

PATRICK G. BLUMM  
D/B/A RIO GRANDE RAPID TRANSIT

IBLA 88-472

Decided October 29, 1990

Appeal from a decision of the District Manager, Albuquerque (New Mexico) District Office, Bureau of Land Management, suspending special recreation use permits for conducting river rafting trips. NM-018-85-11 et al.

Affirmed in part as modified, and reversed in part.

1. Administrative Procedure: Administrative Record--Bureau of Land Management

BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of a notice of appeal.

2. Bureau of Land Management--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

3. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation are substantially followed.

4. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly reversed insofar as it purports to affect a period beyond the expiration date of the permits.

APPEARANCES: Patrick G. Blumm, pro se; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Patrick G. Blumm, doing business as Rio Grande Rapid Transit, has appealed from a decision of the District Manager (DM), Albuquerque (New Mexico) District Office, Bureau of Land Management (BLM), dated March 29, 1988, which confirmed a February 2, 1988, letter of the Area Manager (AM), Taos (New Mexico) Resource Area, BLM, suspending Blumm's special recreation permits. 1/ Blumm's permits authorized him to conduct commercial rafting trips on BLM-regulated sections of the Rio Grande and Rio Chama Rivers in northern New Mexico. 2/

Several factors were named in the AM's decision to suspend Blumm's permits, including failure to file commercial trip logs, failure to report trips on the trip logs, late payment of commercial use fees, and failure to report an accident. At the center of this controversy is Blumm's failure to submit commercial trip logs, which is entwined in his failure to

1/ The DM's Mar. 29 decision amended an earlier decision by him dated Mar. 15. There was no formal appeal of the AM's decision to the DM, and none is contemplated by the regulations. See 43 CFR 8372.6. Rather, it appears that the DM reviewed the AM's decision in response to Blumm's written objections and as agreed in a meeting on Mar. 4, 1988.

The AM's decision adversely affected Blumm and was therefore subject to immediate appeal to this Board. 43 CFR 4.410. The AM should have notified Blumm of his right to file an immediate, direct appeal to this Board. Instead, BLM, in effect, created an unofficial intermediate appeal to the DM. No such procedure is contemplated in the regulations. However, it is unnecessary to address the legality of this procedure, as it is clear that the DM's subsequent decision was subject to appeal. See Petroleum, Inc., 115 IBLA 188, 190-91 (1990).

2/ There are three distinct sections of river involved here: (1) the "Pilar" or "Race Course" section of the Rio Grande, from Pilar, New Mexico, to the Taos/Rio Arriba County line; (2) the "Lower Taos Box" section, from just north of Pilar to Arroyo Hondo; and (3) a section of the Rio Chama from the El Vado Reservoir to the Abiqui Reservoir. For simplicity, we shall refer, respectively, to the "Pilar," "Box," and "Rio Chama" sections.

pay his fees timely. 3/ There is substantial relevant background on these points. We deem it appropriate to set this background out fully, in view of the history of misunderstanding between Blumm and BLM.

BLM issued yearly permits for commercial rafting trips. The permit year runs from May 1 to April 30 of the following year.

By letter dated February 24, 1985, the AM notified commercial outfitters that they were required to submit trip logs for rafting trips on the Rio Grande and Rio Chama. 4/ The AM explained that the trip logs were required "so we may be able to bill you according to the amount charged your passengers." He specifically stated that trip logs must be submitted "on a monthly basis beginning June 1, 1985," and that an outfitter would incur a late fee with respect to trip logs submitted over 10 days late.

The trip log form was designed so that the permittee would enter information for each day a trip was taken, including the launch date, launch and take-out locations, total number of people, and the numbers of people at up to three different passenger prices. 5/ With this information, BLM could determine not only the gross receipts from the permittee's trips (from which the fee, a percentage of gross proceeds, could be calculated), but also what areas of the river had been used and the proximity of the launch and take-out points to the permittees' business situs. As discussed below, this information was critical to determining whether to allow deductions for use of non-public lands or transportation costs. By letter dated May 1, 1985, BLM sent copies of the trip log form to commercial outfitters.

By letter dated May 24, 1985, he asked BLM "why your agency needs detailed records on how much each of my customers is paying for a day on the river." BLM responded promptly on May 31, 1985, that, in accordance with its special recreation permit policy, "[f]ees will be charged according to the 'adjusted daily charge collected by permittee from each participant.' This charge may be the advertised price or an adjusted price allowing for deductions (long distance, off-site transportation, lodging expenses, etc.)." This response accurately stated BLM's fee policy for commercial raft trips. See 49 FR 5302 (Feb. 10, 1984).

3/ These logs are also known as "Commercial Billing Reports." For simplicity, we shall refer to them as "trip logs."

4/ It is not clear from the file whether this notice marked BLM's first attempt to collect trip logs from commercial operators, but the fact that it did so as early as February 1985 is adequate to establish that Blumm was on notice well before 1987, the critical time here, that the forms were required.

5/ Beginning in 1986, BLM included columns in which it could make appropriate adjustments for deductions such as transportation costs and discounts for non-public land use.

Blumm still did not file trip logs. In an August 1, 1985, letter, the Acting AM reiterated that commercial outfitters were required to submit trip logs, if they had not already done so. Blumm continued to withhold the trip logs.

On September 11, 1985, BLM wrote to Blumm, succinctly adding to its May 31 response to Blumm's concerns about the confidentiality of the commercial fee data, that "commercial use and records of your use is confidential and not available to the public." In a letter filed on September 19, 1985, Blumm asserted that BLM's response did not answer his question and again asked whether his financial disclosure was public information, whether the discounting policy of his business could be viewed by his competitors, and to what degree BLM would protect the confidentiality of this information.

Although BLM's September 11 letter had already advised Blumm that his records were confidential, the AM promptly responded in a September 24, 1985, letter:

As previously indicated to you, the information required by this office is used to tabulate the use fees due the government for your commercial use of public land resources. You have been told on several occasions that the information we require is considered proprietary and not available [as] public information.

The AM demanded compliance within 15 days on pain of cancellation of his permits. 6/

By letter dated September 29, 1985, prior to his receipt of the AM's September 24, 1985, letter, Blumm informed BLM that the use figures for 1985 were "compiled and ready to be submitted to [BLM]." Blumm stated, however, that he would not submit the data until he had received a "proper reply to my recent letter to the BLM concerning the status of this data's confidentiality."

On October 22, 1985, Blumm filed a letter dated October 15, 1985, enclosing some limited trip information. The information related only to the Pilar section of the Rio Grande. It did not indicate the dates of the trips or the launch or take-out locations. Despite the fact that no

6/ On Oct. 16, 1985, Blumm responded to the AM's Sept. 24, 1985, letter, asserting that BLM had responded to his request for the status of his data's confidentiality with threats to cancel his use permits, and criticizing BLM for not responding to his concerns about the confidentiality of the commercial information he filed. Blumm's allegations were plainly unfounded: the record establishes that BLM had clearly, patiently, and promptly responded to these concerns. BLM's threat to cancel his permits was not in response to his inquiry about the confidentiality of his commercial information, but in response to Blumm's failure to file trip logs.

information was included documenting use of the Box and Chama sections, Blumm computed the use fees due for 1985. Blumm refused to pay full user fees. Blumm stated that he was entitled to a discount of 40 percent for user fees for the Box and Pilar sections, because his commercial rafting trips spent only 5 to 60 percent of their time on public lands and waters. He applied this adjustment for both full and half-day trips on the Pilar section. Blumm submitted a check covering the 1985 user fees, as he calculated them. As discussed below, BLM eventually partially approved this deduction. <sup>7/</sup>

At first, however, BLM denied the deduction. On November 20, 1985, it returned Blumm's tendered payment, demanding full payment within 30 days of his receipt of the billing. By letter dated December 11, 1985, Blumm specifically stated that he wished to challenge BLM's policy of charging user fees for the use of lands and waters not under the Bureau's jurisdiction. He continued to withhold his payment for 1985.

In a letter to Blumm dated February 3, 1986, the AM effectively reversed BLM's earlier decision to disallow the 40-percent discounts, partially allowing transportation deductions concerning so-called "full-day Pilar runs."

In a February 21, 1986, letter, the AM, noting that Blumm had also claimed a 40-percent discount with respect to half-day trips on the Pilar section, stated that BLM had determined that Blumm did not qualify for such a discount, based on its own monitoring. However, he did not foreclose the granting of such an allowance, indicating that when Blumm submitted the applicable trip logs, BLM "will evaluate that information and determine if an adjustment in your fees is warranted" for these half-day Pilar trips.

On March 24, 1986, Blumm submitted a partial payment of the fees owed for the 1985-86 season covering use of the Rio Chama and the Box section of the Rio Grande. He did not pay anything for use of the Pilar section, either for half- or full-day trips, explaining that he would pay the 1985-86 user fees for full-day trips on the Pilar section only after he had received a bill noting a 40-percent discount. He also asserted that BLM was "apparently undecided as to what to do with" the discount for the half-day Pilar tours. Thus, Blumm evidently disregarded BLM's February 21 letter indicating that BLM would determine whether an adjustment was warranted for the half-day trips only if Blumm filed his trip logs. In his March 24 letter, Blumm asserted that filing the use forms was not required, since they only related information concerning the fares that had been charged for the trips, and since he was not requesting a discount based on reduced fares. Of course, Blumm overlooked that (as BLM had repeatedly advised him) the use forms also indicated (among other things) the starting

<sup>7/</sup> The 40-percent deduction Blumm claimed corresponds to that subsequently expressly authorized in the BLM Manual, H-8372-1 V.B.2. (Rel. 8-33 Sept. 9, 1987), as a "discount for nonpublic land use" where between 6 and 60 percent of the commercial trip time was spent "on public lands or related waters."

and ending points for his trips, which are critical factors in determining whether a deduction for non-public land use is appropriate.

On March 25, 1986, the AM reiterated to Blumm that "[u]ntil you submit the required trip logs indicating your use on the Pilar Section, we can not provide the 40% discount you request" and concluded that no use permits would be issued for 1986-87 until this matter was resolved.

Finally, on April 15, 1986, Blumm submitted trip logs documenting his commercial half-day trips on the Pilar section of the Rio Grande in 1985. These records were admittedly reconstructions. Despite BLM's having repeatedly advised him beginning in February 1985 that these forms had to be filed contemporaneously, Blumm blamed BLM for his failure to comply, indicating that he had been misinformed at the 1985 orientation meeting that the forms only had to be filed if a fare-reduction discount was being sought. We have no way of ascertaining what transpired at this meeting, but the record convinces us that any such misimpression was dispelled by the clarity of BLM's subsequent communications concerning the need to file these forms.

BLM promptly calculated the fees due for the Pilar section for 1985-86, applying 40-percent discounts for non-public land use as appropriate. On April 17, 1986, BLM notified Blumm of the adjusted fees due. <sup>8/</sup> A bill for collection for this amount, along with the advance deposit for 1986-87 use fees, was prepared on April 30, 1986. This bill was paid by checks dated April 30, 1986.

By this time, Blumm had applied for permits to conduct commercial rafting trips on the Rio Chama and Rio Grande from May 1, 1986, through April 30, 1987. On April 30, 1986, BLM issued his 1986-87 permits, but the AM expressly alluded to the fact that Blumm's failure to submit the required trip logs had caused both him and BLM "considerable problems" and cautioned that "[t]his season we must have them completed accurately and submitted in a timely fashion." The AM indicated that his 1986-87 permits were being issued "under probationary status" and set forth two additional conditions which were "designed to assure there is no confusion about what is expected from you \* \* \* for this season." First, the permits were initially issued for 31 days only (from May 1 to May 31, 1986), subject to renewal after an assessment of performance. Second, the AM required that the trip logs be submitted each week. <sup>9/</sup>

Blumm's performance in the first part of May 1986 was evidently satisfactory. The record contains trip logs for trips on the Pilar and Box sections through May 16, 1986, which were evidently timely filed. A notation on the permits indicates that they were extended to April 30, 1987, by

<sup>8/</sup> Blumm did not object further to fees imposed by BLM.

<sup>9/</sup> The record contains a copy of the AM's letter on which Blumm indicated in script that the letter was unacceptable. However, no formal appeal was filed.

the AM on May 28, 1986. The record does not indicate that his probationary status for 1986-87 was lifted, however.

Blumm quickly stopped timely filing his trip logs. Between June 20 and August 13, 1986, BLM notified Blumm by telephone that trip logs for the balance of May and for June 1986 for all three river sections, which were each due on the 15th of the following month, were overdue and requested that they be submitted.

Some of the logs for months through July were finally received by BLM on August 15, 1986, and included deductions for transportation. By letter dated September 18, 1986, apparently in response to a verbal request by Blumm, the AM provided him a written "definition of transportation costs as it applies to deductions from gross receipts for Special Recreation permit use." The record, however, does not contain the attached definition.

On September 30, 1986, BLM issued a bill for the collection of the user fees incurred for some trips conducted on all three river sections in 1986. It was not clear from the bill for collection or from BLM's worksheets whether BLM allowed Blumm's requested transportation deduction.

Blumm responded to this bill by letter dated October 17, 1986, acknowledging that he had received the bill on October 11, 1986. He requested that the bill be "redone properly":

[T]his is the second year in a row that [BLM] \* \* \* has overbilled my company. Last year [BLM] failed to acknowledge established U.S. Federal law concerning use reductions and did not allow for any transportation reduction. This year [BLM] has again failed to credit my legal transportation deductions.

Blumm asked BLM to reduce his user fees to reflect transportation costs incurred for trips on the Box and Pilar sections. Specifically, he requested a deduction of \$75 per day for the Box section, which (he indicated) is what he paid a transportation concern, and 5 cents per mile per passenger for Pilar passengers. 10/

In the meantime, by letter dated December 8, 1986, the AM notified Blumm that his trip logs for August and September 1986 for all three river sections were overdue. The AM stated that Blumm had 5 days to turn in the logs or his use permits would be suspended. No written response appears in the record.

On December 17, 1986, the AM advised Blumm that a 20 cent per mile per vehicle transportation adjustment would be computed for his Pilar billings.

10/ Blumm also asserted that his telephone calls raising the question of what transportation allowance could be made had not been returned, thus evidently disregarding BLM's letter of September 18 providing information bearing on this question.

Blumm's trip information for August for the Pilar and Box sections was finally filed on December 18, 1986. As in the previous year, this information was not filed on BLM's forms and, thus, did not contain all relevant information concerning the trips.

On February 4, 1987, BLM forwarded its bill for collection of the August 1986 fees for the Pilar section, along with a revised billing for use of all three sections for May through July 1986, taking into account all deductions found to apply to Blumm's operations in 1986. In an accompanying letter, the AM noted that his late filing of trip logs had delayed its billing and reminded Blumm that the trip logs "are due by the 15th of the month following the actual use." The AM pointedly warned Blumm that "[c]ontinued late reporting of use will also subject your permits to probationary action or cancellation," and that any delay in payment "will subject your permits to cancellation for the [1987-88] season."

A notation on the February 4, 1987, bill indicates that it was not paid until April 13, 1987. <sup>11/</sup>

Meanwhile, on April 3, 1987, Blumm submitted applications for his 1987-88 permits. These applications were approved on June 3, 1987, for the 1-year period from May 1, 1987, until April 30, 1988. Attached to these permits were stipulations, including the following, listed as Stipulation B.1.b.:

The permittee will complete a monthly Commercial Billing Report due by the 15th of the following month. This report provides billing information based on fees charged commercial passengers and adjustments to these charges. If the Commercial Billing Report is not received by the due date, the permit will be subject to action under Stipulation K. [Emphasis in original.]

Stipulation K referred to BLM's procedures for termination of the permit or "to take other appropriate disciplinary action." The record indicates

<sup>11/</sup> The delay in payment was in part caused by the fact that Blumm did not claim BLM's letter, sent to his address of record by certified mail, and forwarded to his winter residence in Arizona. This is perhaps explained by a Sept. 29, 1985, letter in which appellant stated that "I do not pick up certified mail."

BLM's obligation to communicate the amount due to Blumm was fully met when it mailed the bill to his last address of record, and he is properly regarded as having received the bill as of the date it was returned to BLM. 43 CFR 1810.2(b). This "constructive notice" that money was due was legally effective notwithstanding that Blumm obviously did not actually receive the bill. While the effects of constructive notice may be harsh, they serve as an effective sanction to prevent parties from shunning their obligation to receive important communications from BLM, such as bills for collection requiring timely payment.

that Blumm had knowledge of the contents of these stipulations as early as March 30, 1987, when he discussed them by telephone with BLM.

On July 9, 1987, the AM advised Blumm that his 1987-88 permits had been placed "on probationary status" because of the late submission in 1986 of trip logs for the permit for the Pilar section of the Rio Grande River and the late payment of user fees for all three permits. 12/ The AM concluded that "[c]ontinued violations will cause your permit to be suspended or cancelled." Appellant objected to the AM's decision to place his permits on probationary status in a letter received by BLM on July 29, 1987.

Meanwhile, Blumm's failure to timely file his trip logs continued. By letters dated July 13, 1987, the AM notified Blumm that the trip logs, now referred to as "commercial billing reports," for May 1987 for all three river sections, due on June 15, 1987, were overdue and concluded that, if the reports were not submitted within 5 days, his permit would be suspended. 13/

On July 17, 1987, BLM received trip logs for the Box section for June 1987 and for the Chama section for May and June 1987. Promptly, on July 22, 1987, BLM issued a bill for collection of the applicable user fees based on these logs. Payment was timely received on August 21, 1987.

By letter dated July 31, 1987, the AM notified Blumm that the trip log for June 1987 for the Pilar section, due on July 15, was overdue and again concluded that, if the log was not submitted within 5 days, his permit would be suspended.

On August 11, 1987, almost 2 months after it was due, BLM received a trip log for the Box section for May 1987. It also received a trip log for the Box section for July which was timely filed. On August 17, 1987, Blumm filed trip logs for the Pilar sections for May to July 1987. The information for May and June was not timely filed. BLM issued a bill for collection of the applicable user fees based on these logs on September 1, 1987.

Blumm did not pay the bill, but by letter dated September 2, 1987, notified BLM that its "billing procedure \* \* \* leaves much to be desired." In particular, he noted that the bills were not itemized in terms of

12/ The AM also gave as a reason the fact that Blumm had failed to accept mail at his address of record. The record indicates that Blumm had failed to receive three items of mail. This arguably violated sec. 10 of his 1986 permits, which stated that the permittee "must notify the authorized officer of address change immediately." (Emphasis omitted.) However, BLM did not cite Blumm for this failure in connection with the action on appeal. Nevertheless, Blumm's failure to pick up certified mail contributed to his late payment of fees in 1986 (see note 11).

13/ This notice was repeated on July 20, 1987, but, by this time, Blumm filed the commercial billing reports for May.

"advance fees, use figures, total reported gross and applicable fees." Furthermore, Blumm stated that the fact that he, unlike other companies, no longer received a transportation discount was "unfair and discriminatory" and concluded that "[t]his needs to be resolved in advance of fee payment." 14/

On September 11, 1987, BLM received timely filed trip logs for the Pilar section for August and September 1987. The record indicates that BLM issued a bill for collection of the applicable user fees on October 6, 1987.

Also on October 6, the AM notified Blumm that his July and August 1987 trip logs for the Chama and Box sections were overdue. By separate letter the AM also notified Blumm that his payment of the bill dated September 1 was overdue and that, if the payment was not submitted within 5 days, his permits would be suspended.

Blumm also withheld payment of the October 6 bill. On October 19, 1987, he submitted photocopies of BLM's October 6, 1987, notices. On the notice regarding trip logs, Blumm indicated that he had not used the Box section in August 1987. On the notice regarding payment, Blumm reminded BLM that it had not resolved his demand for an itemized billing and allowance of the transportation discount.

On November 4, 1987, the AM reminded appellant of the amounts previously billed on September 1 and October 6, 1987. The AM responded to Blumm's September 2, 1987, letter, stating: "[Y]ou have requested additional information regarding your billing for use on the Rio Grande and Rio Chama. We don't understand what can be provided that you don't already have. As you are aware, we base our billing on your own itemized Use Reports submitted to this office."

By letter filed on November 18, 1987, Blumm reiterated his desire for "itemization" regarding the calculation of user fees and a discount for transportation costs. He indicated that, "[d]ue to the current policy of no refunds for overpayments, this issue must be made equitable before any fees can be paid." 15/

On November 25, 1987, BLM advised Blumm's employee by telephone that log files for the Chama section had not been filed for July, August, and September 1987.

14/ We find nothing in the record explaining the details of BLM's asserted denial of a transportation deduction for Blumm's operations. While the details are not clear, it appears that BLM actually allowed some transportation deduction. As Blumm indicated, it is not clear from BLM's billing procedures what, if any, transportation or other deductions were allowed.

15/ It would appear, however, that, despite language to the contrary in the permit stipulations, Blumm would have been entitled to a refund for an overpayment. 43 CFR 8372.4(b)(3); see Fortune Oil Co., 71 IBLA 153, 156-57 (1983).

By letter dated November 27, 1987, the AM responded to Blumm's objection, raised on July 29, 1987, to the fact that his 1987 permits had been placed on probationary status. The AM stated that Blumm would have "one final opportunity to provide any information that will show cause why the probationary status should not remain" within 30 days from receipt of the letter. BLM clearly regarded Blumm's permits as ripe for suspension at that time, as it stated: "If additional violations are found to exist, suspension could occur without further warning."

In a December 8, 1987, telephone conversation, Blumm asked why he was not allowed a discount for transportation costs in computing user fees and was informed by BLM that "[d]eductions for long distance transportation are allowed between point of origin and local community only." 16/

Blumm paid the amounts billed on September 1 and October 6, 1987, by check received on December 23, 1987, along with a December 19, 1987, cover letter. Blumm, however, did not pay any of the interest or administrative charges required to be paid by the AM's December 2 and 4, 1987, letters. In his December 1987 cover letter, Blumm stated:

Clarification of the Transportation discount is essential not only to the payment of User Fees but also for the timely submittal of Use Reports. For over a year your office has been telling me that an answer is on its way. I expect it prior to your due date for any [1988] Use Reports.

Thus, Blumm attempted to condition his obligations both to pay fees and to file trip logs on BLM's responding to his demand for information concerning the transportation deduction.

On January 8, 1988, BLM received a December 8, 1987, letter from Blumm in response to the AM's November 27, 1987, letter confirming that his permits were on probationary status 1987 and extending probation through 1988. 17/ Blumm asserted that he had done everything possible to comply with BLM's requirements for the submission of use reports and payments, but had been unable to do so because of changes in BLM's policy regarding whether he was entitled to a discount for time spent not on public land and waters and BLM's failure to answer his questions regarding whether he was entitled to a discount for transportation costs. Thus, Blumm again argued that uncertainty about the applicability of deductions excused him both from paying fees and filing trip logs.

By letter dated January 28, 1988, the AM responded to Blumm's December 8, 1987, letter. The AM found no basis to alter his decision and

16/ As noted above, it is unclear from the record why Blumm's operation did not qualify.

17/ Blumm had attempted to mail his Dec. 8, 1987, letter to BLM, but had failed to place it in the envelope, which BLM received on Dec. 17, 1987.

reaffirmed his decision to place Blumm's 1987-88 permits on a probationary status. The AM's decision to suspend Blumm's permits, discussed further below, followed on February 2, 1988.

The AM's decision to suspend Blumm's 1987-88 permits was also based on an unreported accident. This accident is fully described in the following document titled "Investigation of Unreported Accident," prepared by BLM and endorsed by the person involved in the accident:

Statement of Incident: On Monday, July 13, 1987, at 2:00 p.m., Susan Brantley was guiding a raft for "Rio Grande Rapid Transit" Company on the Racecourse section of the Rio Grande. There were six (6) people paddling a 14-foot stern mount raft, plus the guide, Susan, on oars. At Big Rock Rapids, at low water levels (below 500 [cubic feet per second]) there is a narrow slot on the right side of the center rock which must be negotiated with precision or a boat could become wedged between the rocks, then filled with water and flipped over. One of the precision moves required is the "high side" maneuver where all rafters move to the highest side of the raft, keeping that side down and preventing a flip. This maneuver was executed by Susan's group, but the river somehow overturned the raft anyway, requiring the entire group to swim for shore. Everyone that is except Susan who was trapped between the overturned raft and the "Big Rock" for 15 seconds. The flip occurred with such force as to slam her into the rock when she suffered a blow to the head. Susan managed to free herself from this entrapment situation between the raft and the rock and made it to shore with the help of fellow guides who had stopped to assist in negotiating this rapid. Susan completed the trip, but later in the day realized she had an injury requiring medical attention. Elizabeth Ridel at the Embudo Clinic diagnosed a concussion and a ruptured eardrum, and prescribed antibiotics against the infection. Susan was unable to work for one month, but returned to her job as a raft guide with Rio Grande Rapid Transit on August 12.

This incident was first reported to Mr. Patrick G. Blumm, owner of Rio Grande Rapid Transit on July 13, 1987.

The record further indicates that the AM requested the New Mexico State Park and Recreation Division, by letter dated January 29, 1988, to advise BLM whether it had a record of the July 13, 1987, accident and whether the failure to report this accident constituted a violation of State law. By letter dated February 9, 1988, the State responded that it had no report of the July 13, 1987, accident.

Blumm has not disputed the facts of the incident, as set out above, but, as discussed below, argues that the incident was not an "accident"

that needed to be reported. He also argues that he reported the incident verbally to State authorities, who declined to take criminal action against him.

On February 2, 1988, the AM advised Blumm by letter that his permits were suspended until June 1, 1988, because "[v]iolations of your permit stipulations have been numerous, repeated, and serious, even while you were under probation." The AM indicated that these violations primarily consisted of Blumm's failure to file trip logs and pay user fees timely. In addition, the AM stated that Blumm had failed to report the above-detailed accident on July 13, 1987. Finally, the AM stated that Blumm's permits would be cancelled unless he submitted payment of the outstanding debt, trip logs for the Rio Chama for July to September 1987, and a "written response to the apparent failure to report an accident" within 15 days of receipt of the letter.

BLM subsequently received the required trip logs and payment. In a February 9, 1988, letter directed to the State Director, New Mexico, BLM, Blumm explained that the July 13, 1987, accident had consisted of one of his employees "bang[ing] her head against the rowing frame of her overturning raft." He stated that the employee had only received first aid at a medical facility and, thus, he was not required to report the accident under State and Federal law where there was no loss of life, no medical treatment beyond first aid or damage in excess of \$100.

In his letter to the State Director, Blumm also challenged the suspension of his permits, contending that the failure to file trip logs and pay user fees timely had been caused by BLM's failure to provide an "explanation of the Taos BLM's policy concerning transportation discounts," stating that "accurate use forms can not be submitted until [BLM] clarifies the hassles concerning inequitable transportation discounts," and that "accurate fees can not be paid until the forms are submitted."

The record indicates that the DM, Albuquerque District, subsequently met with Blumm on March 4, 1988, to discuss the AM's suspension of his permits. The DM evidently agreed to take up the matter and issue his own decision. <sup>18/</sup> In his March 15, 1988, decision, the DM stated that he had concluded that the AM had properly suspended the permits, but on March 29, 1988, amended his decision to shorten the suspension from February 2 through May 30, 1988, to February 2 through May 22, 1988. Blumm filed a timely notice of appeal of the DM's decision on April 29, 1988.

[1] Before considering its merits, we note our concern over BLM's untimely transmittal of the appeal. The DM did not immediately forward the casefile to this Board upon receipt of Blumm's notice of appeal, but instead retained it until June 6, 1988, more than a month after the notice of appeal was filed, and after the suspension of Blumm's permits had expired.

<sup>18/</sup> See note 1, *supra*.

The filing of a notice of appeal removes BLM's authority to take further formal action on the matter under appeal and vests exclusive authority over the matter with the Board of Land Appeals, and BLM's authority is not restored until the Board takes action disposing of the appeal. AA Minerals Corp., 27 IBLA 1 (1976). In keeping with this principle, BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of the notice of appeal, in order to allow the Board to exercise its authority over the matter. BLM has no discretion as to whether the case file should be submitted to the Board for review. A case file may not be withheld while BLM reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. Thana Conk, 114 IBLA 263 (1990); Utah Chapter Sierra Club, 114 IBLA 172, 174 (1990) (citing with approval BLM Manual 1841.15 A).

The Board is sensitive to BLM's delays in forwarding files as they might be regarded as recalcitrance, resulting in delaying a party's right to have his appeal considered. Harriet Ravenscroft, 105 IBLA 324, 330 (1988) (Hughes, A.J., concurring). Here, the challenged action (suspension of Blumm's permits) had already irrevocably occurred before the case file was even received by the Board, as BLM's decision remained in effect unless stayed by the Board. 43 CFR 8372.6(b). Thus, while Blumm did not request a stay in this case, delay in transmitting the file could effectively prevent the Board from considering the option of barring enforcement of a BLM decision by suspending its effect.

[2] Turning to the merits, we first address Blumm's failure to pay fees timely, cited by the AM as a reason for the suspension of his permits. We are convinced that, under these circumstances, he had reason to withhold payment, and, insofar as BLM's decision to suspend his permits cited him for such failure, it is hereby modified.

We have held, in a different but comparable context, that where a party disputes the correctness of a requirement imposed by BLM, he has three options. First, he can comply without objecting, in which case he waives his right to seek redress. Second, he can comply under protest, in which case he cannot be subject to sanctions for failure to comply if BLM's requirement is found to be correct on review, as he had in fact complied. Third, he can refuse to comply with and object to the requirement, in which case he would be subject to sanctions if the requirement is found to be correct on review. See Fortune Oil Co., 71 IBLA 153, 156-57 (1983). However, it follows conversely that, if he protests and refuses to comply and the requirement is found to be incorrect on review, he is not subject to sanctions.

In this case, in each permit year from 1985-86 through and including 1987-88, Blumm refused to comply with BLM's requirement that he pay assessments for permit fees, while protesting the accuracy of these assessments.

Thus, Blumm effectively chose the third option described in Fortune Oil, *supra*. 19/

Our review of the record indicates that Blumm had legitimate reasons to withhold payment in 1985-86 and 1986-87. In 1985-86, he disputed the amount billed because BLM did not allow him a deduction for use of non-Federal lands. This deduction was substantial, and, in fact, Blumm prevailed in his effort to receive such deduction. Similarly, in 1986-87, he disputed the amount billed because BLM did not allow him a deduction for transportation costs. He also prevailed in part on this objection. 20/

Blumm was hardly blameless in this confusion. There is no indication that he ever sought BLM's approval of deductions prior to BLM's issuance of the billing statements. The mechanism for doing so was readily at hand: the permit stipulations and the commercial trip logs provided that the permittee could, in the course of reporting his use, justify any adjustment which he desired to take on a supplemental form, whereupon BLM would presumably have considered whether to allow the adjustment. See Timber River Rafting, Inc., 95 IBLA 90, 91 (1986). Appellant failed to take advantage of this opportunity. Further, there is no doubt that his failure to file his trip logs contributed to BLM's initial over-billings. Specifically, in February 1986, Blumm completely disregarded BLM's explanation that it could not evaluate his request for a deduction for half-day trips on the Pilar section unless he submitted trip logs. Nevertheless, the fact remains that Blumm did eventually succeed in getting BLM to substantially reduce the amount due in 1985-86 and 1986-87.

In 1987-88, Blumm objected to BLM's failure to provide an itemized billing and to clarify whether he was entitled to a transportation deduction. Evidently, unlike in previous years, he ultimately failed to persuade BLM that he was entitled to a reduction of fees due to transportation costs. However, we can agree that BLM's billing procedures did not give a clear statement of what was being billed. BLM's response to Blumm's concerns was not extensive. Against the background of confusion in previous years, and in view of Blumm's fear that he could not receive a refund if he overpaid, we are unable to conclude that his failure to pay should have subjected his permits to suspension. 21/

19/ The requirement involved in Fortune Oil was compliance with stipulations as a condition of issuance of an oil and gas lease rather than the payment of use fees. In that case, the party appealed to the Board to seek redress from BLM's requirement. Blumm did not appeal to the Board, but sought redress directly from BLM.

20/ We note that Blumm's failure to pay after BLM's Feb. 4, 1987, notice that he had received his transportation allowance was not excused. However, we find this failure to pay inadequate, by itself, to justify taking action against his permits.

21/ Such policy would appear to violate 43 CFR 8372.4(b)(3). See note 15, *supra*.

[3] Nevertheless, we hold that BLM was justified in suspending Blumm's 1987-88 permits, as he clearly violated his permit stipulations by failing to file trip logs and by failing to report an accident. These violations alone justified the suspension of the permits.

As set out above, the record establishes beyond doubt that appellant consistently failed to cooperate with BLM by filing trip logs. The special recreation permits in effect from 1985 through 1988 expressly provided that user fees would be charged based on valid affidavit of use forms. <sup>22/</sup> The contents of the log forms and directions for completing them leave no room to doubt what they were to be used for: "Enter all requested information each day a trip is taken. Submit the Billing Report to the BLM on a monthly basis. If no trips are taken during the month, you are not required to submit a Billing Report." Spaces are provided on the logs for indicating launch and take-out locations, the total number of passengers transported, the prices charged and any adjustments taken. In addition, the logs provide that the permittee may explain any adjustments on a supplemental form. Throughout the time period encompassed by the present case, commercial trip logs have remained substantially unchanged. That appellant was, from the start of the 1985 rafting season, fully aware of this requirement and what it entailed is evident in his May 24, 1985, letter to BLM in which he questioned the need for submitting "detailed records on how much each of my customers is paying for a day on the river."

As a matter of administrative convenience, BLM reasonably placed the burden of reporting commercial use of the rivers on the permittees. In view of the administrative burden of accounting for use and collecting fees, and in view of shrinking Federal personnel resources, BLM was justified in requiring the permittees to supply information in a standardized fashion, so that its clerks could process bills with a minimum of research. BLM should not have to assemble trip information from other sources or presume any specifics as to the portion of the river used, or other questions. By failing to provide timely trip logs, despite repeated and consistent warnings from BLM that these logs were important, Blumm consistently delayed and complicated BLM's accounting procedures. Although it is evident that Blumm regarded BLM's reporting requirements as a nuisance, we consider them an essential aspect of BLM's attempt to establish an effective system for collecting fees for commercial use. Accordingly,

<sup>22/</sup> Although there are affidavits of use which are signed by a BLM river ranger on the date of each trip, these do not indicate the prices charged passengers. We have no doubt, based on BLM's actions to notify permittees of the need to provide trip logs that the language in the permit stipulations indicating that user fees would be computed based on affidavit of use forms refers to trip logs.

The stipulations attached to the 1986 and 1987 permits for both the Rio Grande and the Rio Chama provided that: "The permittee will complete a monthly Commercial Billing Report due by the 15th of the following month. This report provides billing information based on fees charged commercial passengers and adjustments to these charges." (Emphasis in original.)

Blumm's demonstrated continuous refusal to cooperate over a 3-year period is not a trivial matter.

Blumm has argued that he is not required to file trip logs while there are questions concerning the amount of fees that he is to be charged for his commercial use. We reject this argument. Although (as discussed above), a failure to pay these fees might be justified if legitimate objections are raised by a permittee, we perceive no justification for failure to timely report the details of the use itself to BLM. 23/ Blumm clearly could have reported the number of people carried, the prices charged, and the transportation costs incurred without a final determination by BLM regarding whether it would allow the transportation deduction he sought.

More serious was Blumm's failure to file a written report concerning the accident in which his employee was injured. Section I.10. of the stipulations attached to the 1987 permit issued to appellant for conducting rafting trips on the Pilar section of the Rio Grande River provided:

In case of an accident resulting in injury requiring medical attention or death to a person, or damage to property in excess of \$200.00, the permittee shall, within 48 hours, file with the New Mexico State Park [and] Recreation Division \* \* \* a U.S. Coast Guard Form [3865 Boating Accident Report]. A copy of this report must be submitted to the Taos Resource Area within five (5) calendar days of the incident.

We conclude that Blumm was required by the stipulations to report the July 13, 1987, accident in writing to the State authority and BLM because it resulted in an injury to a person requiring medical attention. Following the accident, the injured person was diagnosed in a medical clinic by a doctor as having a concussion and a ruptured eardrum, and antibiotics were prescribed. Thus, she clearly had suffered an injury which required more than emergency treatment at the scene of the accident and, thus, medical attention beyond first aid. 24/ There is no dispute that appellant failed to report the accident in writing to the proper authorities within 48 hours after the accident as required by the permit stipulation.

The reasons for requiring permittees to report accidents are self-evident. BLM must review each accident to determine whether the operator was at fault, so that it can issue sanctions, if appropriate. There is no indication that Blumm's operation was at fault concerning the accident.

23/ As suggested above, Blumm's concern that this data be kept confidential, though certainly legitimate, was answered by BLM's assurances that it would not be disclosed.

24/ "First aid" is defined as "emergency and sometimes makeshift treatment given to someone (as a victim of an accident) requiring immediate attention where regular medical or surgical care is not available." Webster's Third New International Dictionary 857 (1971).

Nevertheless, even where an accident occurs despite due caution being taken, BLM needs to review the circumstances to determine whether it is safe to allow portions of the river to be run, or whether the rafting techniques employed might be improved. In contrast, allowing a verbal report might compromise the completeness and accuracy of the report, and the absence of a written report document might present problems of establishing exactly what was reported after the fact.

Blumm argues on appeal that no "accident" occurred, because the State agency has taken no action against appellant. However, the fact that the State has apparently failed to take any action for the unreported accident does not establish that a violation of Federal permit stipulations did not occur or preclude BLM from taking appropriate action for such violation. Blumm also seeks to absolve himself of responsibility for failing to report the accident by arguing that he is being discriminated against, because the "operator" of the raft involved in the accident equally failed to report the accident, and because numerous (but unspecified) unreported accidents by other permittees have occurred without any adverse action being taken. However, these facts, even if true, cannot absolve him, because he was clearly required to report the July 13, 1987, accident and failed to do so.

It remains to determine whether BLM was empowered to suspend appellant's existing permits for these infractions. It is well established that BLM may provide in such permits the appropriate penalty for a violation of permit terms and conditions. See Rogue Excursions Unlimited, Inc., 104 IBLA 322, 325 (1988); Osprey River Trips, Inc., 83 IBLA 98, 101 (1984). Attached to each of the permits for the 1987 rafting season and incorporated in those permits are stipulations expressly providing for suspension of the permits, under certain conditions:

The BLM will give the permittee a written proposed decision concerning the alleged violations \* \* \*. In this written proposed decision, the BLM will explain the nature of the apparent violation \* \* \*. BLM will describe, where appropriate, the steps necessary to remedy the situation, and the penalty to be assessed for the violation \* \* \* if the situation is not corrected. \* \* \* The permittee will normally be given thirty (30) days from receipt of the proposed decision to respond. \* \* \* The BLM will provide the permittee a final written decision after expiration of the 30 days \* \* \* response period. If the BLM judges a violation \* \* \* has [occurred], the permit is considered on probation for a specified period of time. Additional penalties may also be specified by BLM. \* \* \* If the permittee fails to remedy a violation \* \* \* within the time period fixed by the BLM, the BLM may declare the permit suspended, or at its discretion take other disciplinary actions \* \* \* in order to protect the public interest. [Emphasis supplied.]

Blumm was warned repeatedly and consistently throughout the 1986-87 permit year of violations of his permit, and these violations continued

into the 1987-88 permit year. His 1986-87 permits were in probationary status when the above procedure was implemented in the 1987-88 permit year. Additionally, BLM notified Blumm of violations in writing on December 8, 1986, and again on February 4, 1987. The February 4 letter, although not styled as a "decision" as contemplated by the stipulations, plainly notified Blumm that he was not in compliance and explained the nature of the apparent violations and the steps necessary to remedy the situation if his permits were re-issued for 1987-88, as well as the penalty to be assessed, namely, cancellation. The February 4 letter expressly solicited a reply. In fact, Blumm had more than 30 days to respond, but he did not. On July 9, 1987, BLM notified Blumm that his 1987-88 permits were placed on probationary status for the 1987 permit year.

BLM substantially complied with the procedural requirements for issuing sanctions for permit violations established in the 1987-88 permit stipulations. <sup>25/</sup> There could be no doubt following BLM's July 9 letter that Blumm was on probation for the 1987-88 permit year for failing to file trip logs and pay use fees timely and that BLM was considering severe sanctions against him. Blumm's noncompliance with the requirement that he file use reports continued after this date. Thus, the violations identified in the July 9 letter were not remedied, and, additionally, he failed to report an accident while on probation. In these circumstances, BLM properly suspended Blumm's 1987-88 permits.

[4] Although his 1987-88 permits expired on April 30, 1988, the AM's suspension purported to run through June 1, 1988. This suspension was later shortened to run only through May 22, 1988, which was also after the expiration date of the 1987-88 permits. Insofar as BLM purported to

<sup>25/</sup> We recognize that we rely on notice that was given to Blumm prior to the implementation of the procedure quoted above, in that the 1987-88 permits were not in effect when the Feb. 4, 1987, letter was issued. In these circumstances, where the permittee had demonstrated an ongoing lack

of compliance, we are willing to accept this notice as providing substantial compliance with the procedural steps set up by BLM in its stipulations. BLM otherwise complied with these procedural steps and was therefore free to suspend the permits on February 2, 1988, when the AM issued his decision. However, as discussed below, this suspension could not properly extend beyond the termination date of the permits.

We must observe that the review procedures adopted by BLM are ill-suited to a year-to-year permit system. As a practical matter, in view of the short time commercial operations actually take place during a permit year, it may be impossible for BLM to assess meaningful penalties for non-compliance under this procedure. Even if a violation occurs at the very beginning of the season, by the time BLM provides a written proposed decision, 30 days to respond, a "final" written decision placing the permittee on probation and providing a compliance period, and yet another decision declaring the permit suspended, the season will likely be over, so that a decision cancelling or suspending a permit (even through the end of the permit period) will be harmless to the violator.

suspend those permits past their April 30 expiration date, its decision must be reversed. BLM has adopted a year-to-year permitting system for commercial river permits. This system allows BLM flexibility to take into account yearly variations in use to allocate starts, as well as the opportunity to review compliance of permittees annually. In the present case, BLM treated Blumm's permits as indefinite, in that it attempted to suspend them for a period when they were not in effect. Although BLM may have intended to partially deny Blumm's applications for 1988-89 permits, it did not do so, and we are unwilling to interpret its decision in such a manner.

Therefore, 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 in part as modified, and reversed in part.

David L. Hughes  
Administrative Judge

I concur:

Franklin D. Arness  
Administrative Judge