



The FOAMLINE

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FISHING OUTFITTERS ASSOCIATION OF MONTANA
406.763.5436 info@foam-montana.org www.foam-montana.org

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Correction

The last FOAMLINE incorrectly reported that Lee Kinsey (Region 7 - Livingston) could not run again. Since he has only completed one full term, he may be nominated for another two terms. Garrett Munson, Guide-at-large director, may also be nominated for another term as director. We are seeking nominees to replace Tim Linehan (Region 1 - Libby, Troy), Matt Greemore (Region 4 - Dillon, Twin Bridges), and Matson Rogers (Region 6, Bozeman). Ballots will be mailed out with renewal forms this fall.

BIG HOLE, B'HEAD TEMPORARY USE DAYS

FWP Application Deadline is November 1, 2005

Outfitters currently operating on the Beaverhead and/or Big Hole rivers and guides who become outfitters before November 1 may apply for temporary use days on these rivers. FWP has sent out applications to outfitters already permitted to work there. Others may get an application from: FWP Region 3 - 406-994-4042.

OUTFITTER BOARD PROPOSES NEW RULES

FOAM Comments Question or Reject Several Ideas

The Montana Board of Outfitters, after several years of internal review and rearranging, has proposed several new rules and rewritten or deleted others. Public notice was sent out during the summer, and FOAM submitted comments during September.

When the board moved to the Dept. of Labor & Industry a while back, all references to the former Dept. of Commerce were to be deleted from all board rules and replaced by DL&I notations. The board also met several times to review unnecessary references to old rules or laws, reorder sections of rules or rewrite specific rules for clarity, and to propose new rules. The MBO should review all comments and adopt the new rules - including whatever changes are appropriate - at its December meeting.

FOAM comments included the following:

- 1) Agreed that a \$5 fee for replacing boat stickers during the working season was reasonable. Remember, an outfitter or guide can get replacement stickers when they renew or reapply for their licenses - this fee is just for 'emergency' replacements during the working season.
- 2) Agreed to a \$50 fee for river-use day audits, to be paid by the selling outfitter, when and if such an audit is requested by the individual purchasing an outfitter's business.
- 3) Agreed to add the phrase 'as a named insured' to the rule requiring insurance coverage for all outfitters. Why? Because we

agree that only individuals, rather than business entities (like corporations or partnerships), can be licensed outfitters.

4) Questioned the requirement that outfitters acting as guides must send written notification to the board. The rule mentioned no specific timing *before* or *after* the work was done as a deadline for board notification. Similar to the in-field understanding regarding the current rule requiring outfitters to sign a guide license for each day of work, we hope the board will accept some dates bracketing the period of time an outfitter MAY work as a guide for another outfitter and allow the outfitter logs to reflect what actually happened. Otherwise, we noted it was a hardship for an outfitter needing immediate help from another outfitter to notify the board before assigning him/her to clients for a trip the next day.

The board justified the notification by noting that enforcement personnel in the field needed some way to connect an outfitter acting as a guide to a specific outfitter in order to check if the 'guide' was allowed to offer specific services in a specific area outlined in the 'sponsoring' outfitters' operation plan. In the past, outfitters have abused this 'guide' status and offered, say, hunting services in Ekalaka or fishing on the Missouri for some outfitter who had these areas in his or her op plan but never contacted the outfitter for permission to act as a guide. Enforcement people just couldn't tell what was what during their brief encounter with the 'guide' in the field or on the water.

FOAM noted that since most fishing outfitters have listed all drainages as their operating areas, few fishing outfitters would have to resort to this ruse to obtain access to any water. A call to the MBO office can check on op plan service areas and a call to the outfitter can clear up who's legitimate and who's not.

On FWP and/or USFS-governed waters like the Beaverhead, Big Hole, Smith, Rock Creek, Alberton Gorge, etc., tags will show who's working for who, though this can be abused, too. FWP and MBO enforcement folks talk about guides picking from several possible outfitter tags when questioned on the water.

Outfitter Russ Kipp, warden Coy Klien, and FOAM worked together on a solution and presented it to the MBO at its August meeting. For this specific situation - permitted waters - we *suggest* that any guide (or outfitter acting as a guide) be required to fill out a log they carry with them on the water. The log shows the client's name, ALS number, the sponsoring outfitter's name and license number, the date(s) of intended service, and the name of the water(s) to be used (subject to change by the client or conditions, of course). Note that we only suggested this; it is NOT a rule requirement included in this package.

At the August meeting, the MBO agreed to a two-year trial period for this suggestion on the Beaverhead and Big Hole rivers,

but not statewide, as we advocated. We'll see how the guide log idea fits with this new rule proposal, particularly if and when it's on a statewide basis.

5) Concerning new wording stating that "An outfitter whose license is currently suspended or revoked is not qualified for a guide or pro guide license," we suggested they amend the rule to also prohibit an outfitter with a suspended license from acting as a guide under rule 24.171.510 since they don't have to apply for an official guide license.

6) Suggested the board's new rule requiring outfitters to "provide in writing to the board, on a board-prescribed form, all designated booking agents used by the outfitter prior to providing services" be amended to say "prior to THAT AGENT providing services."

We wonder what happens when a guide acting as a booking agent for outfitter A finds that A is unavailable and has no guides available, but suggests the guide-booking agent call outfitter B to satisfy the clients' wish to be on, say, the Missouri the next day. What's outfitter B supposed to do? Yes, these scenarios are a little strained, but the economics of outfitting create some innovative short-term, short-notice situations. We'd like the board to recognize these quickly-evolving circumstances and relax their requirements a little. Perhaps the board could add language like "as soon as possible" or "within 10 days" regarding board notification of an outfitter using a booking agent.

7) Agreed that all guides and pro guides be required to hold a current basic first aid card while licensed. The current rule requiring an affidavit stating that the guide or pro guide (or outfitter, for that matter) has a current first aid card did not work very well. It allowed many licensees to bend the rules a little, send an affidavit, and get renewed or a new guide/pro guide license without having a valid first aid card. The number of disciplinary actions taken for violation of the first aid card and affidavit rule increased for several years and forced the board to revert to actual proof.

We also suggested the board notify all FWP wardens that the rule states that guides/pro guide (and outfitters) must HOLD a current first aid card, not *carry* a current first aid card at all times when serving clients. We note that, with this rule change, no one can be licensed without proof of a current card - logic should dictate that if the person is licensed, they have a current card, and need not be hassled in the field by a warden.

8) Similar to #6 above, we agreed that it is OK for an outfitter to designate *in writing* an agent (a guide, or another outfitter) to collect all fees from clients in newly proposed rule 24.171.2301(j), but still wonder how this concept jives with the FWP ban on all

such actions by anyone but permittees on the Beaverhead and Big Hole rivers.

9) A new rule states that a guide may only pick up his license in person from the board offices if the sponsoring outfitter has previously given the board written permission for the guide to do so. We suggested the board provide a place on the application for the sponsoring outfitter to both sign and authorize release of the license to the guide.

That's about it. FOAM representatives will track our comments and make sure they're given sufficient thought before the board adopts these new rules.

FOAM thanks those outfitters and guides who commented personally on these rules. Together, we can all help create rules that enhance our good business and professionalism.

OUTFITTER EXPERIENCE: OLD RULE OKAY

Business/Schooling Not Equal to In-field Experience

As reported in the Summer FOAMLINE, the board of outfitters was considering substituting 100 days of in-field experience with a variety of replacements, such as college class credits, business experience, and the like. The sponsor of this suggestion, board member Kelly Flynn, noted that the only comments he received on this idea came from FOAM, who, you may remember, rejected the idea of replacing real guiding experience with schooling or business experience.

Because no one else seemed to back or care enough to comment about his concept, Flynn backed off the proposal, except for the possibility of exploring what happens when an outfitter dies or is disabled. FOAM agreed the board should discuss some arrangement whereby a family member could take over the outfitting license under such circumstances. We suggested the family prepare for this possibility by working as guides a few times a season, accumulating 100 days over the years to qualify as a replacement outfitter just in case.

NEW INDEPENDENT CONTRACTOR IDEAS

FOAM Rep Helps IC Group Understand our Needs

The Independent Contractor Central Unit of the Dept. of Labor & Industry has hired several new compliance specialists as part of the legislation that revised IC laws and rules. These new hires attended a week-long training session that included a morning spent with FOAM's Executive Director, Robin Cunningham, as he explained the needs and working circumstances of our industry.

BOARD of DIRECTORS

Region 1 (Kootenai, Flathead)
Tim Linehan
295-4872

Region 3 (Missouri)
Pat Straub
495-0487

Region 5 (Madison)
Joe Dilschneider
682-5356

Region 7 (Yellowstone)
Lee Kinsey
222-4494

Region 2 (Bitterroot, Clark Fork)
Jack Mauer
642-6548

Region 4 (Big Hole, B'head)
Matt Greemore
684-5639

Region 6 (Gallatin)
Matson Rogers
556-1197

Region 8 (Bighorn, Ft. Peck)
Matt McMeans
666-2326

Guide-at-Large Director Garrett Munson 431-5089

In response to an ICCU case determination that asserted a guide could not be an IC because the guide couldn't be licensed without the endorsement of the outfitter and such endorsement equalled control, violating IC qualifications. FOAM worked to change the law to say that such an endorsement did NOT constitute control.

With this change in mind, the ICCU group wondered just what endorsement meant. Maggie Connor, Program Manager for the ICCU, asked Wayne Johnston, executive director for the MBO, if the endorsement implied some sort of control. Wayne noted that it only meant what the rules said - that the outfitter had checked that the guide met the requirements for licensure. Johnston also explained that if the original sponsoring outfitter withdrew his or her endorsement, the guide still had a license and only needed the signature of another outfitter (again, implying that the guide met the licensing requirements) in order to offer services.

At the end of the meeting, Connor summarized the new unit understanding that statutory or regulatory requirements regarding outfitter and guide relationships did not constitute or imply control. That is, just because the laws or rules require an outfitter to endorse a guide for licensure, that endorsement does not constitute control. Similarly, the rule requiring a guide to work only within an outfitter's operation plan area(s) do not constitute control in the context of independent contractorship.

The group quizzed the FOAM E.D. about actual practices such as booking clients, taking deposits, the relationship between the guide and the outfitter on the water, etc. Interestingly, the group spent some time discussing what happens when a client books, makes a deposit, then cancels the trip. Cunningham said when that happened to him, he typically paid the guide a portion of the deposit for the cancelled trip.

"Well, what about when the client takes the trip, but doesn't pay or the check bounces," they asked. "I pay the guide from my own pocket," he responded. "They've done the work and deserve the pay, even if I eventually have to take a loss." That phrase - take a loss - stirred a mini-controversy: Some staffers said that if an I.C. cannot experience a profit or loss in a working relationship, they're considered employees.

FOAM's rep noted that this example was an individual decision, not an industry standard. The group backed off a bit when they understood that the guide being paid or not was up to the outfitter in question, but the staff questions were still unsettling. Cunningham suggests that outfitters carefully spell out what happens in a variety of cancellation or bad payment situations in their contracts with I.C. guides.

The group was also very interested in the I.C. status of shuttle drivers. Reviewing the particular point system that determined whether a driver ran an independently established business, the group argued that lack of a professional license, no substantial investment in equipment, and lack of commercial liability insurance coverage meant that the shuttle driver had to look to other ways to prove their I.C. business status. The group thought that the shuttle driver's coordinator could run an independently established business under certain circumstances, but

thought that directing shuttles to drivers, transporting drivers up and down the river between shuttles, and paying weekly added up to employment, not I.C.'ship, for the drivers.

FOAM explained how important and interconnected shuttle drivers were with our industry and openly wondered how FWP would feel if, say, the Smith River shuttle drivers were required to be employees (with accompanying Work Comp, Unemployment Insurance, withholding, and Social Security deductions from their meager pay). Would the Smith suddenly lose a lot of nonresident and resident applicants because the shuttle companies either couldn't afford to pay employee drivers or, realistically, raised, perhaps doubling, the shuttle fees to cover these new costs?

Ms. Cooper was sensitive to the economics of an important cottage industry like shuttle services, but emphasized that "we all must play by the rules."

FOAM will track the shuttle driver question, looking for answers and suggestions. If FOAM members could notify the FOAM office of shuttle companies they use, we can contact them and see what we can do together. Email info@foam-montana.org or call 406-763-5436 with the contact names and numbers of shuttlers in your area. Thanks for your help.

If you have any questions about these new ideas and developments, contact the FOAM office at the above address and number. We'll try to update our website's FAQ section, too, with this information and contact numbers for the ICCU folks. If you have any particular experiences, good or bad, with IC compliance or investigation, please let FOAM know so we can maintain a log of circumstances, rulings, and declarations to help our other members.

PERC HOLDS STREAM ACCESS DISCUSSION

Gallatin Area Research Group Seems to Back Landowners

FOAM was asked to join a panel discussion on the stream access law by the Property and Environment Research Council, PERC, in Bozeman this September. Landowners, legislators, attorneys, and reps from FOAM, TU, the Wildlife Federation, and Fish, Wildlife & Parks were invited. The affair was moderated by Terry Anderson, PERC Executive Director.

After explaining that PERC had worked successfully with groups deciding elk management questions in the past, Anderson took a less-than-moderate role by directing discussion to what FOAM came to consider his pet topic - the consequences of the law regarding landowners. Among these consequences were increased trespass, fence damage, littering, and a disincentive to provide resource enhancement.

The landowners present agreed. Scott Blackman, a rancher along the Missouri, wondered aloud why he should continue to offer limited access across his land to the river when it means he must suffer many trespassers and their destruction of his fences. Bill Galt, owner of a ranch abutting the Smith river, asked if FWP could close access to a small stream that runs off his land into the Smith due to 'excessive' trespass.

Roger Raynel, manager of one of the ranches contending that Mitchell Slough along the Bitterroot is not a part of the river

and doesn't support stream access, asked just what was meant by 'stream' in stream access. Jim Kennedy, the rancher who owns a great stretch of land along the Ruby river, claimed he would never have bought his land there if he knew people could access it via county bridges and challenged the notion of road easements allowing access at those bridges.

John Bloomquist, former attorney for the Montana Stock Growers and legal representative for several landowners challenging stream access, claimed that landowners were increasingly resisting stream improvements in waters accessible to the public. Kennedy asked why he should conserve the Ruby when anyone could fish it. Anderson wondered aloud if access was harming the resource.

TU's Bruce Farling noted that, regarding trespass, there will always be 'boneheads' who break the law. FWP counsel Bob Lane explained that bridge access was allowed by a Montana Attorney General's opinion and suggested that some landowners may be improving streams along or within their property so they can have exclusive access for themselves and their friends. Mr. Lane also suggested that discouraging access would lead to lack of support for overall stream health throughout Montana, certainly not a good thing from his department's point of view.

For our part, FOAM explained how important stream access was for the continued viability of our industry, both at settled access points on major streams and rivers, as well as at lesser-used county bridges crossing smaller waters.

The wrangling and answerless questions continued until Anderson wrapped up the session with his summary of what had happened, including the warning that future access actions take 'incremental' steps, ie. don't rush decisions on bridge access (apparently ignoring the Attorney General's opinion), a concern about the effect of 'continued access on the resource', perhaps playing to some landowners' desire to trade stream rehabilitation for exclusive access, and contending that road easements didn't automatically allow access.

FOAM was surprised at Anderson's role in this discussion. We agree with other attendees that Anderson was relatively self-indulgent in his 'moderation' and certainly seemed to back the landowners' points of view. We note that PERC has always been concerned about private property rights. Rich Day, member of the National Wildlife Federation, seemed to remember that PERC used to stand for Policy, not property, and Environment Research Council. We join him in wondering how - and why - the name changed.

This forum reminded the FOAM representative that the stream access issue is not settled, and that landowners - from the traditional, native ranchers with trespass problems to the newer transplants who are acquiring ranchlands and seeking exclusive access to local waters - remain unconvinced of the benefits of stream access. Our association must and will continue to support stream access and resist attempts to dilute or reject current legal decisions and statutory holdings that preserve public access to the public waters we love.

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