

DONALD E. AND NANCY P. JANSON
(ON RECONSIDERATION)

IBLA 74-6 (Supp. II)

Decided February 4, 1976

Petition for reconsideration of the decision of the Board of Land Appeals in Donald E. Janson, 19 IBLA 154 (1975).

Reconsideration granted; decision reaffirmed as modified.

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

The regulations governing Departmental employees' rights to hold a direct or indirect interest in public lands must be construed in pari materia with the regulations governing qualification to hold a grazing lease under section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1970). A non-employee may be disqualified from holding a lease by his business relationship with an employee if the issuance of the lease would create an interest in public land proscribed by regulation.

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

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Douglas W. Cumming has petitioned the Board for reconsideration of its decision of March 14, 1975, titled Donald E. Janson, 19 IBLA 154 (1975). In that decision, the Board noted that petitioner's brother, an employee of the Department of the Interior, was co-owner of the corporation which leased to petitioner the contiguous base lands on which he grounded his preference right. The Board thus held that the issuance of a grazing lease under section 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970), to petitioner would violate 43 CFR 7.3, by giving petitioner's brother

a prohibited interest in lands administered by the Bureau of Land Management. Regulation 43 CFR 7.2(b) provides in relevant part:

The term "interest" means any direct or indirect ownership in whole or in part of 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 * * *. It includes * * * ownership of stock or other securities in a corporation which has such an interest * * *.

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." 43 CFR 7.2(c).

[1] Petitioner argues that 43 CFR Part 7 cannot be applied to deny him the lease because he is not an employee of the Department, and he meets the only regulations governing qualifications for holding a grazing lease, 43 CFR 4121.1-1.

Regulation 43 CFR 4121.1-1 prescribes the minimum qualifications, but not the only qualifications, for holding a grazing lease. Petitioner's brother might well be qualified to hold a lease if reference is not made to Part 7. The regulations in 43 CFR Part 7 must be construed in conjunction with Part 4120 to determine qualification to hold a lease. The regulations in Part 7 are not explicitly addressed to petitioner, but they do prohibit the lease from issuing in such a way as to allow petitioner's brother, a Departmental employee, to obtain the albeit indirect benefit accruing to his 50 percent interest in Cumming Land and Livestock Corp. Persons who engage in business ventures with employees of the Department of the Interior assume thereby the burden that the regulations of the Department may have adverse impact on such a business. As we pointed out in our prior decision, the rental or resale value of the corporation-owned base lands would be enhanced by its use in conjunction with the section 15 grazing leasehold.

The regulations promulgated by the Secretary have the force and effect of law, and we cannot disregard them. See Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Arizona Public Service Co., 20 IBLA 120, 123 (1975); Frank Allison, 3 IBLA 317, 320 (1971). 43 CFR Part 7 is a valid exercise of the Secretary's authority under 5 U.S.C. § 301 (1970), formerly 5 U.S.C. § 22 (1964).

In his letter protesting his disqualification, petitioner reiterates that his brother submitted a request to the Bureau of Indian Affairs (BIA), his employer, on October 29, 1974, for guidance on whether, by placing his stock in blind trust, he could avoid the proscription of 43 CFR Part 7. In response to an inquiry by this Board, Kendall Cumming indicated that no action has been taken on his request to BIA, nor has he received any acknowledgment or status report from BIA.

In the absence of any action by the Department on Kendall Cumming's request, (see 43 CFR 7.4(b)(3)), petitioner remains disqualified in our view from holding the lease at issue for the reasons reiterated above. Further, this Board will not suspend action on the conflicting lease application until action on the request is taken. The Department has no duty to wait for other potential applicants to qualify themselves before acting on a preference right lease application. However, if a lease issues to the Jansons (see below) and Kendall Cumming is later found qualified by the Secretary or is permitted to retain the interest pursuant to 43 CFR Part 7, the District Office may reexamine the issue.

In addition to the protest against his own disqualification, Douglas W. Cumming protests the issuance of the lease to Donald and Nancy P. Janson, on the same grounds asserted in his original application as justifying the award of the lease to him: the tract is isolated from the Janson fee lands by a ridgetop and cliff; use of the lands would necessarily interfere with use of the Cumming fee lands; and improvements needed by the Jansons in order to properly use the land will detract from the scenic value of the ridge area.

As no decision has been rendered by the District Office on the Jansons' application and Mr. Cumming's protest, 43 CFR 4125.1-1(e), we remand the case for the consideration which the record shows the District Office was commencing at the time Douglas Cumming's petition for reconsideration was filed. 43 CFR 4125.1-1(e). See 43 CFR 4121.2-1(a), 4121.2-1(c)(1), and 4125.1-1(c)(2).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the petition for reconsideration is granted, the decision of the Board in Donald E. Janson, 19 IBLA 154 (1975), is reaffirmed as modified.

Frederick Fishman
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joseph W. Goss
Administrative Judge

