

O'CONNOR, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 98–1991

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[May 15, 2000]

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins,
concurring.

I join the Court's opinion. I write separately to make
the following observations concerning the Court's decision.

First, in Part II–A, the Court holds that the Secretary
did not exceed his authority under the Taylor Grazing Act
by promulgating the new “grazing preference” and “per-
mitted use” rules. I agree with that holding but would
place special emphasis on the Court's third reason for
rejecting petitioners' facial challenge to the regulations.
Petitioners have not shown how the new regulations
themselves—rather than specific actions the Secretary
might take pursuant to those regulations—violate the
Taylor Grazing Act's requirement that “grazing privileges
recognized and acknowledged . . . be adequately safe-
guarded.” 43 U. S. C. §315b. It is of particular impor-
tance, as the Court notes, *ante*, at 14, that the Secretary
has assured us that the new regulations do not in actual
practice “alter the active use/suspended use formula in
grazing permits” and that “present suspended use would
continue to be recognized and have a priority for addi-
tional grazing use within the allotment.” Brief for Re-
spondents 22 (quoting Bureau of Land Management,
Rangeland Reform '94: Final Environmental Impact

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Statement 144 (1994)). For these reasons, petitioners' facial challenge to the regulations must fail. Should a permit holder find, however, that the Secretary's specific application of the new regulations deviates from the above assurances and in the process deprives the permit holder of grazing privileges to such an extent that the Secretary's conduct can be termed a failure to adequately safeguard such privileges, the permit holder may bring an as-applied challenge to the Secretary's action at that time. The Court's holding today in no way forecloses such a challenge. See *ante*, at 15 ("[T]he affected permit holder remains free to challenge such an individual [denial of] grazing privileges, and the courts remain free to determine its lawfulness in context").

Second, it is important to note that the Court's decision today only rejects petitioners' claim that the 1995 regulations exceed the Secretary's authority under the Taylor Grazing Act. We are not presented in this case with a claim under the Administrative Procedure Act (APA), 5 U. S. C. §706(2)(A), that the Secretary acted arbitrarily and capriciously in promulgating the new regulations. Under our decision in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 42 (1983), an agency that departs from its previous rules will be found to have acted arbitrarily and capriciously if it fails "to supply a reasoned analysis for the change" Although petitioners pressed precisely such an "arbitrary and capricious" challenge before the District Court, for whatever reason, they chose not to raise it before this Court. Regardless of whether the "arbitrary and capricious" claim remains open to these permit holders, the Court's decision does not foreclose such an APA challenge generally by permit holders affected by the 1995 regulations.

With these understandings, I join the Court's opinion.