



# The FOAMLINE

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FISHING OUTFITTERS ASSOCIATION OF MONTANA  
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## VOTE NO ON I-147; SAVE OUR RIVERS

You've read all the hype, and you probably remember the long legislative and initiative battle Montana waged against cyanide heap-leach mining. Let's not give an inch. Cyanide is not required for efficient mining. The long-term consequences of this technique are too risky, especially near our productive rivers. Vote for your future, vote for Montana's future. Keep our rivers safe. Keep cyanide out.

## JUDGE REJECTS FOAM LEGAL CHALLENGE

*Salvagni Agrees with FWP on all Major Legal Points*

FOAM's legal challenge to the techniques used to create the current Beaverhead and Big Hole river management rules was denied by Gallatin District Court Judge Mike Salvagni. In his ruling, the judge spent no time discussing FOAM's various arguments and simply restated the points FWP made in support of their position.

FOAM argued FWP didn't have the specific legislative authority to restrict classes of users (nonresident floating anglers and fishing outfitters who float); FWP didn't follow the Montana Administrative Procedures Act (MAPA) requirements to show a rationale for selecting these user classes to satisfy their vaguely-stated reasons for applying restrictions; FWP violated the Land and Water Conservation Act by creating a de facto preferential reservation system at BLM fishing access sites through forcing nonresident floating anglers to travel up to a mile downstream before fishing while allowing residents to begin float angling at the sites, and, last, FWP's rule restrictions burdened nonresidents while benefiting residents in violation of the Interstate Commerce Clause of the U.S. Constitution. FOAM attorney Mike Cusick said he didn't expect Salvagni's response so quickly - only six weeks after the hearing in court chambers - and suspected the judge defaulted to FWP's position. Mike spotted several legal lapses that could warrant an appeal to the Montana Supreme Court, and the FOAM Board of Directors is meeting to decide whether to continue down that road.

Of course, we're disappointed. After the several years and multiple tangled legal maneuvers we've invested in this issue, we were surprised to receive such a summary rejection, but there it is. We're left hoping the new statewide decision-making process will fill the gaps we've pointed out in our challenge. And even that is a problem, explained in the following article.

## FWP SETS COUNCIL FOR BH2 RULE REVIEW

*Only Local Citizens Selected for River Mgt. Decision*

Just before the new statewide River Recreation Management Policy was adopted into administrative rule, the Dept. of Fish, Wildlife & Parks started soliciting nominations for the new BH2 Citizen's Advisory Committee (CAC), following recommendations from the River Recreation Advisory Council - well, sort of.

The RRAC made it very clear in their recommendations that when forming CAC's, FWP should appoint local and *statewide* representatives of a variety of stakeholder categories. When the recommendations were adopted into administrative policy, this concept was clearly noted. But when the solicitation letter was sent out, it failed to include categories for a statewide angler or outfitter representative or a nonresident angler representative.

The CAC membership list includes:

- David Carter, Big Hole angler, Butte
- Bob Desjardines, B'head angler, local business, Dillon
- Ron Flick, B'head landowner, Dillon
- Matt Greemore, B'hole, B'head outfitter, local business & conservation, Twin Bridges
- Russ Kipp, B'hole, B'head outfitter, lodge-owner, Dillon
- Steve Luebeck, B'hole wade/float angler, Butte
- Tom Rice, B'head landowner, Dillon
- Greg Smith, outfitter with no BH2 use, Twin Bridges
- Randy Smith, B'hole landowner, Dillon

The same day the policy was adopted, FOAM started to notify FWP about this lapse in procedure: President Matt Greemore wrote to FWP Director Jeff Hagener, Commissioner Tim Mulligan, and Region 3 Director Pat Flowers to explain that his representation of three separate categories was plenty for him to handle without having to speak for other statewide outfitters and nonresident anglers, too. FOAM VP Matson Rogers recommended Robin Cunningham as a representative for outfitters "out of the area" and for nonresident anglers. FWP replied that the names were set and no changes would be made.

It is disappointing to work so long to get a policy in place and have it immediately ignored or diluted. If we can expect local citizens to decide the future of their local rivers, we fear a hyper-regional division of Montana's waters that will only discourage statewide and nonresident efforts to protect and enjoy the rivers we all love. It would certainly be a change in how our business is pursued.

## INDEPENDENT CONTRACTOR LEGISLATION

### *Interim Committee Revamps I.C. Codes, Registration*

Legislators of the Economic Affairs Subcommittee have met since the 2003 legislative session to review and rewrite the statutes regarding independent contractor status. FOAM has reviewed draft legislation they may propose during the 2005 session that starts in January.

To make a complicated and long story short, the subcommittee wanted to see if recent legal decisions could be integrated into current laws to simplify and clarify I.C. status so that exemption from Workers Compensation regulation and payment will fit into the “public policy” long ago established by the legislature. Quoting current law, “The following is the public policy of this state: It is the objective of the Montana workers’ compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Work-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.” This statement hits the three major ideas behind work comp benefits and rates:

- Work comp is a *no-fault* benefit, so there should be little or no legal argument regarding benefits associated with an accident or disease
- Benefits are meant to support the injured or diseased worker “at a reasonable cost to the employer”
- Benefits should relate reasonably to “actual wages lost” and, presumably, to help determine the rate of work comp payment required of the employer

With these points in mind, the subcommittee considered this simple statement: “Exemptions: Do they make sense in a no-fault work comp system?” After reviewing those occupations that are not currently considered employment that warrants work comp benefits, the group considered several alternatives concerning exemptions (including I.C. exemptions) and has settled on language that makes sure that a person holding an I.C. exemption doesn’t try to claim work comp (or unemployment) benefits: “It is the intent of the legislature to allow (I.C.’s) . . . to waive all rights and benefits provided by Montana’s Workers’ Compensation and Occupational Disease Acts.”

At the same time, the subcommittee made it clear that wages for employees and I.C.’s need not be the same: “To offer an independent contractor more in payment for the (I.C.’s) services than is paid for identical work performed by an employee does not violate the public policy of the State of Montana.” A recent lawsuit made much of the different pay an I.C. received versus an employee in the same job; hence, the new language.

Regarding disputes over I.C. status, the I.C. holding a certificate or the employer hiring that I.C. may currently “after mediation pursuant to department (of Labor & Industry, DL & I) rules, petition the workers’ compensation court for resolution of the dispute.” The proposed legislation makes any decision of the Independent Contractor Central Unit (ICCU) final “unless a party dissatisfied with the decision appeals by filing a petition with the workers’ compensation court.” Before, there was a time limit to file after the ICCU decision; the proposed legislation doesn’t mention this limit.

However, if an I.C. *exemption* is denied, the applicant has 30 days to petition the W.C. court for a decision. And, the I.C. certificate, once granted, may be suspended or revoked by the Dept. of Labor & Industry for several reasons; the main one for our purposes, reads, “. . . if the department determines that the employing unit (in our case, the outfitter) exerts or *retains a right of control* to such a degree that would cause a certificate holder to violate the provisions of (another section, stating that the I.C. ‘has been and will continue to be free from control or direction over the performance of the services, both under contract and in fact.’)” Sorry for the convoluted quote, but that’s taken directly from the proposed legislation, except for the italics added for emphasis.

What this section means to us is pretty simple: In light of an ICCU determination dating back to 2003, apparently no guide can ever be “free from control” since to become a licensed guide in the first place, they need the endorsement of an outfitter and then must have any and each hiring outfitter sign their license with this endorsement when they work for them after they’ve been licensed.

The majority of FOAM guide members are I.C.’s and have received exemption certificates from DL & I. Word from within DL & I has it that exemption certificates will continue to be issued, but if a dispute between a guide

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and outfitter (I.C. and 'employing unit') arises, there is little chance the outfitter in question will succeed in proving that the guide is an I.C., even when they hold a current exemption certificate.

This is clearly a "Don't ask, don't tell" situation that begs resolution, but there's no satisfactory answer. As discussed in the summer FOAMLINE, we could ask the MBO to change their laws from "a guide MUST be endorsed by an outfitter" (to get a license) to "a guide MAY be endorsed by an outfitter," with those who are not endorsed by an outfitter being licensed directly by the MBO through a qualification-and-testing process. But, according to I.C. laws, an I.C. must be able to advertise, and it's unclear whether the current MBO rule barring a guide from advertising directly to the public without clearly indicating the license number of the outfitter they're working for would satisfy I.C. law.

Some I.C.'s are soliciting (openly or covertly) clientele and getting paid directly - in other words, working as unlicensed outfitters. On the other hand, what about the outfitters who *require* their guides to become I.C.'s, thereby violating the I.C. law that states I.C.'s must be running an "independently established" business - how independent is it if your only path to work is to be an I.C.? Add in the obvious possibility of 400 or so I.C. guides simply becoming licensed outfitters, and you can see there's a wreck waiting to happen.

An outfitter's alternative to using an I.C. is to hire a guide as an employee. This means paying work comp rates of approximately \$20.18 per \$100 of wages, not to mention matching deductions for social security and paying unemployment benefits. Altogether, deductions and payments could amount to 30% of a guide's wages. Aside from the question of how this affects the take-home pay for guides *and* outfitters, there's the bookkeeping involved, another expense or hassle that's not part of current business practices for the majority of FOAM outfitters.

FOAM has struggled with these changes and apparent paradoxes for some time. We need to decide if we want to resolve these challenges or just let sleeping dogs lie by continuing with I.C.'s as our main outfitter-guide relationship and hope subsequent wage or labor disputes between individual guides and outfitters don't lead to industry-wide consequences.

Your feedback and, more importantly, suggestions and ideas are certainly welcome. Contact your regional FOAM director (see bottom of page 2) or the FOAM offices (406-763-5436 - email: info@foam-montana.org). Our business practices have been relatively simple for a long time. We know the issues here and can search for a good resolution that satisfies outfitters, guides, our industry and the state agency requirements. It's time to work together to survive this long-pending, now current, crisis.

## **WORKERS COMP RATE MAY DROP SOON**

*A Variety of Factors are Involved; Action May be Needed*

Since employment is an alternative to hiring guides as I.C.'s, we're interested in how workers' compensation rates for our industry are set. Here's some background.

Since July of 2001, fishing outfitters and guides have been classified under a "state special" business class code of 9094. The codes come from the National Council on Compensation Insurance (NCCI) that sets codes and rates for most state work comp systems. Code 9094 applies to insureds who operate as outdoor guides for activities such as hunting, fishing, camping, hiking, float trips, canoe trips, kayaking, rock climbing, mountain climbing, back-packing trips or white-water rafting.

The State Fund (Work Comp) calculates code rates on a 5-year cycle, dividing liability payouts by payroll received to yield a work comp rate for that code's set of businesses. A contact in the state fund predicts that our current rate (\$20.18 per \$100 of payroll) based on the 5-year policy period ending 7/2006 will be reduced if there are no unusually high liability claims against our growing payroll.

FOAM has requested the State Fund people to calculate the risk experience (liability claim history) for Montana-based outdoor outfitters and guides, but they claim they can't selectively separate this info from their actuarial histories.

There is a Classification Review Committee that can review and change rates for specific business classes. We may well be able to request and warrant a review, but only after we have firmly in mind what our claim history is and exactly how we justify a reduced rate. We can also argue that licensing reduces claims and that we warrant reduced rates compared with unlicensed industries under this code.

Of course, if our I.C. exemption status closes, more guides will become employees, the payroll for our class code will increase, and our work comp rate will go down accordingly. Maybe this is a hidden blessing.

## **FWP ADOPT-A-SITE PROGRAM: GOOD DEAL**

*FOAM Members Could Help Keep FAS's Clean*

Region 3 Warden Joe Knarr and Park Maintenance Supervisor Tom Greason unofficially created the Adopt-A-Site program whereby a local group conducts a clean-up twice a year (spring, fall) at a local fishing access site in exchange for FWP placing a sign at the site noting the group's name and public recognition. FWP continues to clean the site on a regular basis, including larger maintenance duties, such as grading, ramp repair, vault pumping, etc. A sponsoring group could certainly go beyond clean-ups; depending on their energy and expertise, they could paint, rebuild tables, and the like. Call FOAM if you're interested. We'll coordinate and see what we can arrange.

## MBO UPDATING OUTFITTER LOG SHEETS

*Also Open to Suggestions for Accurate Tally Sheets*

The Montana Board of Outfitters' Executive Director, Wayne Johnston, and FOAM have coordinated to add a second line for the client's city, state, and zip number, rather than one line for address, city, state and zip.

This should make it a little easier to fill out the forms correctly, legibly, and accurately. Along with this change, Wayne is considering replacing the address, city, etc. lines with space for the ALS and nothing more. The MBO can coordinate with FWP to use the ALS information to track clients when necessary.

Also, we need to simplify the tally sheets. We now list both the number of *individual clients* we've served and the number of *service days* these clients generated. FOAM reviews this data in summary form each year, and each year there are outfitters who can't get the data straight. For example, an outfitter will list 31 actual clients, but only 29 service days; or 0 actual clients and 31 service days. We should either drop the actual clients served column or find a way to accurately reflect both the people and the service days.

Since this data is or will be important for river management, we should strive to gather and report the most accurate data we can. Again, your ideas are welcome.

## FOAM SURVEY SHOWS INTERESTING DATA

*Response Rate Low, but Trends, Averages Evident*

Remember filling out the FOAM survey last spring? Forty-six out of 286 outfitter members (16%) and 33 out of 401 guide members (8%) sent in their surveys, a low response rate, so low accuracy is not guaranteed. But the results available are still intriguing.

The standard age of a FOAM outfitter? 41-55 years old. Years licensed? 20+. Typical clientele source? Repeat clients. Average # of waters used? 1-3.

How about guides? Standard age: 41-55 years old. Years licensed: 3-7. Number of outfitters they work for: 1, with 81% of respondents working for less than 4 outfitters. Do they plan on becoming an outfitter? 81% said No, with the rest noting they'd become an outfitter by 2006. Average percentage of total income from guiding: 10%.

Based on the low response rate and results, we suspect only the older guides and outfitters answered the survey. If we do another survey, we want the younger members to take the time to respond so we'll have a more accurate reflection of our membership characteristics.

If you'd like a complete summary of the survey results, send a stamped, self-addressed envelope to: FOAM Survey, PO Box 67, Gallatin Gateway, MT 59730 or email FOAM at [info@foam-montana.org](mailto:info@foam-montana.org).

*In This Issue*

- \* Vote NO on I-147: Save our Rivers
- \* FOAM Legal Challenge Rejected
- \* BH2 Committee Make-up Flawed
- \* Independent Contractor Legislation
- \* MBO Client Log Sheets & Tally Sheets
- \* FOAM Membership Survey Results

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