

Editor's note: Reconsideration granted – reversed See Donald Jansen (On reconsideration), 19 IBLA 154, 82 I.D. 93 (March 14, 1975)

DONALD E. & NANCY P. JANSON, APPELLANTS;
CUMMING LAND & LIVESTOCK CORPORATION, APPELLEE

IBLA 74-6

Decided June 25, 1974

Appeal from decision of Phoenix District Office, Bureau of Land Management, denying an application for a grazing lease on certain lands.

Affirmed.

Grazing Leases: Preference Right Applicants—Grazing Leases: Renewal

Where the decision of the Authorized Officer as to division of lands under section 15 of the Taylor Grazing Act is based on topography and the record is silent as to the extent of actual historical use, the decision will be sustained where it is not shown to be inequitable.

APPEARANCES: Donald E. and Nancy P. Janson, each pro se; Douglas Cumming, President, for the Cumming Land and Livestock Corp.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Donald E. Janson and Nancy P. Janson have appealed from a decision, dated May 1, 1973, rendered by the Phoenix District Office, Bureau of Land Management, which rejected a grazing lease application, filed pursuant to section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970).

Appellants' application was rejected in part and only as to 271 acres because a fence separated this tract from the main part of appellants' ranching operation, a steep ridge interfered with its use, and another preference right applicant, Cumming Land and Livestock Corporation [appellee], could more advantageously use the tract. These 271 acres fall between the fee lands of Cumming on the south and the ridge, once paralleled by a fence, running roughly northwest to southeast.

Appellants challenge these findings. They contend that the fence, though paid for by them, was built in the wrong location;

but, even so, was not a barrier to cattle movement when they wired the gates open and put salt blocks in the area. They also charge that their cattle, of a particular breed (Charolais) were not hindered in grazing by the terrain. Appellants assert that the competing applicant did not have an economic unit for cattle production in this area, southern Arizona; that their competitor is interested in purchasing their ranch; and that it is primarily interested in a hunting operation on these lands.

After appellants filed their notice of appeal, the Phoenix District Office supplemented the record with a memorandum of June 26, 1973, which set forth several additional reasons for the denial of appellants' lease application.

Three additional reasons were included:

1. Appellants had built the fence which separated these lands from the remainder of their operation, and
2. Appellants would not meet with the competing applicant and a representative of the Bureau of Land Management, and
3. Water for stock was most readily available on the land of the competing applicant.

In reply to appellants, appellee denied that it was responsible for the location of the fence, which was built on a roughly northwest to southeast line. It also asserted that its employees had not closed any open gates; nor had seen any gates wired open; nor had seen or removed any salt blocks; nor had seen any cattle, or their signs, evidencing grazing on the east side of the fence. Appellee corporation elaborated on the fact that appellants' cattle were not better suited physically to use the land, and the fact that though appellee's ranch is uneconomic by itself, it is part of such a unit with another ranch some distance away. Appellee also alleged that whatever hunting took place was a sideline to the main activity of ranching.

Before consideration of the case, the memorandum was forwarded to both appellee and appellants (Order of December 7, 1973) for any appropriate responses. Appellants filed a letter after receiving a copy of this memorandum. In this letter, it appears they misconstrued this Order as an indication that their appeal had never been received. In this they were mistaken, for their appeal had been received, and the Order was based upon considerations of fairness in preliminary matters before the appeal was ruled upon. In addition to this minor misconception, appellants generally repeated the contentions contained in their statement of reasons. However, they also alleged that the fence has now been removed, and that the reason they did not meet with representatives of appellee corporation

and the Bureau of Land Management was because they were awaiting a return call from the BLM.

As for the finding of the Phoenix District Office that the availability of water and the character of the terrain favor grazing from appellee's side of the area in dispute, appellants have characterized the finding as "nitpicking", and have emphasized that their cattle "thrive in the most difficult and rough terrain."

The regulations governing the administration of grazing on the public lands, outside grazing districts and irrespective of Alaska, 43 CFR Part 4120, dictate consideration of seven factors in allocating grazing leases. These include

- 1) Historical use
- 2) Proper range management and use of water for livestock
- 3) Proper use of the preference lands, i.e., the adjacent lands
- 4) General needs of the applicant
- 5) Topography
- 6) Public ingress and egress across those lands
- 7) Other land use requirements

43 CFR 4121.2-1(d)(2).

Summing up the factors as used in the decision of the District Office, we find that the last two are irrelevant, that the first, historical use, possibly favors appellants, but that the four other factors are definitely in dispute. While the record is clear that appellants and their predecessors in interest have enjoyed the right to use the lands in controversy the record is bare of evidence of the extent of actual usage.

The Board has been reluctant to disturb an award of a grazing lease which considered the above seven factors, unless the party challenging the award can show that the award was inequitable. Dick Reckman, 8 IBLA 227 (1972). Appellants perhaps could demonstrate such inequity by showing they have a greater need for the land than appellee corporation or that the range could be managed better by them. Id. at 229. Indeed, where proper management can be obtained from either applicant, and where both have an equal need for the land, the applicant seeking renewal based on historical use generally will be favored. Victor Powers, 5 IBLA 197 (1972). But a renewal applicant will not be favored if to do so would be contrary to the requirements of proper management of the Federal range. Therefore, we must turn to the allegations of the parties

and analyze them in terms of the four factors which remain, aside from historical use. ^{1/}

Proper Range Management and Use of Water for Livestock

The District Office found that the nearest water on appellants' lands was 3/4 miles from the disputed parcel, and the intervening ridge rose to 1600 feet in that distance. It also found that the ridge's steepness would prevent appellants' cattle from using the disputed area between the ridge and the Cummings' ranch.

In their appeal, the Jansons alleged that their cattle, of the Charolais breed, would have no problem with steep terrain. They alleged that all of their property was mountainous and that their cattle have adapted to such terrain.

The Cummings' corporation answered by alleging that once appellants' cattle climbed the intervening ridge, they could drift off the ridge toward the Cummings' ranch, and then would fail, due to lack of fodder or lack of water, to climb back up the steep slope.

Proper Use of the Preference Lands

No facts were alleged on this point, although appellants did imply that appellee corporation's contiguous lands were not economically sufficient for a cattle operation. It is true that no preference right can be based on operations on noncontiguous lands. Winchester Land & Cattle Company, 65 I.D. 148 (1958). However, mere allegations that a ranch, where cattle have been seen, is used for hunting, is not enough to establish that the contiguous lands are being improperly used, and that such improper use would extend to the disputed public lands.

General Needs of the Applicant

This factor has been already discussed, but suffice it to say that appellants and appellee have not demonstrated anything more than a supplementary need for this tract.

Topography

It appears from the record that the boundary between the disputed parcel and appellants' ranch closely follows the aforementioned

^{1/} As already noted appellee corporation has alleged that its officers and employees have never seen appellants' cattle in the disputed area, and that the party from whom appellee purchased the range has indicated that this condition prevailed even before the fence was built.

substantial ridge, which best can be described in geological terms as a volcanic dike radiating from the volcanic neck forming Baboquivari Peak.

Appellants' statements on this factor are ambiguous, for they merely point to a comparison between their cattle and that of appellees. The real issue remains as to the extent topography favors use of the disputed area by one or the other of the preference right claimants.

Thus the essential issue is reached, for the conflict among the factors discussed boils down to historical use versus topography. Where, as here, the decision of the District Manager is based upon topography, and the record is silent as to the actual extent of historical use of an area, the party appealing has not shown the decision to be inequitable. Failing such a showing, the decision will not be disturbed. Dick Reckmann, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Phoenix District Manager is affirmed.

Frederick Fishman
Administrative Judge

We concur.

Martin Ritvo
Administrative Judge

Joseph W. Goss
Administrative Judge

