

Editor's note: 82 I.D. 93; Reconsideration granted; decision reaffirmed as modified -- See Donald & Nancy Jansen (On Reconsideration) 23 IBLA 374 (Feb. 4, 1976)

DONALD E. AND NANCY P. JANSON

(ON RECONSIDERATION)

IBLA 74-6 (Supp.)

Decided March 14, 1975

Petition for reconsideration of the decision of the Board of Land Appeals in Donald E. Janson,
16 IBLA 66 (1974).

Reconsideration granted; decision of June 25, 1974, reversed.

1. Federal Employees and Officers: Interest in Lands --Grazing and
Grazing Lands--Grazing Leases: Generally--Grazing Leases:
Cancellation--Grazing Leases: Preference Right Applicants

Where a section 15 grazing lease is issued to an applicant whose brother is an employee of this Department, and such employee owns stock in the corporation that owns the contiguous fee land, control over which the applicant asserts as the basis for his preference right to the grazing lease, such applicant cannot

be granted the desired grazing lease. Any such lease must be canceled when the facts are called to the Department's attention. This result occurs under 43 CFR 7.2 and 7.3 which prohibit any employee from acquiring or retaining any interest in the lands or resources administered by the Bureau of Land Management. The prohibition extends to any interest in land which in any manner is connected with or involves the use of the grazing resources administered by the Bureau of Land Management.

APPEARANCES: Donald E. Janson and Nancy P. Janson, pro se; Calvin N. Calvin N. Brice, Esq., of Cook & Brice, Ltd., Phoenix, Arizona, for Kendall Cumming; Douglas Cumming, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Donald E. Janson and Nancy P. Janson have petitioned for reconsideration of the decision of this Board in Donald E. Janson, 16 IBLA 66 (1974), in which the Board affirmed a decision of the Phoenix District Office, Bureau of Land Management (BLM). That decision rejected in part the Jansons' application for a grazing lease under section 15

of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970). The BLM rejected the Jansons' application for the 271-acre parcel at issue in this petition because it found that Douglas Cumming, 1/ the conflicting preference-right applicant under 43 CFR 4121.2-1(c)(1), could more advantageously use the tract. A lease for the lands in conflict was issued to Douglas Cumming on August 1, 1974.

The Jansons present two arguments in their petition which they maintain justify reversal of the prior decision. First, regarding the merits of the award of the grazing rights, they "disagree with the Board of Land Appeals reasoning in its decision one hundred percent." They argue that the factors cited by the BLM in support of the award to Douglas Cumming, particularly topography and availability of water, were erroneously relied upon in reaching the decision.

We need not discuss the first issue since the second issue, set forth below, is dispositive of the case. The assertions made by the Jansons were offered for the first time after our earlier decision.

1/ Cumming Land & Livestock Corporation originally filed an application for these lands some time prior to the expiration of the Jansons' lease in 1973. (Letter from Douglas Cumming to District Manager, March 14, 1973.) When the lease came up for renewal, Douglas Cumming filed the conflicting application in his own name on April 10, 1973. This confusion, and our erroneous caption in the original decision, are due to the fact that Douglas Cumming signed much of the correspondence, including his answer to petitioner's Statement of Reasons for Appeal, as "President, Cumming Land and Livestock Corp." However, the lease at issue was applied for and issued to Douglas Cumming in his individual capacity.

[1] The Jansons' second argument is that "there is a clear-cut and uncomplicated case of conspiracy and fraud involving the [Cumming Land and Livestock] Corporation and the United States Government officials for the purpose of taking over the lease from the Jansons." Petitioners support this assertion by pointing to: the gut reaction of a friend to a BLM employee; the fact that the BLM supplemented the record on appeal with additional reasons for its decision; crossed-up communications with the BLM; the BLM's failure to agree with all the assertions in the Jansons' lease application; and the fact that a co-owner of Cumming Land and Livestock Corp. is an employee of the Department of the Interior. The facts asserted, however, do not constitute the conspiracy perceived by petitioners.

We expressly find nothing in this record constituting evidence of misconduct in the award of the lease at issue here. That the BLM knew that Kendall Cumming, half-owner of Cumming Land and Livestock Corp., works for the Bureau of Indian Affairs of the Department of the Interior does not show undue influence. 2/

2/ As indicated in footnote 1, *supra*, Cumming Land & Livestock Corp. first applied for this land before the Jansons' previous lease expired. Whether or not the District Manager knew anything about Kendall Cumming or his stockholder's interest in the corporation (when treating the corporation as a qualified applicant under 43 CFR 4121.1-1(c) or otherwise,) is not revealed by the record.

Independent of any question of misconduct or influence, however, the information presented by petitioners raises the issue of whether Kendall Cumming's employment disqualifies Douglas Cumming, Kendall's brother and owner of the other half of the stock of Cumming Land and Livestock Corp., from holding the lease issued for the land involved here. In response to petitioners' assertions, counsel for Kendall Cumming appeared and responded: 1) that Cumming Land and Livestock Corp. owns 160 acres of base lands, but neither it nor Kendall Cumming nor his spouse own any cattle; 2) that Douglas Cumming leases the base fee lands from the Corporation, personally owns the cattle and runs the ranch operation; 3) Kendall Cumming will place control of and voting rights to his stock in the Corporation in a voting trust until he leaves federal employment; and 4) Kendall Cumming's superiors have been fully informed of this potential problem.

We look to the provisions of 43 CFR 7.2 and 7.3 to see whether Kendall Cumming's ownership of 50 percent of the stock of the corporation owning land, upon which Douglas Cumming's preference right is predicated, interdicts the granting of the lease to Douglas Cumming and his holding the lease. These regulations provide in applicable portion as follows:

§ 7.2 Definitions.

(a) The term "employee" as used in this part includes any person employed by the Department of the Interior, or any of its bureaus or offices however designated.

(b) The term "interest" means any direct or indirect ownership in whole or in part of the lands or resources in question, or any participation in the earnings therefrom, or the right to occupy or use the property or to take any benefits therefrom based upon a lease or rental agreement, or upon any formal or informal contract with a person who has such an interest. It includes membership in a firm, or ownership of stock or other securities in a corporation which has such an interest: Provided, That stock or securities traded on the open market may be purchased by an employee if the acquisition thereof will not tend to interfere with the proper and impartial performance of the duties of the employee or bring discredit upon the Department.

(c) The prohibition in § 7.3 includes but is not limited to the buying, selling, or locating of any warrant, scrip, lieu land selection, soldier's additional right, or any other right or claim under which an interest in the public lands may be asserted. The prohibition also extends to any interest in land, water right, or livestock, which in any manner is connected with or involves the use of the grazing resources or facilities of the lands or resources administered by the Bureau of Land Management.

§ 7.3 Prohibition.

(a) An employee and the spouse of an employee, except as provided in §§ 7.4 to 7.6, are prohibited from:

(1) Voluntarily acquiring an interest in the lands or resources administered by the Bureau of Land Management;

(2) Retaining an interest in the lands or resources administered by the Bureau of Land Management acquired voluntarily or by any other method, before or during employment by the Department of the Interior. (Emphasis supplied.)

It is clear and undisputed that Kendall Cumming, as an employee of the BIA, is an "employee" of this Department, within the ambit of 43 CFR 7.2(a). His 50 percent interest (or any interest) in the Corporation falls within the purview of an "indirect ownership." The use of the fee land as bestowing a preference right to be considered for a

section 15 lease seems to be disconsonant with Kendall Cumming's obligation not "to take any benefits therefrom [i.e., the public lands] based upon a lease or rental agreement." Fee lands which adjoin public lands are in some circumstances a proper base for a preference right of consideration for a section 15 grazing lease. Thus the rental value of the fee lands is enhanced.

But what is more to the point, the prohibition against an Interior employee acquiring any interest in public land also extends "to any interest in land * * * which in any manner is connected with or involves the use of the grazing resources * * * administered by the Bureau of Land Management." 43 CFR 7.2(c).

It is clear that the Cummings' fee right land would be used in connection with the lands embraced in the section 15 lease issued to Douglas Cumming. We find that in the circumstances, Douglas Cumming's grazing lease cannot be permitted to stand. That Kendall Cumming has offered to place control and voting rights in a trust until he leaves federal employment does not vitiate the effect of the regulation. He would still have a beneficial interest in the base land used in connection with a public land grazing lease.

Since the Jansons were the only preference-right applicants for public lands qualified to make proper use of their contiguous fee

lands, they must be awarded the grazing lease they seek, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted in order to treat the newly raised issue, and on reconsideration, the decision of the Board of June 25, 1974, is reversed.

Frederick Fishman
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joseph W. Goss
Administrative Judge

