permit holders would retain a 'first priority' *for renewal*.'" *Id*. (quoting 43 U.S.C. § 1752(c)) (emphasis added). In so doing, the FLPMA tied the "first priority" associated with a previously issued permit to the permit renewal process.

Neither the TGA nor the FLPMA mention a process for canceling a grazing preference. Yet both statutes *do* address circumstances under which the agency may cancel a *permit* prior to its scheduled expiration. *See* 43 U.S.C. § 315q; 43 U.S.C. § 1752(g). The explicit provision for cancellation of a permit, and the omission of any corresponding provision for cancellation of a preference, is "imbued with legal

significance," *Pit River Tribe v. Bureau of Land Mgmt.*, 939 F.3d 962, 971 (9th Cir. 2019) (quoting *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)), for "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *id*. (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)). If Congress intended grazing preferences to exist indefinitely until canceled, as Ranchers urge, we would expect the statutes to at least mention cancellation of preferences. This is particularly true because the drafters of the statutes made express provision for cancellation of grazing permits.

Several "words [and] phrases" of the TGA and the FLPMA, "when placed in context," *Nat'l Ass'n of Home Builders*, 551 U.S. at 666 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)), illuminate a defining characteristic of the statutory scheme: to preserve the agency's discretion over grazing privileges and to avoid establishing any indefinite entitlements for private parties. The TGA specifies that the agency retains "discretion" over whether to grant a permit even when an applicant seeks renewal subject to a preference, and admonishes that grazing privileges "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b. The FLPMA reinforces this theme, clarifying that permits are "subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit . . . or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease." 43 U.S.C. § 1752(a). Both statutes also clarify that permits

grant only temporary grazing privileges. *See* 43 U.S.C. § 315b; 43 U.S.C. § 1752(a).

Ranchers nonetheless contend that "the Grazing preference remains attached to base property until separately canceled," suggesting that a grazing preference is a stand-alone interest that runs with the base property. This is incorrect. As the Supreme Court has explained, the statutory scheme reflects a congressional decision to vest the agency with control over the public lands, including discretion to revoke use of those lands. *See Pub. Lands Council*, 529 U.S. at 742–43 ("[T]he Secretary has always had the statutory authority under the Taylor Act and later FLPMA to reclassify and withdraw rangeland from grazing use . . . . [and] has consistently reserved the authority to cancel or modify grazing permits accordingly."); *United States v. Fuller*, 409 U.S. 488, 494 (1973) ("The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property might be created in the permit lands themselves as a result of the issuance of the permit.").

This Court and other federal courts have likewise underscored that the agency's discretion over public lands supersedes any preference right. *See United States v. Est. of Hage*, 810 F.3d 712, 717 (9th Cir. 2016) (ownership of water rights adjacent to an allotment "has *no effect* on the requirement that a rancher obtain a grazing permit" which "'has always been a revocable privilege' and is not a 'property right[]'" (quoting *Swim v. Bergland*, 696 F.2d 712, 719 (9th Cir. 1983))); *Fed. Lands Legal Consortium ex rel. Robart Est. v. United States*, 195 F.3d 1190, 1198 (10th Cir. 1999) ("Although FLLC may have a priority during renewal, this court has repeatedly held that the decision whether to issue or deny a permit is a discretionary one[.]"), *abrogated on other grounds as recognized in Onyx Props. LLC v. Bd.*

of Cnty. Comm'rs of Elbert Cnty., 838 F.3d 1039, 1043 n.2 (10th Cir. 2016); *Alves v. United States*, 133 F.3d 1454, 1457 (Fed. Cir. 1998) ("[T]he distinction between grazing 'permits' and grazing 'preferences' is irrelevant because neither constitutes a property interest compensable under the Fifth Amendment.").

Ranchers' argument that a grazing preference runs with the base property also misses the mark because it overlooks the fact that this appeal stems from the BLM's denial of the Corrigans' preference transfer application. As the IBLA correctly concluded, with no valid permit, there was no preference to transfer, irrespective of who controlled the base property.[5]

3. Statutory Purpose

In interpreting a statute, a court must also account for that statute's history and purpose. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–93 (2007). The stated purpose of the TGA is to "promote the highest use of the public lands." 43 U.S.C. § 315. Congress described the specific objectives of the TGA as being "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range." TGA, 48 Stat. 1269 (1934). These objectives are consistent with Congress's reservation of discretion in the agency. In order to carry out the purpose of the TGA by acting as "landlord of the public

[5] We leave open the possibility that if a permit terminates and the base property is sold in an arm's length transaction, the new owner of the base property might be entitled to a preference in applying for a new grazing permit.

range," *Pub. Lands Council*, 529 U.S. at 735, the Secretary of the Interior must be able to prevent former permittees from continuing any pattern of conduct that causes "injury to the public grazing lands," 48 Stat. 1269.

Ranchers' proposed interpretation contravenes this purpose. It would empower those private parties who have acted in a manner that causes damage to the lands to reserve certain grazing privileges, even after the agency has determined that their bad behavior justifies denying them the privileges of receiving new grazing permits. As WWP points out, "[a]ccepting Ranchers' theory would mean that a rancher whose record of performance disqualifies it from holding a grazing permit nevertheless could hold a transferable, non-expiring privilege to stand first in line for a new permit." According to WWP, this would enable HRP to "dictate use of the public lands despite its abuse of its grazing privileges," and "would interfere with the Secretary's exclusive discretion granted by Congress to determine who may graze the public lands and under which conditions."

We agree; this interpretation makes no sense. Where Congress has expressly empowered the Secretary of the Interior to manage the public lands and has declined to limit the Secretary's discretion to revoke grazing privileges, it strains credulity that a former permittee such as HRP – whose permit the BLM declined to renew after "numerous and continuous instances of non-compliance" – should retain a preference right that it can transfer to a party of its choosing.

In sum, the text, structure, and purpose of the TGA and the FLPMA, when viewed together, make clear that Congress intended preferences for renewal to be exercised only by individuals who hold valid grazing permits and are

in compliance with the terms of those permits. Ranchers "offer[] no persuasive authority compelling [their] preferred conclusion." *W. Watersheds Project*, 624 F.3d at 989. The intent of Congress is clear, and we affirm at *Chevron* step one.

B. The Grazing Regulations do not Support Ranchers' Position

Because a plain reading of the statutory language of the TGA and the FLPMA resolve this case, there is no reason for the Court to consider the Grazing Regulations. But it is clear that Ranchers would fare no better under the Regulations, which – contrary to Ranchers' argument – are wholly consistent with the statutes they implement.

Ranchers' theory depends on their reading of Section 4110.1(b)(1)(i) and Section 4170.1-1(a) of the Grazing Regulations. Section 4110.1(b)(1)(i) describes the qualifications for permit renewal, and Section 4170.1-1(a) describes a process by which the agency may cancel a grazing permit before its scheduled expiration. 43 C.F.R. §§ 4110.1(b)(1)(i), 4170.1-1(a). According to Ranchers, Section 4170.1-1(a) shows that, in some instances, the BLM formally cancels a grazing preference, but here, the BLM relied only on Section 4110.1(b)(1)(i) in declining to renew HRP's grazing permit. Because Section 4110.1(b)(1)(i) makes no mention of grazing preferences, Ranchers would have us conclude that the decision pursuant to Section 4110.1(b)(1)(i) did not cancel HRP's grazing preference.

This argument is unpersuasive. Not only is there a complete absence of authority for the notion that a preference exists until it is canceled under Section 4170.1-1(a), but Section 4170.1-1(a) is not even at play in this case. Ranchers ask the Court to elide the

distinction between non-renewal of a permit and cancellation of a permit. But the distinction they ask us to ignore bears directly on the continued existence of a preference.

As the government explained at oral argument, when the BLM issues a grazing permit, that permit may include a preference for renewal. When the term of that permit is set to expire, the permittee may exercise its preference in applying for a new permit. If the BLM grants this application, the new permit may be accompanied by a new, separate preference for future renewal. Whether or not the BLM issues a new permit, however, the original preference disappears after being exercised. Within the context of non-renewal of a permit, therefore, the Grazing Regulations make no specific provision for cancellation of a preference, because that preference ceases to exist in the normal course. By contrast, where the BLM cancels a permit prior to the normal expiration of its term – and before the permittee has had an opportunity to exercise the associated preference – a question might arise as to whether the preference continues to exist even after the BLM cancels the permit. For this reason, Section 4170.1-1(a) specifically provides for cancellation of a preference in conjunction with cancellation of a permit.

The BLM did not cancel HRP's permit pursuant to Section 4170.1-1(a); rather, it declined to renew the permit upon the expiration of its term pursuant to Section 4110.1(b)(1)(i). Accordingly, we agree with the government's statement that "the Grazing Regulations' cancellation procedures were not applicable in this case," because of the simple fact that neither HRP's permit nor HRP's preference was canceled prior to their scheduled expiration. As the district court correctly explained, the

statutory and regulatory framework make clear that "once the permit is not renewed due to noncompliance, the preference disappears at the same moment the permit disappears."[6]

Even if Section 4170.1-1(a) were at all relevant, it would not have been possible for the BLM to cancel HRP's grazing preference pursuant to that provision, which provides for cancellation of a "grazing permit or lease *and* grazing preference." 43 C.F.R. § 4170.1-1(a) (emphasis added). Because of the conjunction "and," Section 4170.1-1(a) is most naturally read to mean that the BLM only cancels a preference when it simultaneously also cancels a permit or lease. HRP did not retain any grazing permit after February 28, 2012, so the BLM could not have canceled HRP's preference pursuant to this provision after HRP's permit expired.

V. CONCLUSION

We uphold the IBLA's decision at *Chevron* step one because the IBLA correctly applied the clear and unambiguous language of the TGA and the FLPMA, which

[6] Ranchers contend that the BLM's conduct in an unrelated case contradicts this conclusion because it shows that in at least one instance, the BLM canceled a former permittee's preference after the corresponding permit had expired. In that case, E. Wayne Hage declined to sign a permit renewal that the BLM sent to him in 1997 and the BLM therefore did not renew his permit. Twelve years later, the BLM issued a separate decision formally canceling Mr. Hage's preference pursuant to 43 C.F.R. § 4170.1-1(b). Yet Ranchers present no evidence that this decision was ever appealed to or affirmed by the IBLA, whose decisions represent the agency's official position. *See* 43 C.F.R. §§ 4.403(a), 4.1(b)(2). This is much more akin to an "ad hoc statement not reflecting the agency's views," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019), and does not carry the force of law.

establish that a grazing preference cannot be exercised after the corresponding grazing permit is not renewed for bad behavior. Because the IBLA correctly interpreted and applied the statutory authorities, and therefore did not act "contrary to law," it follows that the decision is not arbitrary and capricious in violation of the APA. The district court's grant of summary judgment was therefore proper.

The judgment of the district court is **AFFIRMED**.