



The FOAMLINE

VOL. 11, #4

FISHING OUTFITTERS ASSOCIATION OF MONTANA

FALL 2002

FOAM ANNUAL MEETING - NOV. 2 IN HELENA

Goals, Updates, Questions & Answers Slated for Membership

FOAM will hold its annual membership meeting at the Helena Wingate Inn on Saturday, November 2 from 9 a.m. to 5 p.m. We are preparing for the upcoming legislative session and the FOAM board wants to make sure the membership is informed and involved in recent, long-term, and future regulatory, economic, and resource issues that shape our industry so we can set goals for the next few years.

Several state officials and other advocates, including Hank Worsech of the Montana Board of Outfitters, Charlie Sperry, new River Recreation Coordinator for FWP, Tim Mulligan, FWP Commissioner from Whitehall, and Amy Sullivan, lobbyist for the Montana Travel Coalition, are scheduled to address the membership. Also on the agenda are regional reports from FOAM board members, a discussion of FOAM goals, a "Question and Answer" session with the membership, insurance updates from Fred Wardinsky, lunch and our traditional happy hour.

The Wingate Inn is located at 2007 North Oakes, behind Perkins Restaurant on Cedar Street in Helena. If you're from out of town, Cedar Street is off Interstate 15 just north of Prospect Avenue. Once you're on Cedar, head west toward downtown Helena and look for Perkins. We're in the Big Sky Room at the Wingate. If you're staying overnight, the Inn has special room rates at \$72/night for two; rooms will be held until October 15th only. Call 406-449-3000. Please fill out the registration slip enclosed in this newsletter, plan to attend, and bring your good ideas for FOAM's future.

RIVER REC. ADVISORY COUNCIL UNDERWAY

Focus on Statewide Decision-making Process, Policies

Fish, Wildlife & Park's River Recreation Advisory Council met during August to lay out ground rules for discussion and decisions, then explored the variety of stakeholder interests. For a listing of the membership, go to fwp.state.mt.us/riverrec/default.asp or to FOAM's website (www.foam-montana.org), then navigate through the FOAM news pages to the "Currents" section for continual updates.

The group will use consensus to reach recommendations that will be presented to the FWP Commission sometime in February. FWP has set legislative "placeholders" for any legislation the council may recommend.

Commercial interests, including FOAM, the Big Hole, Beaverhead Outfitters and Guides Association (BBHOGA), whitewater rafters, and canoe liveries joined together to voice a common theme - We would accept reasonable controls on our

services IF we were proven to cause crowding or conflict. Nonresident representatives, including sports equipment dealers, the new Executive Director of the Fly Fishing Federation, Jim Rainey, and Amy Sullivan of the Tourism Coalition, set their own expectation of equal treatment for nonresident users on Montana's rivers.

During September, the group settled on "bottom-line" interests ranging from FOAM's desire for free-market-based mechanisms for regulating commercial enterprises when proven necessary, the Wildlife Federation's repeated call to avoid creating a "private interest in the public resource" (think NO transferability under a commercial allocation scheme), right on through to the landowner representatives' demand that decisions respect their property rights.

A subcommittee selected crowding and user/use conflicts as the key component "problems." They also realized that defining crowding and conflict, then balancing data with personal values when determining solutions were equally difficult topics to resolve.

The last "exercise" during the October meeting was to list guidelines for agreement and resulted in the most encouraging aspect of the process so far. Respect for the resource, equal treatment for *all* users and service providers, and an understanding that *all* users need to pay for their recreating on the resource topped the list. The emphasis on equality and balance can go far in resolving FOAM's interests.

Data presentations by FWP and the MBO brought the group up to speed on use levels, though FWP continues to use slanted charts that overstate nonresident use on the Big Hole river. Hank Worsech of the MBO reviewed how outfitters track their client numbers via logs and will assemble total client numbers for a series of rivers requested by the group.

At the next meetings, scheduled for October 17 and 18, the council will tackle how to make decisions that incorporate stakeholders' interests while working within the agreed-upon guidelines. FOAM has long advocated a modified "Limits of Acceptable Change" management decision-making process, as outlined in our "Currents" section of the FOAM website. We'll continue to request this process, one that truly accommodates all interests and can protect what we all recognize as the best fishing resource in the U.S. while balancing suitable controls, if needed, for commercial providers with the opportunity to continue or "grow" our businesses.

In the last FOAMLINe, an article outlined our association's concerns about the top-down control of this advisory council. Those concerns remain, though, to her credit, facilitator Ginny Tribe has a knack for rendering long-winded or

convoluted participant statements into understandable and accurate points of view, considerations, and summaries of interests. On the other hand, it is clear that she works for FWP and sets the agenda items and the rapid pace of discussion. Several participants have also commented on the extremely short time-frame for setting a statewide management decision-making process and individual policies that will direct all future thinking. Others wonder if the group can agree once deep-seated interests are challenged. Nothing is guaranteed by this process - remember, the group will only make recommendations to the FWP Commission.

FOAM would like Commissioner Mulligan, as a participant, to keep the council up-to-date on current commission thinking and reaction to what the council is considering. Charlie Sperry, FWP's River Recreation Coordinator, will present an update to the full commission on Thursday, Oct. 3, during their regularly scheduled meeting in Helena at FWP headquarters. FOAM will monitor the commission's discussion, hoping to gauge their mood on the council's progress.

INCREASING MANAGEMENT COSTS MAY RAISE OUTFITTER & GUIDE LICENSING FEES

Dept. of Labor & Industry Increasing Recharges for MBO

The Board of Outfitters, one of about twenty licensing boards managed under the Professional and Occupational Licensing Bureau (POL) of the Dept. of Labor and Industry (DLI), is facing rising costs for shared expenses of non-MBO personnel and managers. Since the POL was moved into the DLI from the Dept. of Commerce, DLI management has distributed shared operating costs or "recharges" among all the boards in POL. Costs include salaries for POL administrators, personal services, supplies, communications, travel, office rent, repair & maintenance, and legal expenses.

DLI officials are suggesting that boards pay these shared expenses based on the number of Full-time Equivalents (FTE's or employees) working for each board. The MBO has six employees, so their recharges would be six times those of, say, the Tram Operators Board, who has only one employee.

Outfitter Board vice-chairman Jennifer Cote, a registered Certified Public Accountant, argues that DLI should use "other cost factors, in fact, several cost factors." For example, electricity, rent, and other occupancy costs could be shared based on square footage of each board's office. Similarly, POL personnel costs could be based on FTE's, and legal costs could be based on the number of cases each board handles. Using three or four cost factors, rather than just the number of FTE's, will "distribute the expenses where they are generated,"

she explains.

Board member Rick Pasquale noted that several of the new MBO employees were needed to handle "unfunded mandates" of the legislature, like Net Client Hunting Use review and calculations. He argued that the MBO shouldn't have to pay non-MBO recharge expenses for these additional duties added on by legislators driven by resident concerns.

FOAM has wondered, too, just how DLI would handle these internal expenses. Typically, DLI gets its revenue from the General Fund, buoyed up by state taxpayers. Board expenses (and recharges) are paid by license fees, something new to the DLI chiefs. Now that they realize they can get money from licensees, they may realize they can shift expenses without going to the legislature for authority.

Whatever the internal workings of this expense argument, the MBO's recharges are projected to increase 66 percent by 2005, growing from \$124, 661 in Fiscal Year 2000 to \$206,904 in FY 2005. Actual MBO expenses shouldn't increase much - salaries for MBO employees increased 4% in 2002 while other board and staff expenses are projected to stay more or less the same. Only recharges passed on by the POL increase dramatically.

As for income, MBO license revenue is projected to stay the same (\$479,991) for 2003, 2004, and 2005, while the fund balance (past income not spent on expenses) will be spent down to a projected \$25,000 deficit by 2005. Before then, the MBO will have to come up with enough revenue, generated by new licensees or increased license fees, to keep the fund balance at about \$100,000. FOAM argued during the last fee-increase debate that the MBO didn't need \$100k in the bank and could reduce the 2000 license fee increase by 25%. The board didn't agree and will face a similar problem come 2005.

FOAM calculates that by 2005, the MBO will need to raise outfitter license fees to \$370 and guide license fees to \$125 just to equal the increased expenses. Worse, if projections by DLI are accurate, recharges will continue to rise, possibly requiring another fee increase in three more years.

Perhaps the outfitter board should ask DLI why their POL bureau needs eight employees to do the work previously handled by three Dept. of Commerce employees. DOC had a POL chief (who also directed the legal division) and two bureau heads. DLI has a chief, his assistant, two bureau heads each with their own assistant, a legal bureau head and his assistant - eight people to do the work that was previously handled by three people in the Dept. of Commerce. FOAM suggests the MBO look at the budget for the POL and ask them to justify

BOARD of DIRECTORS

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

Region 3 (Missouri)
Pat Straub
495-0487

Region 5 (Madison)
Eric Shores
682-4011

Region 7 (Yellowstone)
Todd Wester
222-5175

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

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

Region 6 (Gallatin)
Matson Rogers
556-1197

Region 8 (Bighorn, Ft. Peck)
George Kelly
665-3029

any increases before simply passing them along to licensees.

Some FOAM members suggest that DLI should justify its POL expenses passed on to the boards as recharges. Meanwhile, the MBO should hold expenses in check while retaining current employees and let license fees settle at a fixed number for at least five years. The board members tried to do this when considering the 2000 fee change, but couldn't foresee legislation that moved the boards over to DLI and the increased recharge expenses associated with the move. FOAM will track this issue closely and advocate belt-tightening within POL and the MBO if and when the board finds it necessary to charge higher fees to pay off recharge expenses.

MBO DEVELOPS PENALTY "MATRIX" FOR DISCIPLINARY ACTIONS ON LICENSEES

Fines, Probation, Letters of Warning Typical Penalties

After many years of working on a process to bring consistency and equality to disciplinary actions, the MBO has instituted a point-based penalty schedule (matrix) that levies fines and discipline even-handedly across a spectrum of violations.

Points are tied to specific violations, license types (outfitter or guide), multiple offenses, etc., then added up. The total determines what level of fine and/or probation the violator receives. For the licensee, this means you know beforehand what you'll face if you break the law. This system should bring some consistency to the penalty phase of the MBO disciplinary process. If you have any questions, call FOAM (406-763-5436) or the MBO (406-841-2370).

On another issue, the MBO often hears of outfitters or guides who receive a Notice to Appear (a ticket) in the field from a warden for allegedly violating MBO or FWP laws or rules, then pay the fine in court because the warden says, "IF you pay this, that's the end of it." The warden is wrong - that's not the end of it. As licensees, you are held to a higher standard when working with clients and when enjoying your hunting and fishing privileges. If you violate an FWP law or rule, you are subject to MBO disciplinary action in addition to whatever penalty you may face with FWP if convicted or you plead "no contest."

Many licensees think this is double jeopardy; but it is not. FWP violations are treated in county court as *criminal* violations, and if the charge is proven and/or a guilty or no contest plea is entered or a fine paid, you are subject to *administrative* disciplinary action by the MBO. A violation can warrant both criminal and administrative discipline without being double jeopardy.

So, if you receive a ticket from a warden for either an FWP, gauge for yourself if you really committed the violation and are willing to face penalties in both the county and MBO venues. FOAM is not advocating that you ignore tickets and violations or spend legal fees to dodge conviction when it's a clear violation. The association only wants its members to understand the dual consequences of FWP violations and not be misled by wardens in the field who may not understand the full meaning of discipline for a licensed outfitter or guide. You

don't need to plead guilty if you're not, even though it may seem like the easiest and cheapest way to handle a ticket.

EQC ACCEPTS FWP DEFINITION OF 'SEASON' FOR COMMERCIAL USE RULES ON BH2

FWP says Season Could be a Year or Several Years

A final go-around by EQC to deal with FWP's self-defined terms when dealing with commercial use on the Beaverhead - Big Hole river rules came to a sputtering end in September.

EQC member Chris Harris had requested the EQC question FWP about the department's use of a "seasonal" exception to the Montana Administrative Procedures Act (MAPA) when making rules controlling outfitters on the BH2 rivers. Harris persuaded the EQC to request a response from FWP, suggesting in a letter to the department that the FWP may be "inclined or persuaded to use the MAPA exception" for rules "in the absence of further legislative direction regarding what criteria should be used to determine whether use of the MAPA exception is appropriate." FOAM thinks Harris was correct in wondering if FWP could continue to use this exception to their own (and the resident public's) advantage when controlling commercial use under the recreational and seasonal definition. The EQC had to wait two months for FWP to reply.

In their letter to the EQC, FWP again stated that the BH2 rules are "actually fishing regulations because they only regulate one recreational activity - fishing." FOAM wonders how the now-four-consecutive-year outfitter moratorium and the current launch allocation schemes fit under the definition of "fishing."

Moreover, FWP says the term "seasonal" is not just related to "differences among spring, summer, fall and winter seasons, but is also related to the differences that occur from year to year." FWP says, for example, the Smith River Regulations are "seasonal" because "they depend on the weather with more people using and camping in state parks and floating the Smith River in the summer," "are affected by drought years or wet years," and the fact that "public use patterns and pressures change from year-to-year."

FWP also argues that a "formal MAPA" process would take too long to implement when recreational circumstances and conditions change almost annually. They calculate it would take "too large a bite out of the limited time available for adoption of these rules and consequently would consume too much of the time available to involve the public."

No matter what legal interpretation FWP puts on this issue, the EQC didn't act in any significant way on this response. Indeed, as vice chair Doug Mood said, "This is not an action item." The EQC has dodged any real consideration and handling of the legal questions posed by FOAM via the Governor's Office, and so we are carrying our legal challenge to Gallatin County District Court.

FOAM is confident FWP has misinterpreted both the use of their exception to MAPA in their efforts to control "recreational" use on Montana's rivers and their authority to impose unwarranted regulations on outfitters and the nonresi-

dent public on the Big Hole. Perhaps we can make some headway on the River Recreation Advisory Council or in court. Our industry's interests and significant contributions to Montana's economy shouldn't be brushed aside just because some people think our services and our clients impose on what they may consider their entitlement or their undefined "quality of experience." Rather, an equitable system of use distribution should be based on proven factual considerations. Our legal challenge intends to promote these considerations and defend against their misinterpretation and misuse by agencies or the public.

FOAM REVIEWS LEGISLATIVE PROPOSALS

Boat Fees, FWP-administered State Lands Rec Permits, Etc.

Early drafts of legislation are out, and FWP has several which may affect FOAM members, as will another legislator's proposed driftboat-fee bill. Here's a rundown.

FWP plans to augment funding for their Water Safety and Fishing Access Site (FAS) programs by requiring registration of all watercraft (not just motorized) and payment of a \$6-per-boat decal fee. Driftboats, rafts, canoes, johnboats, etc. would need a decal. Several alert EQC members asked if there could be a multiple-craft discount or a moveable decal (think of our boat stickers) for a fixed \$6 fee. FWP will consider these suggestions.

Equally controversial is a proposal for FWP to take over administration of State Lands Recreation Permits. While commercial use will not be regulated by FWP, they want to lease state school trust lands on a yearly basis, then charge all conservation license holders a \$1 fee to cover the new leasing expense. At least one EQC member wondered why FWP would replace a voluntary permit system with a mandatory additional fee across all conservation licenses. There's also the question of FWP balancing the income from the proposed \$1 fee with their annual lease expenses - could they make money on the deal? These questions need to be answered before the bill takes on momentum.

Aquatic Nuisance Species Special Legislation would authorize FWP to deal with invasive species such as zebra mussels, New Zealand mud snails, and whirling disease. FWP's fisheries division would coordinate with Montana's Dept. of Environmental Quality, Dept. of Agriculture, and the U.S. Fish & Wildlife Service.

Other FWP proposals include "removing quail from the definition of upland game birds," adding perch to the definition of game fish, allowing the commission to continue regulating the number of nonresident game bird licenses, and adding recommendations from the River Recreation Advisory Council and the Private Land / Public Wildlife Council.

Finally, Rep. S. Kitzenberg has requested a bill to charge a fee for "drift-type" boats at state parks and fishing access sites - interesting that he singles out drift-boats, unlike the FWP proposal for all boats.

FOAM will follow these legislative developments of interest to our board and membership. Keep an eye out for updates in the FOAMLINE and on-line at our website.