Editor's note: Reconsideration denied by Order dated June 17, 1986; Appealed -- aff'd, Civ.No. 86-436-RE (D. Or); aff'd, sub nom. Ken Warren Outdoors, Inc. v. U.S., No. 87-3691 (9th Cir. July 5, 1988), 852 F.2d 571 (table).

DAVID FARLEY, INC.

IBLA 84-903 Decided December 23, 1985

Appeal from decision of the Medford, Oregon, District Office, Bureau of Land Management, denying reissuance of commercial outfitter/guide special use permit and rescinding status as authorized outfitter on the Rogue River.

Affirmed.

1. Special Use Permits

> Any transfer of authorized use of a special recreation use permit in conjunction with the sale of the business by the permittee is subject to the approval of BLM. A decision denying reissuance of a commercial outfitter/guide permit and rescinding status as an authorized outfitter based on a sale of the permittee's business, and transfer of the permit without prior BLM approval will be affirmed where the record on appeal supports the BLM decision and is consistent with BLM's authority to impose sanctions for violations of the policy guidelines and permit conditions.

APPEARANCES: David L. Jensen, Esq., Eugene, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, Pacific Northwest Region, Department of the Interior, for Bureau of Land Management; and John Merritt, Secretary, Oregon Guides and Packers Association.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

David Farley, Inc., (DFI), appeals from a decision of the Medford, Oregon, District Office, Bureau of Land Management (BLM), dated July 12, 1984, which denied the reissuance of a commercial outfitter/guide permit to DFI and rescinded its status as an authorized outfitter on the Rogue River. These punitive sanctions were levied for violation of published guidelines and permit conditions which prohibit sale or unauthorized transfer of allocated river start dates and permit privileges.

The Rogue River is one of the original rivers designated in the Wild and Scenic Rivers Act of 1968, 16 U.S.C. ° 1271 (1982). Pursuant to the Act, a combined plan was prepared by the Forest Service (FS) and BLM to provide for regulation of boating on the river when necessary to achieve the objectives of the Act. 37 FR 13408 (July 7, 1972). Pursuant to the combined

plan, recreational use controls were established in 1978 for an area of the river between Grave Creek and Watson Creek. 43 FR 12091 (Mar. 23, 1978). A joint BLM-FS commercial outfitter/guide permit for this regulated section of the Rogue River was issued to David Farley on June 29, 1979. This permit has been reissued from 1979 through 1983.

On June 13, 1984, BLM issued a proposed decision to appellant which concluded:

> It is obvious after reviewing the May 1, 1981 Purchase Agreement between Dave Farley, Inc. and Ken Warren Outdoors, Ltd. that ownership of your business and the control of your Commerical Outfitter/Guide Permit was sold to Mr. Warren in 1981. In addition as part of the purchase agreement, both David Farley and Cynthia Farley resigned as officers and directors of David Farley, Inc. This sale was in direct violation of the permit in 1981 and subsequent years. It also appears from the purchase agreement, that the only tangible asset purchased by Mr. Warren for $ 22,500.00 was the permit itself. Since both the 1981 use controls and permit stipulations and the Final Special Recreation Permit Policy state that a[n] outfitter's authorization to conduct float trips is not a saleable commodity, any permit transfer must be predicated on a bona fide business transfer or sale involving equipment and other tangible assets sufficient to conduct a business. Any effort to sell authorized use only, together with failure to gain approval from the managing agencies for the proposed transfer of permit privileges, are both cause for permit revocation.
>
> You are hereby notified that unless this office receives evidence from you within fifteen (15) days' receipt of this letter that a violation of the 1981 use controls and permit stipulations did not occur, you will be notified that this proposed decision has been final and your Commercial Outfitter/Guide Permit will not be re-issued for 1984 and that your authorized outfitter status will be rescinded.

Rather than attempt to establish the validity of the transaction and demonstrate that no violations occurred, counsel for appellant responded by letter dated June 18, 1984, advising BLM in part:

> I can advise you right now that we will not be sending any additional information in that we wish to have this matter reviewed by both higher and more independent authority than the Medford BLM office. Consequently, feel free to send notice that the decision is final at your convenience, and an appeal will then be filed with the Interior Board of Land Appeals.

BLM issued a final decision in the matter, and appellant filed this appeal.

In its statement of reasons, DFI challenges BLM's decision on the grounds that BLM has erroneously characterized the situation as DFI "having sold its Rogue River permit to Ken Warren Outdoor, Ltd. (KWO) for

$ 22,500." It asserts that the 1981 sales agreement was for the purchase of the business of DFI including various physical assets, a mailing list, and the business "goodwill." Appellant contends that the agreement did not violate the regulations and that it was arranged at a time when the legal status of permit transfers was vague and uncertain. It also alleges that it attempted to keep BLM apprised of the facts and was not unwilling, as BLM claims, to provide requested information.

Appellant further avers that:

> [D]uring the period while [the case docketed as] IBLA 81-167 was in litigation BLM was kept apprised of the intent of DFI - KWO, and that appellant invited further questions. BLM was at all times aware of the status of DFI - KWO and was on its own initiative deferring action on commercial permit transfers until decision of IBLA 81-167 and subsequent regulatory direction. Any implication that appellant kept BLM in the dark regarding DFI - KWO is inaccurate.

DFI charges that BLM was aware of its situation and knowingly allowed the arrangements with KWO from 1981 through 1983. Further, DFI complains about an added reference to a previous incident in the decision. It notes that two start dates were previously forfeited as a penalty. Appellant asserts that additional sanctions based on these incidents would comprise a situation of double jeopardy for the same act. It also claims that BLM's decision imposes a penalty greater than allowed under the permit guidelines and that BLM failed to adhere to the established process for imposing sanctions.

BLM responds to DFI's arguments by asserting that DFI failed to comply with the prevailing regulations in 1981 when the sale actually occurred and accordingly must be penalized for its unauthorized activities. BLM asserts that direct and misleading statements were made by appellant in an attempt to disguise the nonconforming and unapproved transfer.

In addition, the Oregon Guides and Packers Association, an organization of professional guides and outfitters, has filed a letter expressing concern on behalf of professional guides and outfitters regarding the fundamental fairness of BLM's decision and its effect on other outfitters. It charges that BLM failed to follow the guidelines expressed in the special recreation permit policy, 49 FR 5300 (Feb. 10, 1984), when it did not seek voluntary compliance prior to imposing sanctions. It also asserts that the penalty assessed is inappropriately severe.

The circumstances surrounding the transaction and the chronicles of appellant's dealing with BLM do not support appellant's assertions on appeal. On April 6, 1981, David Farley, who had until that time been the permittee in his personal capacity, submitted an application to transfer the outfitter privileges from himself to "David Farley, Inc.," a corporation which had been incorporated on February 23, 1981. The application, which Farley signed on February 23, 1981, contained a statement expressly advising applicants that "any transfer of authorized use in conjunction with the sale of a business must be approved by the managing agencies prior to such a transfer." (Emphasis in original.)

Despite this clear admonition, Farley was already

engaged in selling his authorized use at that time as can be witnessed by the November 20, 1980, "prepurchase agreement" which appellant submitted on appeal. That document, itself, establishes that the permitted use was the key element of the sale since it begins, "Pursuant to your request, here is a listing of the major pieces of equipment we will be selling to the purchaser of our Rogue River dates." (Emphasis added.)

On May 5, 1981, Farley wrote to the District Office in Medford. In the statement of reasons for appeal, appellant's counsel argued: "On May 4, 1981, appellant notified BLM, the DFI [David Farley, Inc.] and KWO [Ken Warren Outdoors, Ltd] 'had merged.' While the accuracy of the legal language might be debated, the notice was given [to] BLM. Appellant invited BLM's questions" (Statement of Reasons at 4).

Farley's May 5th letter actually reads:

> Dear Bryan;
>
> This letter is to notify you that effective this date, Dave Farley, Inc. has merged with Ken Warren Outdoors, Ltd. in respect to our Rogue River operations.
>
> Ken Warren Outdoors, Ltd., a well established and qualified outfitter, and his equipment will be working with and for Dave Farley, Inc. This should necessitate no change in the scope or manner of the operation.
>
> If any questions arise, please give me a call.

Appellant did not merely say that a merger had occurred. He also declared that KWO would be working "with and for Dave Farley, Inc." What is not mentioned, however, is that KWO had purchased all of the stock of Dave Farley, Inc. Nor does this letter mention that, effective May 1, 1981, appellant had resigned as president of Dave Farley, Inc. (a point not revealed until 1984). While counsel attempts on appeal to rationalize reference to the sale as a merger, suggesting that appellant may have inadvertently described the nature of the transaction, this is contradicted by the actual language of the May 5th letter, and the clear terms of the sale agreement itself, which is labeled a "PURCHASE AGREEMENT" (Emphasis in original.) The agreement is between "DAVID FARLEY and CYNTHIA L. FARLEY, (herein called 'Sellers')." The merit of appellant's assertion that his good faith was shown by the fact that he invited questions pales in light of appellant's subsequent failure to answer the many questions posed by BLM.

By letter of March 11, 1982, BLM responded to a request from appellant to change his address to that of Ken Warren:

> Dear Mr. Farley:
>
> We noted when processing your request for an address change from yours to that of Ken Warren, that we do not have the addition of a partner approved and documented in our files. If you would like to add a partner,

please fill out the enclosed form

and forward it, along with a copy of the partnership agreement, to this office. We will then forward the request to the Managing Agencies for the necessary review and action and notify you of the decision.

If we can be of further assistance, please feel free to contact this office.

Obtaining no response, a second letter was sent on April 27, 1982:

Dear Dave:

While reviewing your permit file I noticed that we have not received the information we requested concerning your planned partnership with Ken Warren. We recently received the filing fee for your 1982 Commercial outfitters permit and noted that the check was made out by Ken Warren. We have also recently received a certificate of insurance for Mr. Warren.

As stated in our letter of March 11, 1982, we cannot approve the addition of Mr. Warren as your partner until we have received a copy of your partnership agreement detailing who the majority owner is and indicating what would happen to the business with the loss of either partner. The more detailed the information we receive concerning this proposed partnership, the faster we can render a decision.

No answer was received from this letter either. Accordingly, on May 26, 1982, BLM tried again:

Dear Dave:

On March 11, 1982, you received a letter from this office requesting information about your planned partnership with Mr. Ken Warren. We also asked that you complete an enclosed form and return it to this office as soon as possible. On April 27, 1982, we sent you another letter requesting the same information. We also asked why Mr. Warren had paid the application fee for you Commercial Outfitter Permit. We are also aware that Mr. Warren has advertised trips on the Rogue's "Wild Section" on your scheduled start dates of June 24 through July 9 and August 6.

Until the information requested in the above letters is received and a partnership with Mr. Warren is approved by the managing agencies, any trips taken affiliated with Mr. Warren or his Company will be considered unauthorized use and will jeopardize your status as an Authorized Outfitter.

If you have any questions concerning this matter, please call me at any time.

Evidently, the threat to treat his river runs as unauthorized use prompted Farley to respond. But the actual response, dated June 2, 1982, is filled with misleading statements:

> Dear Tom:
>
> The purpose of this letter is to notify you that David Farley, Inc., an Oregon corporation, has decided not to change its name and merge its operations with Ken Warren Outdoors, Ltd. Instead, David Farley, Inc. will continue as a separate corporation and would propose to enter into an Equipment Lease with Ken Warren Outdoors, Ltd. If the Bureau of Land Management requires a specific form of a Lease or any application, or has regulations in connection with leases, I would appreciate a copy.
>
> I have notifed Ken Warren Outdoors, Ltd., that Ken Warren Outdoors, Ltd. will have to change its advertising to reflect that David Farley, Inc. will continue to manage and operate its application as in the past. Ken Warren, as President of Ken Warren Outdoors, Ltd., has agreed to correct the advertising and do whatever else is necessary to see that David Farley, Inc.'s status as an authorized outfitter is not jeopardized. Any previous bookings by Ken Warren Outdoors, Ltd. for Rogue River trips will be solely as an agent of David Farley, Inc. If you have any questions or need any additional information, please do not hesitate to call.
>
> Sincerely yours,
>
> DAVID FARLEY, INC.
>
> By: David Farley, President

Farley's reply (save for one exception) may be literally correct but is completely misleading. Clearly Farley was making every effort to make sure BLM did not know that David Farley, Inc. was wholly owned via a 1981 sale by Ken Warren Outdoors, Ltd. Even though David Farley was no longer the president of David Farley, Inc., as proven by appellant's submissions on appeal, he continued to sign the permit application as president of David Farley, Inc. Of course, if Ken Warren had signed as president of David Farley, Inc., BLM's suspicions might have been aroused. By having David Farley sign as president of David Farley, Inc., appellant represented to BLM that David Farley somehow still controlled DFI, and was conducting float trips on the Rogue River, as indicated in the permit application.

Unaware of the true situation concerning the relationship of KWO to DFI, BLM accepted appellant's representations at face value. By letter of June 22, 1982, it responded:

Dear Dave:

Thank you for your letter dated June 2, 1982, concerning Ken Warren Outdoors, Ltd.

As you will note in the special provisions and requirements attached to your permit (page 9 Item 18):

> No assignment or subleasing, by the Authorized Outfitter, of the permit, or any part thereof, or interest therein, directly or indirectly, voluntary or involuntary, shall be made. Contracting of equipment or services may be approved in writing on a case by case basis, but the Authorized Outfitter shall continue to be responsible for compliance with all conditions of the permit.

Any further use of your commercial outfitters permit by Ken Warren without specific approval in writing by this office will be considered an unauthorized use of your permit. This will result in a penalty against your 1983 use and may very well jeopardize your permit.

If you would like to propose some type of subcontracting agreement with Ken Warren please send this office a detailed copy of that agreement for our review. [Emphasis in original.]

If you have any questions concerning this matter please contact me at any time.

There is no written reply to this letter, but a further phone inquiry by BLM elicited the following letter dated June 30, 1982, from appellant:

Dear Tom:

I hope this will answer the questions you asked per our phone conversation June 28, 1982.

1. Equipment with regards to my Rogue River operations, is owned by Ken Warren, Ltd. and Dave Farley, Inc. is renting the equipment necessary for my three starts for $ 20.00 per boat per trip.

2. Shuttle service is through Jean Smith and arranged by the legal boatman or myself prior to each trip.

3. Advertising - I have my own brochure (will be pleased to send some to you under seperate cover if you wish some, I don't have any at the shop at this time). I have asked Ken Warren to list the Rogue in his brochure since his distribution is so much greater than mine (and I need all the exposure I can get). It does have a disclaimer re: Running under Dave Farley, Inc.

4. All deposits and receivables are deposited to Dave Farley, Inc.

5. All Boatman wages are paid by Dave Farley, Inc.

6. Insurance will, in the future, as it is presently be with Dave Farley, Inc.

Thanks for your help. If you have any additional questions please give me a call - 222-3827 anytime.

While he did not sign this letter as president of Dave Farley, Inc., he still neglected to advise BLM that he had sold Dave Farley, Inc., over a year earlier.

Dave Farley continued to apply for the outfitter guide permit on behalf of DFI, and from 1981 through 1983 represented to BLM that his interest in the company was extant, when in fact his interest in DFI, under the terms of the purchase agreement, had been extinguished. He did not seek to have the sale approved or to have the permit transferred to Ken Warren, owner of DFI. The record shows that appellant cleverly and consistently evaded BLM inquiries relative to the ownership status of the business. Appellant does not now allege that he retained the permit to operate an outfitter business in his own behalf after the 1981 sale, even though he certified in his 1982 permit application that he was making the application for his own use and benefit. See response to question in a 1983 application form 8370-1 (Oct. 1980). Thus Farley continued to obtain permits ostensibly for his use when, in fact he had no present interest in the business.

Appellant, in his statement of reasons, states that on December 2, 1983, "when adoption of the new permit transfer regulations was imminent, appellant requested transfer of the permit to KWO." The letter requesting the transfer, however, made no reference to the fact that the sale, not merger (as previously alleged), occurred in 1981. It simply stated: "Tom: Dave Farley Inc. has been sold to Ken Warren Outdoors & please accept this letter as my intent/desire to have those permits transferred to Ken Warren."

BLM found out that the sale had occurred in 1981, in January 1984 when Warren's wife accosted a BLM employee to upbraid him about a penalty assessed against "them" for the 1983 season. During this conversation she said that Ken Warren had purchased the business and the permit in 1981. Thus, appellant's assertion that BLM was kept informed of the transaction between DFI and KWO must be rejected out-of-hand.

The only document appellant provided to BLM in 1983 to obtain its approval of the transaction was the purchase agreement. The actual terms of the purchase agreement evidence that the permit had already exchanged hands, even though appellant was aware that prior approval of the transaction by BLM was required. Section 2(f) of the agreement reads: "(f) The Company owns and Sellers have transferred the permit described in Exhibit 'B' to Company and is entitled to use of the name 'David Farley, Inc.'."

Section 9 states:

> 9. Notwithstanding anything herein to the contrary, if at any time Buyer, or its counsel, determines or is notified that the permit described in Exhibit "B" is not valid, or has been or will be cancelled or terminated, or cannot be renewed by reason of the sale of Stock under this Agreement, or that necessary approval of the sale of Stock under this Agreement by the United States government or any of its Departments or agencies will not be given, Buyer may, at its option, within one year from the date of this Agreement, give notice in writing to Sellers declaring this Agreement to be null and void; whereupon Sellers shall at once refund to Buyer all sums previously paid by Buyer under this Agreement; provided however, in no event shall Buyer be entitled to a refund in the event Buyer or any of its agents or employees are intentionally or negligently responsible for the revocation of the permit.

Exhibit B of the purchase agreement describes appellant's permit:

> PERMITS
>
> Commercial Outfitter-Guide Permit issued by the U.S. Department of Agriculture, Forest Service and the U.S. Department of the Interior, Bureau of Land Management, authorizing use of United States lands within the Rogue National Wild and Scenic River between Grave Creek and Watson Creek for the purpose of providing a passenger boat/raft outfitting and related support services for the public, for the period from January 1, 1981 through December 31, 1981.

While the purchase agreement refers to the sale of 100 shares of zero par value stock for $ 22,500, the only tangible asset listed in the agreement to transfer in connection with the sale of the business was the permit. Since the purchase agreement was the only document relating to the sale available to BLM when it was adjudicating the permit transfer, BLM properly concluded, in light of appellant's efforts to avoid disclosure of the true events, that appellant intended to sell his permit. This would be a violation of the 1978 and 1984 guidelines.

On appeal, appellant has included additional documentation to demonstrate that the 1981 sale was actually a sale of the business, and that no money was tendered to pay for the authorization to use the river granted by the permit. Thus, appellant submitted a copy of the following letter dated September 5, 1984, sent by Farley to Ken Warren:

> This letter is in response to your request for the details of the May 1, 1981, purchase of my business Dave Farley, Inc., by Ken Warren Outdoors, Ltd.
>
> We then agreed to the following components and valuations for the total sales price of $ 22,500.00, payable in cash.

> Boats and equipment $ 10,000. I sent you a list of this equipment and we agreed to the price on the phone.
>
> Mailing List $ 5,000
> 1981 dates sold 5,000 (2 of my 3 dates have been sold Good Will
> 2,500 for 1981, these would be
> $22,500 included in the sale price).

(Exh. 4 to appellant's brief).

Rather than advance appellant's position that the transaction was valid under the guidelines and permit conditions, this letter shows that consideration for two river starts was expressly included in the purchase price for the business. This is a violation of the policy guidelines then in effect as well as the conditions of the permit, for which violation sanctions are appropriate. See Wilderness Public Rights Fund, 63 IBLA 91 (1982).

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate use of the public lands and related waters pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. ° 1732(b) (1982). Special recreation use permit requirements are set forth in the regulations at 43 CFR Subpart 8372. In addition, special guidelines for use of the wild river area of the Rogue River were established and published in the Federal Register at 43 FR 12091 (Mar. 23, 1978). Each permit is also subject to any special conditions and stipulations which the authorized officer issuing the permit considers necessary to protect the public lands, resources, and public interest. See 43 CFR 8372.5(b).

DFI is charged with violating provisions in the guidelines and the permit which prohibit direct sale or transfer of the permit without BLM's prior approval. Although the general regulations in 43 CFR Subpart 8372 do not address this restriction, the special requirements imposed on the wild river area of the Rogue River state:

> An authorized outfitter's authorization to conduct float trips is not a salable commodity. Commercial operations on the river must be understood as a privilege, not a right. Any transfer of authorized use in conjunction with the sale of a business must be approved by the managing agencies prior to such a transfer. Disapproval may be based upon the lack of qualifications of the proposed transferee, the inability of the river and land resources to sustain the use, or other just cause.

43 FR 12091, 12093 (Mar. 23, 1978).

For 1980 and 1981, the annual permits awarded to DFI were subject to the following provision found in special conditions attached thereto:

> V. Assignment, Transfer, Mortgage
>
> No transfer or assignment by the Permittee of this permit or of any

part thereof or interest therein directly or indirectly,

voluntary or involuntary, including but not limited to the assignment or transfer of stock, shall be made. In the event of default on any mortgage or other indebtedness, the creditor may succeed to the interest of the Permittee in Permittee assets, but shall not thereby acquire operating rights or privileges.

The newly promulgated special recreation permit policy as it pertains to transfer of permit privileges, 49 FR 5300, 5305 (Feb. 10, 1984), set forth further standards for transfer of commercial permit privileges:

3. Transfer of Commercial Permit Privileges. On occasion, existing permittees may wish to sell or otherwise terminate their business and desire the permit privileges be transferred to a new owner. This might occur either at the end of the existing permit period or prior to expiration of the existing permit. Procedure for this type of transfer is as follows:

a. When an existing permittee wishes to have the permit privileges transferred to a potential new owner of his/her business the permittee must so notify the authorized officer in writing.

b. The authorized officer will consider the following in determining whether to allow the transfer:

(1) The new applicant must agree to provide the type and size of operation specified in the management plan.

(2) The new applicant must be able to meet any standards required in conformance with management plan decisions or by State or local agencies (this includes standards of outfitter/guide licensing boards in States with licensing requirements).

(3) Adequate documentation must be provided to the authorized officer that a bona fide business transfer or sale is intended. The transfer or sale must include a substantial portion of the equipment and other tangible assets needed to conduct a business. Any attempted transfer or sale of authorized use only is not allowed.

(4) Generally, previous permittee should have operated to an acceptable standard for at least two consecutive use seasons, as defined by the management plan, before requesting a transfer of the permit privileges.

(c) If the new applicant has demonstrated the ability to meet the above conditions and has met State and local requirements (as applicable), the authorized officer should reissue the permit. The new permit may contain terms and conditions that vary from the previous permit, including the number of authorized user days and the length of the permit period according

to the management plan allocation system. [Emphasis in original.]

49 FR at 5305.

Thus, under the present policy although the sale of a permit by itself is not allowed, "any transfer of authorized use in conjunction with the sale of a business" is permitted subject to the prior approval of the managing agencies. Disapproval thereof requires a finding of "lack of qualifications of the proposed transferee, the inability of the river and land resources to sustain the use, or other just cause." 43 FR 12093 (Mar. 23, 1978). (Emphasis supplied.)

In the instant case, BLM looked into the transaction at issue and concluded that the sale of the stock of DFI to Ken Warren contemplated a sale of the permit and that a sale had occurred in 1981 without notification to BLM. The facts and events when unravelled support BLM's determination. Clearly, Farley violated the 1978 policy guidelines, and permit conditions when he sold the business to Ken Warren in 1981 without BLM approval. Such a sale, absent prior BLM approval, would also violate the 1984 policy guidelines and permit conditions even if we credit appellant's post facto rationalizations. BLM concluded, after reviewing the purchase agreement and considering Dave Farley's actions, explanations, and efforts to avoid obtaining BLM's approval of the transaction when it occurred, that the sale of his business included the right to the permit. While, on appeal, appellant attempts to explain the transaction as the sale of the business isolated from the permit, the facts show that appellant's actions were designed to sell the business including the permit, and to keep BLM in the dark with respect to the ownership of DFI. The record supports the BLM conclusion that David Farley violated the policy guidelines and permit regulations when he sold his business to Ken Warren, since he included in the price of his business, a specific valuation for river use. In any event, even had the sale of DFI not constituted a substantive violation of the prohibition against selling permits, appellant, over a period of nearly three years, consistently misled BLM as to the nature of the transaction in direct contravention of the policy guidelines and express terms of his permit.

It is BLM's responsibility to insure that commercial outfitters comply with the policy guidelines and permit conditions. Inherent in that responsibility is authority to impose sanctions where, in BLM's opinion, an outfitter has violated the policy guidelines and permit conditions. In this case, BLM considered the entire history surrounding the sale of the business and determined that the sale of the business was essentially a pretext to sell the permit, which sale was consummated without notice to BLM, and that the sale therefore constituted a violation of the policy guidelines and permit conditions for which it was appropriate to deny reissuance of the permit to DFI and to rescind its status as an authorized outfitter. Having considered the facts of this case and the arguments advanced, we conclude that the record more than adequately supports the BLM decision.

Appellant's request for a hearing is denied. Appellant sold his rafting business including his use permit to Ken Warren in 1981, without obtaining BLM approval. This conduct violates the 1978 and 1984 guidelines and the permit conditions. While appellant contends sanctions imposed by BLM are severe, we think that, in this instance, BLM was justified in taking the action that it did.

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

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE GRANT DISSENTING:

I find that I must respectfully dissent from the decision reached by my colleagues in this case. I believe the result reached by the majority opinion merely compounds the confusion regarding the legal rights of the permittee and the Bureau of Land Management (BLM) policy regarding the effect of the sale of a river outfitter's business on the status of his permit. Such confusion has plagued this case since Dave Farley first decided to sell his business in 1981.

The decision under appeal denied reissuance of a commercial outfitter/guide permit to David Farley, Inc., (DFI), on the ground that DFI violated published guidelines and permit conditions prohibiting unauthorized sale or transfer of allocated river start dates and permit privileges. The permit in this case issued pursuant to the recreation use controls established for the wild river area of the Rogue River. These controls were generated by BLM and the U.S. Forest Service (FS) and published in the Federal Register at 43 FR 12091-12093 (Mar. 23, 1978). 1/ The specific provision governing commercial outfitter's permits relevant to this case provided:

> An authorized outfitter's authorization to conduct float trips is not a salable commodity. Commercial operations on the river must be understood as a privilege, not a right. Any transfer of authorized use in conjunction with the sale of a business must be approved by the managing agencies prior to such a transfer. Disapproval may be based upon the lack of qualifications of the proposed transferee, the inability of the river and land resources to sustain the use, or other just cause.

43 FR 12093 (Mar. 23, 1978).

For 1980 and 1981, the annual permits awarded to DFI were subject to the following provision found in special conditions attached thereto:

> V. Assignment, Transfer, Mortgage
>
> No transfer or assignment by the Permittee of this permit or of any part thereof or interest therein directly or indirectly, voluntary or involuntary, including but not limited to the assignment or transfer of stock, shall be made. In the event of default on any mortgage or other indebtedness, the creditor may succeed to the interest of the Permittee in Permittee's assets, but shall not thereby acquire operating rights or privileges.

Certain conclusions may be drawn from the published recreation use controls 2/ and the quoted permit condition:

1/ Included in the statutory authority cited for the controls was the Wild and Scenic Rivers Act, 16 U.S.C. ° 1271 et seq. (1982) and the Federal Land Policy and Management Act, 43 U.S.C. ° 1701 et seq. (1982).

2/ Unfortunately, the regulations published by BLM governing special recreation permits neglect to deal with the issue of their transferability. See 43 CFR Subpart 8372.

1. The permit is not an asset which may be sold.

2. Approval of any assignment of a permit must be obtained from BLM.

3. Assignment of a permit may be authorized by BLM "in conjunction with the sale of a business" absent certain grounds for disapproval consisting of "lack of qualifications of the proposed transferee, the inability of the river and resources to sustain the use, or other just cause." 43 FR at 12093.

With this background, we must note that at the time appellant's business was sold, a decision of the Medford District Office, BLM, approving the transfer of a Rogue River outfitter's permit in connection with the sale of the business was pending on appeal before the Board. A reading of the Board's opinion in Wilderness Public Rights Fund, 63 IBLA 91 (1982), gives a picture of the conflicting interests with which BLM had to contend in adjudicating requests for permit transfers. In that case, Wilderness Public Rights Fund (WPRF), protested BLM approval of a transfer of a permit in conjunction with the sale of an outfitter's business. Protestant contended that the transfer was an improper sale of future river use and that approval would perpetuate an inequitable allocation of limited river use between commercial outfitters and private users. 63 IBLA at 93-94. In answer to the WPRF statement of reasons in that appeal, BLM defended its 50/50 allocation of river use between commercial outfitters and private users and stated that BLM and FS "have followed a practice of approving a transfer of an outfitter's assets unless the potential transferee lacks qualifications, other just causes exist, or the river and land are unable to sustain the use." 3/

The Board upheld the BLM allocation of use between commercial outfitters and private users. 63 IBLA at 96. However, regarding the transfer of a permit in conjunction with the sale of the business, the Board rejected BLM's contention that the 1978 controls do not address the price paid for the assets of an outfitter and that, even if they did, it would be difficult to allocate the purchase price to the various assets of a business such as clientele, reputation, and good will. 63 IBLA at 97-98. Hence, the Board remanded the case to BLM, holding that BLM was obligated to ascertain whether the assignor received any consideration for its river starts as part of the consideration for sale of the business. 63 IBLA at 98. The decision issued on March 31, 1982. However, the evolution of the Department's policy regarding permit transfers continued thereafter.

Subsequently, BLM published its proposed special recreation permit policy, 48 FR 15275 (Apr. 8, 1983), and the final special recreation permit policy, 49 FR 5300 (Feb. 10, 1984). This new policy deals with the issue of permit transfers in conjunction with the sale of an outfitting business in substantially greater detail than did the prior recreation use controls applied by the Board in Wilderness Public Rights Fund, supra. The policy provides in pertinent part:

3/ These are the same criteria contained in the Rogue River recreation use controls quoted previously. 43 FR at 12093 (Mar. 23, 1978).

3. Transfer of Commercial Permit Privileges. On occasion, existing permittees may wish to sell or otherwise terminate their business and desire the permit privileges be transferred to a new owner. This might occur either at the end of the existing permit period or prior to expiration of the existing permit. Procedure for this type of transfer is as follows:

a. When an existing permittee wishes to have the permit privileges transferred to a potential new owner of his/her business the permittee must so notify the authorized officer in writing.

b. The authorized officer will consider the following in determining whether to allow the transfer:

(1) The new applicant must agree to provide the type and size of operation specified in the management plan.

(2) The new applicant must be able to meet any standards required in conformance with management plan decisions or by State or local agencies (this includes standards of outfitter/guide licensing boards in States with licensing requirements).

(3) Adequate documentation must be provided to the authorized officer that a bona fide business transfer or sale is intended. The transfer or sale must include a substantial portion of the equipment and other tangible assets needed to conduct a business. Any attempted transfer or sale of authorized use only is not allowed.

(4) Generally, the previous permittee should have operated to an acceptable standard for at least two consecutive use seasons, as defined by the management plan, before requesting a transfer of the permit privileges.

c. If the new applicant has demonstrated the ability to meet the above conditions and has met State and local requirements (as applicable), the authorized officer should reissue the permit. The new permit may contain terms and conditions that vary from the previous permit, including the number of authorized user days and the length of the permit period according to the management plan allocation system. [Emphasis in original.]

49 FR 5305 (Feb. 10, 1984). I find that this latest statement of policy authorizes approval of a request to transfer a permit in the context of a bona fide sale of a river rafting business. This is made clear by the preamble to the final policy which, in discussing comments received on the draft policy, expresses the belief of BLM officials that transfer of the permit in conjunction with the bona fide sale of the business, subject to certain limitations, is authorized by the policy:

> Many comments favored the transfer policy saying it allows outfitters to realize the value of their business and provides an opportunity for new people to enter the industry. Those opposed said this practice will lead to speculation on Federally owned resources and results in higher prices to the consumer. One comment said that it represents the buying and selling of public access rights by private businesses.

49 FR 5303 (Feb. 10, 1984). After noting the comments, the drafters elected to leave the provisions of the transfer policy substantially unchanged. Consequently, I must conclude that the prior Board decision in Wilderness Public Rights Fund, supra, which was predicated on an interpretation of the now superseded Rogue River use controls, has now been superseded itself.

I believe we should recognize this fact and remand the case to BLM for adjudication of the application for approval of the permit transfer which BLM has not considered. I find from the record before us that there is substantial evidence to support a finding that there was a bona fide sale of the business including boats and associated rafting equipment, mailing list, goodwill, and bookings for the 1981 season. The majority contends that the entry in Exhibit 4 to appellant's brief "1981 dates sold" for $ 5,000 with the explanation that "2 of my 3 dates have been sold for 1981, these would be included in the sale price" evidences an improper sale of the permit. In light of the fact that bookings are made in advance in this business, the language referred to by the majority as evidencing a sale of the permit could as easily refer to a sale of accounts receivable for the upcoming season. However, under the new policy guidelines, this would not be material in any event to approval of permit transfer where, as here, it appears that there was a bona fide sale of the business.

The majority opinion focuses on the failure of DFI to apply for transfer of the permit in advance of the sale of the business and the propriety of applying punitive sanctions therefor. However, before upholding punitive sanctions, I believe we have an obligation to view the sale of DFI's outfitting business in perspective. In a statement filed in this proceeding, the Board of Directors of the Oregon Guides and Packers Association declares:

> Finally, we believe it is not unreasonable to request that when reviewing this matter the IBLA take notice of, and view this matter within the context of, the "limbo" in which our industry was placed pending a decision in [Wilderness Public Rights Fund, supra] and publication of the final National Outfitter Policy. During this period, local Oregon BLM offices were seriously constrained with respect to their ability to respond to outfitter applications for transfers. During this period such paper work was put on hold. We believe recognition of such a "context" is particularly appropriate since BLM's own records indicate the Medford office of the BLM was formally advised of, and had first hand knowledge of the fact that, Ken Warren was involved in the operation of Dave Farley, Inc. during the period of time the BLM had placed a hold on processing paper work regarding permit transfers.

The background of the WPRF case recited above, including the position advocated by WPRF and the position taken by BLM on appeal, gives substantial support to the assertion of the trade association. I note that upon receipt of DFI's letter disclosing sale of the business and requesting transfer of the permit, BLM responded by letter of December 8, 1983, that no action would be taken upon the request "until after the National Policy has been signed." After publication of the new policy in February 1984, BLM proceeded to ignore the terms of this new policy and cancel the permit for violation of the old policy. I believe this was error in the context of this case and I would remand for adjudication of the transfer request.

C. Randall Grant, Jr.

Administrative Judge