



# The FOAMLINE

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FISHING OUTFITTERS ASSOCIATION OF MONTANA

SPRING 2001

## BIG HOLE, BEAVERHEAD RULES ADOPTED

On Friday, February 9, the FWP Commission adopted two-year rules controlling outfitter and nonresident use on the Big Hole and Beaverhead rivers. From a series of proposals presented and notes taken at the meeting, FOAM has built an unofficial draft of the rules. It's printed on pages 2 and 3 inside. As of "press time" for this issue of the FOAMLINe, Feb. 27, FWP hadn't issued an official version, so this will have to do for now. You can check FWP's website ([www.fwp.state.mt.us](http://www.fwp.state.mt.us)), then check the "recreational mtg." section under Notices for their version.

These current rules were developed from a sort of "Chinese menu" of selections during the Feb. 9 meeting. The commissioners had a hard time tracking the multiple variations available, sorting out which river they were talking about at any one time, and remembering what they had adopted previously. This uncertainty has led to questions about just what period of years is available for outfitters to use when calculating their historical use period - is it '95 through 2000 or just '98, '99, and 2000? Look at sections III C and IV C in the rule for reference to these dates. FWP is apparently still "revising" the rule, polling the now-replaced commissioners, and finding out their "intent." We'll see.

## FOAM CHALLENGES FWP AUTHORITY

The FOAM board of directors has voted to challenge the FWP Commission's authority to adopt rules controlling recreational use on Montana's rivers, streams, reservoirs, and lakes. The commission's lack of objective data or justification for the original moratorium and "Saturday Ban" on the Big Hole and Beaverhead rivers, and their arbitrary adoption of river recreation management policy guidelines, compounded by their rejection of both the Beaverhead and Big Hole Advisory Committee's recommendations, led the board to consider this challenge.

After researching the underpinnings of HB 626, passed during the 1999 legislative session and referenced by FWP as the statutory authority for making rules, and certain provisions in the Montana Administrative Procedures Act (MAPA), the body of law regulating how rules are adopted and how they may be challenged or repealed, the board thinks there are enough statutory and procedural deficiencies to warrant a challenge.

Long before this becomes a lawsuit, per se, FOAM must "exhaust all administrative remedies," the challenges and petitions allowed by law. The first step in this process is to bring our legal argument before the committee responsible for reviewing rules made by FWP. In this case, the committee is the Environmental Quality Council. Right now, during

Several of the alternatives were crafted during last-minute meetings between FWP staff and representatives from the Beaverhead and Big Hole Advisory Committees, but were not sent out for public comment. Advisory committee members had previously held meetings in Dillon and Butte to try to work out their own preferred alternatives to the original proposal from the commissioners. FOAM was represented at most of these meetings, though was not invited to meetings held by the Big Hole Watershed Committee because, as noted by Pat Munday, watershed committee board member, "FOAM is not a committee member."

During the last sessions with the advisory committees, FOAM had abstained from voting for or against any new recommendations they developed for reasons explained in another article in this issue. Simply put, because FOAM doesn't consider the FWP Commission to have the statutory authority to adopt *any* rules for recreational control, we can't endorse new variations or the original proposed rules. At the same time, we didn't want to stand in the way of BBHOGA or other groups who wanted to work out alternatives for their own needs, however short-lived they may be.

the 2001 legislative session, they are on a break from their regular duties and are in the process of having their members replaced with new members selected by the House and Senate from both political parties. Still, our challenge has been presented to the current chair of the EQC, Sen. Bill Chrismore, and he has directed the EQC legal staff to review our "case" and report to the committee before the end of the session.

We expect new members to be on the committee before the EQC takes up our challenge, so the questions could be heard by a fresh crew newly seated. FOAM will make its arguments based on facts, testimony, and legislative record. FWP will probably do the same. Then, the committee members may recommend actions for FWP to follow - either to proceed with their rule-making, to stop for lack of authority, or something in between. The EQC cannot force FWP to stop making rules, but if they recommend against it due to lack of authority or procedural problems, FWP is "on its own" legally and must prove they are acting within their authority. If they continue, and a decision goes against them in district court (our next legal arena), they are liable for court costs and attorney fees. We hope we don't have to go this far, but the route is laid out anyway.

Here's an **UNOFFICIAL** copy of the Beaverhead, Big Hole Rule. As we said, FWP legal is still "revising" the official language of the rule - what this means, I don't know - so FOAM will notify you of the changes, if any, as soon as possible.

**STATE OF MONTANA  
FISH, WILDLIFE & PARKS COMMISSION  
BIENNIAL RULE EFFECTIVE MAY 2, 2001 THROUGH MAY 1, 2003  
REGULATION AND DISTRIBUTION OF RIVER RECREATION USE FOR THE BEAVERHEAD AND BIG HOLE RIVERS**

**I. STATEMENT OF LEGAL AUTHORITY FOR RULE**

Section 87-1-303, MCA, gives the Fish, Wildlife and Parks Commission (Commission) the authority to adopt and enforce rules governing recreational uses of public waters for public health, public safety, public welfare, protection of property, and the protection of public resources. Under § 87-1-303, MCA, the Commission has comprehensive authority to adopt rules addressing use conflicts on rivers such as the use conflicts posed on the Beaverhead and Big Hole Rivers. The Commission is adopting these interim, recreational use rules as biennial rules authorized under the Montana Administrative Procedure Act, § 2-4-102 (11) (d). MCA.

**II. INTRODUCTION**

Because of increased user conflicts on the Beaverhead and Big Hole Rivers, resource and property damage concerns, demands upon limited public facilities related to those use levels, and concerns over the quality of the recreational experience, the Commission finds it necessary to manage river recreational use on the Beaverhead and Big Hole Rivers. This biennial rule is part of that management.

The Commission intends that management of use under this temporary, biennial rule will remain in place for the Beaverhead and Big Hole rivers until the Commission adopts a more permanent recreational resource management plan and implementing rules for each of these rivers. The Commission further intends to continue the development of management plans by considering the needs and impacts of river management on a state-wide basis as well as the particular individual needs and circumstances of the Beaverhead and Big Hole rivers. The Commission believes that this interim rule will give the Commission, the Department of Fish, Wildlife and Parks, other affected agencies, local governments and the public an opportunity to monitor and evaluate the regulations as well as collecting data and analyzing the needs of and impacts on the river resources, the public, and state and local communities, including consideration the carrying capacity of each river.

**III. REGULATION AND DISTRIBUTION OF USE ON THE BEAVERHEAD RIVER**

A. Starting on the third Saturday in May through Labor Day, recreational use of the Beaverhead River from the Clark Canyon Dam to its mouth shall be allowed and restricted in designated river reaches as follows:

- (1) The river reach from the Clark Canyon Dam to the Henneberry fishing access site is open to all fishing including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 3 boats in any day.
- (2) The river reach from the Henneberry fishing access site to Barretts Diversion is open to all fishing including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 3 boats in any day.
- (3) The river reach from Barretts Diversion to the Highway 91 South (Tash) Bridge is open to all fishing including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 1 boat in any day.
- (4) The river reach from the Highway 91 South (Tash) Bridge to Selway Bridge is closed to any float outfitting from the third Saturday in May through Labor Day.
- (5) The river reach from Selway Bridge to Jessen Park in Twin Bridges is open to all fishing including float outfitting. Each outfitter is limited to the launching or use within the reach of a maximum of 1 boat in any day.

B. Starting on the third Saturday in May through Labor Day, there is a noncommercial resident's day on each Saturday on the river reach from High Bridge fishing access site to the Henneberry fishing access site and on each Sunday on the river reach from Henneberry fishing access site to Pipe Organ fishing access site. No float fishing by nonresidents or float outfitting is allowed during each noncommercial day.

C. Each outfitter, from July 1 through August 31 inclusive, shall not exceed the number of client days served by the outfitter on the Beaverhead River during those same months for the outfitter's highest client use year from among the years 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the Board of Outfitters will determine the number of client days outfitted in each year.

*(Continued on page 3)*

**BOARD of DIRECTORS**

**Region 1** (Kootenai, Flathead)  
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**Region 3** (Missouri)  
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**Region 5** (Madison)  
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**Region 7** (Yellowstone)  
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**Region 6** (Gallatin)  
Matson Rogers  
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**Region 8** (Bighorn, Ft. Peck)  
George Kelly  
666-2326

**Guide-at-Large Director** Jerry Wilkerson 442-3692

#### IV. REGULATION AND DISTRIBUTION OF USE ON THE BIG HOLE RIVER

A. Starting on the third Saturday in May through Labor Day, recreational use of the Big Hole River from its Headwaters to the High Road fishing access site shall be allowed and restricted by defining seven river zones with one zone closed to float outfitting each day and with the zone that is restricted on Saturday and the zone that is restricted on Sunday also closed to nonresident float fishing. The seven river zones are defined by a river reach and restricted each day of the week as follows:

- (1) On each Sunday, the river reach from the Divide fishing access site to the Salmon Fly fishing access site at Melrose is closed to any float fishing by nonresidents and to any float outfitting.
- (2) On each Monday, the river reach from the Salmon Fly fishing access site to the Glen Bridge fishing access site is closed to any float outfitting.
- (3) On each Tuesday, the river reach from Headwaters to the Fishtrap fishing access site is closed to any float outfitting.
- (4) On each Wednesday, the river reach from the Notch Bottom fishing access site to High Road fishing access site is closed to any float outfitting.
- (5) On each Thursday, the river reach from the Fishtrap fishing access site to the Jerry Creek fishing access site is closed to any float outfitting.
- (6) On each Friday, the river reach from the Glen Bridge fishing access site to the Notch Bottom fishing access site is closed to any float outfitting.
- (7) On each Saturday, the river reach from Jerry Creek fishing access site to the Divide fishing access site is closed to any float fishing by nonresidents and to any float outfitting.

B. All float users, including each float outfitter, is limited to a total of 2 launches at or near each official access site per day. Official access sites are those that are publicly owned, managed and maintained as an access point, including: High Road, Pennington, Notch Bottom, Glen, Brownes Bridge, Salmon Fly at Melrose, Maiden Rock FWP, Maiden Rock BLM, Divide, Power House, Dewey, Jerry Creek, Mallons, Dickie Bridge, Eastbank, Sportsmans Park, Fishtrap, and Muddy Creek Bridge fishing access sites. If a boat is launched at an unofficial site, the launch will be counted as occurring at the nearest official site in determining the two-boat limit at or near each official access site.

C. Each outfitter, from June 1 through July 31, inclusive, shall not exceed the number of client days served by the outfitter on the Big Hole River during those same months or portion of the month for the outfitter's highest client use year from among the years 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the Board of Outfitters will determine the number of client days outfitted in each year.

D. For the purpose of this rule, float fishing by nonresidents and float outfitting includes both fishing from a boat and wade fishing when access is by boat. The terms do not include wade fishing, either guided or non-guided, where access is gained by foot. Float outfitting is the operation of any boat for commercial purposes by a fishing outfitter or guide.

#### V. CONTINUATION OF OUTFITTER MORATORIUM ON THE BEAVERHEAD AND BIG HOLE RIVERS

For the term of this biennial rule, the moratorium on new outfitter use of the Beaverhead and Big Hole Rivers imposed in the biennial rule effective July 1, 1999 through May 1, 2001, that was adopted June 29, 1999 and amended on January 12, 2000, is continued. Under this rule the Commission asserts that the use of a public resource is a privilege, not a right, and that continuation of the moratorium does not in any way establish a compensable or transferable property right by the outfitters benefiting from the moratorium.

The moratorium provides that a person, subject to the use limitations in III.C. or IV.C., may not outfit on the Beaverhead or Big Hole Rivers except:

- (A) An outfitter with documented use of the Beaverhead River prior to December 31, 1998 may continue to operate on this river.
- (B) An outfitter with documented use of the Big Hole River prior to December 31, 1998 may continue to operate on this river.
- (C) An outfitter who has not documented use of the Beaverhead River prior to December 31, 1998, may not operate on this river unless he/she was licensed by the Board of Outfitters between December 1, 1998 and July 1, 1999, and his/her operating plan included the Beaverhead River.
- (D) An outfitter who has not documented use of the Big Hole River prior to December 31, 1998, may not operate on this river unless he/she was licensed by the Board of Outfitters between December 1, 1998 and July 1, 1999, and his/her operating plan included the Big Hole River.

#### VI. CONDITIONS AND REQUIREMENTS FOR BOTH RIVERS

A. In the event of the death of an outfitter who has an opportunity to outfit on the Big Hole and Beaverhead Rivers, as outlined here, that opportunity may be assumed by a member of the immediate family of the deceased outfitter. This provision does not supercede the outfitter licensing requirements and authority of the Board of Outfitters. No other transfers will be permitted for the opportunity to outfit on the Big Hole and Beaverhead Rivers, as outlined here.

B. All outfitters given the opportunity to operate on the Big Hole and Beaverhead Rivers, as outlined here, will be issued boat tags that will identify them as authorized by the Montana Fish, Wildlife and Parks Commission to operate on the Big Hole and Beaverhead Rivers. These boat tags must be displayed on all authorized outfitter boats when operating on the Big Hole and Beaverhead Rivers.

#### VII. EFFECTIVE DATES OF THESE RULES

These rules are effective from May 2, 2001 through May 1, 2003. This rule was adopted by the FWP Commission on 2/9/01.

## LEGISLATIVE SESSION UPDATE

Here's a wrap-up of bills FOAM tracked during the first half of the 2001 session. Listed are the bill number, sponsor, and the committee who reviewed it.

### **HB 228** Rep. Fuchs (R, Billings) House Fish & Game

Required nonresidents to get a permit through a lottery system to fish on either the Beaverhead or Big Hole rivers. FOAM opposed it because of the uncertainty a lottery would bring to rebooking old clients or getting new ones. We reminded the committee of the money nonresidents bring to their districts and how Montana wants to help its image, not discourage tourism with such a measure. The bill was tabled in committee at the request of Rep. Fuchs, possibly because Gov. Martz made it plain she wouldn't sign the bill.

### **HB 480** Rep. Gallus (D, Butte) House Fish & Game

Gallus' bill proposed a statewide moratorium on fishing outfitter licenses. Again, FOAM opposed the bill, wondering why, if Gallus wanted a moratorium on the Beaverhead or Big Hole rivers, he had to call for one statewide? HB 480 was tabled in committee.

### **HB 481** Rep. Gallus (D, Butte) House Fish & Game

A companion to HB 480, this one would have disallowed outfitters from adding the B'head or B'hole to their operations plans, sort of a "mini-moratorium" for those two rivers. It was another attempt to pressure the commissioners into doing what Gallus thought was "right." When he knew the commission had put a moratorium on the B'head and B'hole, he asked that HB 481 be tabled in committee. It was.

### **HB 528** Rep. Story (R, Park City) House State Admin.

Clearly a smokescreen bill to block access to Montana's waterways at bridges, this one would have allowed county commissioners to restrict access in the interest of "public health, safety, and welfare." Guide-at-large member Jerry Wilkerson testified for FOAM, pointing out that the county commissioners already had the authority to "control" bridges and didn't need this extra authority and noting the clear intent to frustrate the Attorney General's ruling that recreationists have the right of access at easements along bridges.

It passed out of committee, but was voted down on the House floor, 35 for, 65 against. Rep. Story may have also gotten the word that the Governor didn't like this one any better than HB 228.

### **HB 292** Rep. Fuchs (R, Billings) House Fish & Game

A good one, Fuchs' bill creates a "fishing access enhancement program" that will offer incentives to landowners who provide public fishing access across their land. Though seriously amended to remove any fees and language that would have allowed developing access at bridges, the bill still provides some encouragement for FWP and will help landowners fight weeds, improve fire protection, offset the cost of liability insurance, if any, and pay for fencing or gates to control the traffic. A review committee, similar to the

Private Lands, Public Wildlife Advisory Committee, will be set up, too.

**HB 398** Rep. Gutsche (D, Missoula) House Fish & Game  
Rep. Gail Gutsche introduced this bill to "emphasize improvement" for Montana's native fish species of "special concern," in other words, those facing listing under the Endangered Species Act. The TU lobbyist pointed out to FOAM that this is already being done and needed no legislative action. Rep. Gutsche agreed after some discussion and requested the bill be tabled in committee, and it was.

### **SB 306** Sen. Tash (R, Dillon) Senate Fish & Game

Another fishing outfitter moratorium bill worded exactly like Gallus', this one never made it to committee. Sen. Tash pulled the bill from consideration when he understood that the commission had continued the moratorium on the Beaverhead and Big Hole rivers.

Because tabled bills aren't "transmitted" to the other house (House bills to Senate, Senate bills to the House) after Feb. 23, they are considered "dead." FOAM will monitor them nonetheless, remaining vigilant until the session is done. Plus, we'll testify for others that we supported during the first half of the session.

Member participation was good this session so far. Your letters and calls have helped our efforts. Thanks to you who have taken the time and interest to participate.

## **FOAM**

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### *In This Issue*

- \*Beaverhead, Big Hole Mgt. Rules Adopted
- \*Unofficial Copy of B'head, B'hole Mgt. Rule
- \*FOAM Challenges FWP Authority re BH2
- \*Legislative Wrap-up at "Halftime"