



# The FOAMLINE

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FISHING OUTFITTERS ASSOCIATION OF MONTANA

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## FOAM CHALLENGES FWP BEAVERHEAD, BIG HOLE BIENNIAL RULE IN DISTRICT COURT

*Rule Adoption Process, Adequate Justification, and FWP Authority in Question; Rule Could Be Invalid*

FOAM has filed a request for a declaratory ruling by the District Court in Gallatin County on the validity of FWP's Beaverhead and Big Hole Biennial Rule and several issues of the rule-making process used to adopt it. FOAM thinks the rule should be revised and readopted properly.

At issue is FWP's use of an exception to the standard agency rule adoption process outlined in the Montana Administrative Procedures Act (MAPA). The exception, unique to FWP, is meant to be used when making the familiar two-year hunting and fishing regulations and rules for seasonal use of the state's lands and waters. Year-round or commercial restrictions like those in the biennial rule don't fit the "fishing" or "seasonal" terms of this exception.

Then, there's the question of justification for regulations. For over a decade, from the beginning of FOAM's involvement in river management policy, we've advocated that facts should justify decisions. MAPA sets specific requirements for validity, rationale, and justification when adopting rules. But, according to the law, regulations made under FWP's exception to MAPA aren't defined as "rules," so FWP doesn't have to justify their decisions and these regulations can't be reviewed by legislative committees. This means department and commission decisions cannot be challenged except in court.

While FWP does take public comment on regulations made this way, similar to rules adopted under MAPA requirements, individual comments are often summarized, and, if objections are raised in comments, the department doesn't have to list the reasons for overruling these objections as they would under MAPA. So, though FOAM believes river rules should be justified through credible data, in the absence of useful data, the agency often relies on limited public opinion, opinion that's typically critical of outfitters and nonresident anglers.

At a more basic level, the FOAM BoD believes the authority for FWP to make rules for social engineering on rivers is neither clearly nor specifically granted by the legislature. Research has shown that HB626, widely touted by FWP as the authorizing legislation for such broad rule-making, was keyed toward motorized watercraft, with specific regulations suggested for controlling them in the interest of safety and "public welfare." FOAM is convinced that the terms of HB626 weren't meant to be as broad as FWP believes. The legislative example most similar in authority, the Smith River Management Act, sets out clear guidelines for rule-making, distinguishes between recreational and commercial use, and offers criteria to guide the department in their rule adoption.

No such detail is mentioned in HB626, except for those passages aimed directly at personal motorized watercraft.



### *EQC Decision Missed the Point*

With these facts in mind, FOAM decided to have our questions heard by the proper administrative body before considering going to court. So, in November of 2000, FOAM requested a review by the Environmental Quality Council, the interim legislative committee with authority to oversee Dept. of Fish, Wildlife & Park's rule-making. But, the EQC delayed consideration until after the legislative session.

In June, the EQC met, elected a new chairperson, Sen. Bea McCarthy (D, Anaconda), and heard FOAM and FWP's arguments for and against rule review. At this hearing, FOAM discovered the fact that these "rules" weren't rules at all and might not be subject to the scrutiny of the EQC. Nonetheless, the majority of the EQC members voted to have their oversight subcommittee review FWP's use of the exception and report back to the main body.

Rep. Chris Harris (D, Bozeman), Rep. Debbie Barrett (R, Dillon) and public member Harold Strauss (Billings) held a hearing of sorts on the issue on Dec. 10th in Helena. The hearing was packed. Harris, a lawyer and chairman of the subcommittee, understood that FOAM was questioning the validity of FWP's use of the rule-making exception, as did Rep. Barrett. Trying to narrow the discussion to those legal points, Harris asked for testimony on this subject. While several outfitters spoke in favor of the challenge, public members from Butte and Dillon sidetracked the legal issue by describing the disaster that would result if the rules were declared invalid, how hard they worked to get "agreement," the time spent with FWP to develop the rules, and how FOAM was using a "legal technicality" to challenge the rules.

Harris and Barrett voted to object to the rule because of legal flaws in the adoption process, but offered to hold off until May of 2002 to give FWP time to use correct rule-making to reassess the rule. Strauss voted to leave it in place. When asked, FWP said they couldn't pass a rule in five months using the strict rule-making process Harris and Barrett recommended. FOAM noted in private that they passed a rule in less than sixty days using the flawed process and wondered why 150 days wasn't enough time.

The next day, when Harris presented the subcommittee's recommendation, again, much was made of the fact that if the rule was declared invalid, "FWP wouldn't have time to get this right before May of '02," and "commercial interests would flood both rivers." The EQC membership voted against the subcommittee's recommendation, leaving the core legal questions of FWP's legislative authority and proper rule adoption unanswered.

With this off-point decision, it was clear that some EQC members didn't understand the issue at hand. Though several members interviewed mentioned that they also wondered why FWP couldn't get a rule in place in five months, others were convinced that outfitters are a real problem, clearly based on their belief that fishing outfitters were hovering on the banks of the Beaverhead and Big Hole ready to pounce if not restricted in some way. So, in the end, our question of law was trumped by "concern" over the assumed threat of commercial pressure.

Having attempted the possibilities for administrative intervention, FOAM has no choice but to go to court. Unlike the EQC, a district judge will focus on the legal validity of FOAM's allegations. The district court process may take six months to a year to rule on our questions. Then, depending on how FWP deals with a favorable outcome for FOAM, we could recommend a single rule for the Beaverhead alone. The Big Hole requires few limits at all, since data indicates outfitter use has dropped over recent years and nonresident use is typically less than resident use.

*What's Next? A Good Process!*

In the meantime, FOAM is working with other interests to convene a working council with statewide stakeholders (for example, fishing outfitters, sportspersons, public members, landowners, business interests, maybe Travel Montana, the Board of Outfitters, an FWP Commissioner, the Governor's Office, etc.) that should use the leading consensus-building facilitator in the state, Matt McKinney of the Governor's Consensus Council, to build a model *process* for developing river management plans, perhaps starting with the definitions of "crowding" and "conflict."

The FOAM board has reviewed some basic characteristics of a management plan development process taken from established recreational management research and associated social science literature. The steps are shown in the following flowchart. It is only one of several models, but it roughly conforms with the basic process that guided development of the Smith River Management Plan. Remember, this process shows the steps in *how* a plan could be developed and doesn't list specific individual, local river management plan characteristics or control mechanisms. That work comes later.

*Obtain Use Data*

Inventory pre-management use levels  
& identify user groups

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*Set Quality Indicators*

Poll users, managers for indicators of important experience or management values set against a biophysical background. Define "crowding" and "conflict" characteristics & thresholds as part of the quality indicators.

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*Set Quality Standards*

Use data from Step 1 and value indicators from Step 2 to set use/quality indicators as management goals

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*Develop Thresholds for Use*

Use quality standards to set use levels for individual rivers

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*Compare Use with Thresholds*

to identify areas of concern that need management adjustments

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*Develop Management Techniques*

to keep use below thresholds

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*Monitor Management Techniques*

via objective criteria and mechanisms to evaluate success of techniques; revise as necessary for effectiveness or to satisfy changing quality indicators

In anticipation of future river management plans, aside from our legal challenge and request to employ the full MAPA process for rule adoption, the FOAM board has spent considerable time working on resolutions that could form a general *policy* to guide individual river management plans, much like the policy the FWP Commission used to guide the Beaverhead and Big Hole Citizen Advisory Committees. These resolutions address a fishing outfitter moratorium, user rationing rather than service provider allocation (while noting transferability as a mandatory component of allocation if and when it's used), and fair treatment of nonresident anglers.

"It is resolved that FOAM support a moratorium on fishing outfitters if and only if it can be proven that outfitter numbers have had a deleterious impact on fishery or riparian resources and that the moratorium will mitigate those resource impacts. Further, when social crowding is considered a basis for a fishing outfitter moratorium, FOAM will support a moratorium if and only if it can be proven statistically during a specific time on a specific part of a river that outfitters are part of the crowding problem and only if such a moratorium would mitigate this problem.

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It is resolved that, in matters requiring user or service provider controls to alleviate recreational river crowding or fishery or riparian resource damage, FOAM favors rationing of users to any form of service provider allocation. However, should service providers face allocation of use on a resource, FOAM will accept that allocation if and only if the product of that allocation is based on historical use and is transferable.

It is resolved that regarding resource management and recreational use issues, aside from fishing and hunting license fees, no user shall be treated unequally solely due to residency status. Furthermore, FOAM resolves to promote nonresident use of Montana's rivers for the economic benefits they bring."

*Please note:* The FOAM board intends these resolutions to provide guidance for future plans only. The moratorium and allocation of commercial providers on the Smith river are and should remain unaffected by these resolutions. Indeed, the legislature, when authorizing the Smith River Management Plan, specifically provided for "*continued* recreational and *commercial use . . .* of the Smith River waterway . . ." (23-2-4-2, MCA) and authorized FWP to "regulate and *allocate* recreational and *commercial floating . . .*" (23-2-408, MCA), italics added for emphasis.

Favorable settlement of FOAM's legal request should ensure that any authorized agency employs the complete MAPA process to provide full legal rights to all interested parties in future river management plan implementation. This correct plan implementation, coupled with an appropriate river management development process model, will be a good start for the challenging work ahead.

### **FOAM ANNUAL MEETING HOSTS FIRST RIVER MANAGEMENT PANEL, DISCUSSION, INSIGHTS**

*Governor's Office, FWP, Commission Representatives Talk*

The highlight of FOAM's annual membership meeting in Gallatin Gateway last November was the "River Management" panel discussion. Todd O'Hair, Natural Resources Policy Advisor for Gov. Martz, Chris Smith, Chief of Staff for Fish, Wildlife & Parks, and Tim Mulligan, FWP Commissioner from Townsend each took a turn providing their insights and opinions regarding river management.

O'Hair minced no words, saying he didn't want to see river management "kick the crap out of outfitters." He recognized the difficulty in dealing with these issues, wondering how an agency (FWP) used to basing hunting and fishing regulations on factual biological evidence could move into social engineering without employing the same factual standard. O'Hair emphasized the Governor's recognition of fishing outfitters contribution to Montana. "Since Montana's economy is moving from traditional extractive industries to more agriculture and tourism, we see the non-extractive, low-impact fishing recreation industry as one of our future partners," said O'Hair.

Commissioner Mulligan reviewed his sense of the history that led to commission adoption of the BH2 rule. While tracing what he considered the "intent" of vetoed SB445 through ex-Governor Racicot's directive to FWP to use the purported authority gained in HB626, Mulligan explained that several commissioners were reluctant to move ahead with rule adoption, but he was willing to "take the blame" for urging the process forward based on his constituent's wishes. He next

offered his opinion that the commission made several mistakes: one, letting the Citizen's Advisory Committees continue unmonitored down a path that violated the commission's river management policy guidelines, and, two, employing the inexperienced facilitators to guide the plan development consensus process. "When we do future plans, we need strong, experienced facilitators," he said, adding "I'm in favor of the consensus process. I've seen it work in several instances, and I'm convinced it's the right way to go."

Chris Smith expressed his sense that FWP is really reaching "in the dark" on social issues, noting that the department has expertise in biology, but may be weak in sociology. "This is all new to us," he admitted, "and we want to make sure to get this done correctly." He also reviewed the department's on-going search to fill the legislatively authorized "River Management Coordinator" position, noting that "someone should be in that job within a month or so." Last, he explained that the FWP Commission had requested the Governor's Office to authorize a citizen's council for river management issues similar to the Private Lands, Public Wildlife Advisory Council that's been working on land-based hunting and wildlife issues for six years. (As noted earlier, FOAM is participating in the authorization of this council, too.)

FOAM members chimed in with various comments ranging from "What's the role of Travel Montana in all this?" to "What about those out-of-state outfitters? Why can't we control them?" The FOAM board resolutions were mentioned, too. Interestingly enough, when the panel participants were individually interviewed afterward, each expressed that "This was the first time I really understood where (the others) were coming from." FOAM was glad to provide the opportunity for this overdue understanding.

### **DEPT. OF LABOR REVIEWS GUIDE I.C. STATUS**

*Recent Case Law May Change I.C. Exemption Regulations*

FOAM's executive director met with MBO representatives and investigators from the Dept. of Labor (DoL) to discuss Labor's review of I.C. violations, recent case law, and unlicensed outfitting by guides with I.C. status.

The DoL investigator wondered if "guides could really be I.C.'s under MBO statutes and rules." This is an old argument that's periodically revisited by FOAM and the MBO. DoL holds that MBO licensing requirements and rules listing "unprofessional conduct" circumstances establish a degree of control by outfitters over guides that violates I.C. exemption requirements. Actually, on review (both in the past and at that meeting), DoL only requires "necessary control to achieve the ultimate result," not control over the details of the work, to establish an I.C. - contractor relationship. The typical fishing outfitter merely tells guide Schwartz to "take the Holden party fishing," leaving the details of how, when, etc., up to the Holdens and Schwartz. This fits the requirement of "necessary control to achieve the ultimate result," a successful guided trip, without suggesting "control over the details of the work."

The details of I.C. exemption requirements break down into two categories:

1) The outfitter and guide must demonstrate that "the worker is free from control or direction over the performance of services." Keep in mind the previous discussion of control and these other guidelines:

- a.) “An employer does not furnish equipment” (boat or gear)
- b.) “Lump sum payment to the I.C.” (DoL once argued that the guide must receive payment directly from the client, but, since MBO rules prohibit this, client payment to the outfitter of record for the trip is fine, just like a general contractor receives payment from the homeowner, then pays the “subcontractors” for their work.)
- c.) “The employer (outfitter) is exposed to liability for breach of contract if the worker is terminated.” (This and other characteristics of I.C. status are best covered in a written or verbal contract.)

2) “A worker must be engaged in an independently established trade, occupation, profession, or business. During an audit, the employer (outfitter) must provide as much of the following documentation as possible to support the independent contractor status.”

- a.) “Copy of the written contract between the worker (guide) and the employer (outfitter).”
- b.) “Proof the contractor (guide) advertises in the Yellow Pages or public directory or advertisement.”
- c.) “A copy of the contractor’s (guide’s) business license or permit (MBO license).”
- d.) “Business cards or printed invoices from the I.C. (guide).”
- e.) “Taxpayer I.D. number (for guide).”
- f.) Evidence (purchase agreements, titles, or lease contracts) of the contractor’s (guide’s) investment in tools, equipment, or specialized knowledge.”
- g.) “Insurance certificates.”

REMEMBER, *it is the outfitter’s responsibility to have the documentation in hand before using a guide with I.C. status - this includes a copy of the guide’s I.C. exemption.* The guide need only sign an affidavit with the DoL swearing he/she will provide information sufficient to warrant the exemption within three years.

As for contracts, call your director; the FOAM BoD may contact our attorney to see what sort of model we can provide our members. FOAM staff knows of at least one FOAM outfitter who faced penalties because he trusted the guide when the guide told him “I have I.C. status.” Protect yourself and demand a copy of the exemption, among other things. The convenience and utility of using a guide with I.C. status is lost if an outfitter has to pay penalties for noncompliance.

While it seems the burden of proof is on the outfitter in this situation, the guide who seeks an I.C. exemption also has three years to prove they fit the requirements, too. And, after the fact, they have to file a Schedule C (self-employed income) when doing their taxes.

Regarding the exemption and the three-year period, recent case law says, in essence, that “once an I.C. exemption is granted, it cannot be revoked.” An interesting ruling, since DoL typically revokes exemptions of those contractors who fail to stick to the requirements after the three-year proving period. The DoL investigator personally hopes the department seeks legislative remedies for this ruling, but can’t say if his people will follow up or not. FOAM suspects that, with the current Governor’s desire to help small businesses, I.C. exemption violations will be treated on a case-by-case basis,

not by some “blanket denial” method. Of course, if anything changes, the FOAMLINE will keep you up to date.

As for unlicensed outfitting by guides with I.C. status, that’s something the MBO is very interested in. They plan to coordinate with the DoL investigators to see what MBO regulation changes can help successfully prosecute guides who book their own trips, take cash payments (unless as bona fide agents of an outfitter), or advertise on their own behalf, not the outfitter’s, to potential clientele. FOAM outfitter members have been frustrated by having their business undercut by rogue guides who set themselves up as independents, often using the outfitter’s client list to solicit potential business. Perhaps a few successful prosecutions of guides acting as unlicensed outfitters will curb this abuse.

On the other hand, if outfitters are forcing guides to qualify for I.C. status solely to avoid the complications of income tax withholding and worker’s compensation payments, these outfitters may choose to think hard about possible prosecution for violating Work Comp law.

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