



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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LEGISLATURE OK ON FISHING OUTFITTERS

Independent Contractor Bill Can Simplify I.C. Status

In general, the 2005 Legislative Session has been fair to fishing outfitters and our businesses. No bills take aim at our industry, a few will help the stream, fishery, and access issues necessary for our continued business, and a bill simplifying independent contractor statutes can bring law back into compliance with long-standing business practices, for the majority of the building trades and for our fishing outfitting and guiding industry, too.

INDEPENDENT CONTRACTORS

Senate Bill 108 is an industry reaction to the Montana Supreme Court decision in the *Wild v. Fregein* case regarding independent contractors and employers. The case decision tightened regulations for I.C. status, particularly those concerned with 'right to control' issues and an 'independently-established' business. It also noted that an independent contractor exemption certificate was not 'proof' that the holder was an independent contractor.

To many in the building trades, if an I.C. had a valid exemption certificate, they could be considered a bonafide independent contractor. But, the *Wild* decision made it clear that just holding a certificate was no guarantee that the contracted worker was an independent contractor. Later investigation could revoke the exemption certificate and require contractors who suddenly became employers to pay back work comp payments, interest, and penalties.

During testimony on the bill, contractors complained that the *Wild* decision left many of them wondering what a certificate meant if it was not proof of independent contractor status and could so easily be challenged later. SB108 makes it clear that

"It is the intent of the legislature to assert that a conclusive presumption exists that a holder of a current, valid independent contractor exemption certificate issued by the department is an independent contractor if the person is working under the independent contractor exemption certificate."

As a trade-off for this certainty, the Dept. of Labor & Industry (DL&I) will increase worker, contractor, and employer education regarding independent contractor status and explain the exemption certificate application requirements to new and renewing applicants. These services

will be financed by increased I.C. certificate fees - plans are to charge approximately \$125 for a new or renewed certificate *if* the bill becomes law and DL&I issues new rules directly thereafter.

Regarding the issue of implied "right of control" stemming from the MBO requirement that an outfitter must endorse a guide before that guide may be licensed and the DL&I requirement that the individual must be "free from control" to achieve I.C. status, FOAM is pursuing two solutions to address this dilemma:

1) We have joined with the Montana Outfitters and Guides Assoc. to amend SB108 to include the words ". . . *an endorsement required for licensure . . . does not imply or constitute control.*" This should clarify that endorsement, by itself, does not constitute control and allow guides to continue to apply for and receive I.C. certificates, provided they meet all the remaining qualifications.

2) FOAM has introduced HB218 (which has passed the House and is headed for the Senate) which says that a guide can be licensed via endorsement by an outfitter, the current practice, "*unless otherwise qualified by the board.*" This language provides an alternate route to guide licensing, one that allows the board to set qualifications for guides independent of outfitter endorsement while still maintaining the original outfitter-endorsement method.

Clearly, the first solution is much simpler, but if SB108 should fail, we have other legislation that will allow guides to be licensed without endorsement and be eligible to acquire I.C. exemption certificates if they meet all the other requirements.

So, what other requirements will be addressed by SB108? You may remember the old system had an I.C. applicant fill out a simple affidavit stating that they were free of control, had an independently-established business, and could verify this business by way of business cards, ads, business checks, etc.

If SB108 becomes law, the Department of Labor & Industry will write rules to drop the affidavit process and replace it with an 'up-front' proof of I.C. status. DL&I will establish a point system to evaluate the applicant's compliance with the I.C. requirements. If the applicant can show, for instance, they are licensed to provide services, they get, say, 60 points; if they hold liability insurance, they are awarded another 60 points, and so on. Once the applicant

accumulates, for example, 150 points, they are considered an independent contractor and may receive a certificate of exemption.

OK, what are the chances of SB108 passing? Fairly good, considering many of the building trades, the trucking industry, and other major business representatives support the bill, the legislation was the result of an interim (between the legislative sessions) committee's recommendations, and the Dept. of Labor & Industry is behind it 100%.

The only hang-up is this: The bill has a fiscal note showing the Dept. of Labor & Industry will need "spending authority" (authorization to collect and spend) some \$1.6 million to administer the new I.C. system. Yes, the money will come from I.C. applications at \$125 each, but the legislature has the right to approve or disapprove this new spending authority.

With the state surplus doing well, the legislature could easily extend that authority, BUT, there are several other bills with large spending authority attached (think education), so the legislature will have to juggle what's in and what's out so they don't authorize too much spending and go above the budgeted cap on state spending.

The FOAM lobbyist has talked extensively with the head of DL&I and is working along with the involved industries' lobbyists to get this bill passed into law. If Gov. Schweitzer is serious about "boosting" Montana's economy, this is a good way to keep business working. We'll keep you informed.

FISHERIES & ACCESS

FOAM has been actively supporting a variety of legislation that provides for healthy fisheries and maintains access. Top among these bills are:

- SB 269 (Wheat, Bozeman) Allows 'ground water' (well) permit only if such use won't reduce surface water, aka streamflow. Transmitted to House.
- SB 376 (Wheat, Bozeman) Requires funding for DEQ Environmental Assessment needed to proceed with Outstanding Resource Water designation for a portion of the Gallatin river. Transmitted to House.
- HB 269 (Clark, Trout Crk) Mandates replacement of existing public access to recreational waters when road is abandoned. Transmitted to Senate.
- HB 313 (Golie, G. Falls) Directs Smith river fees to

enhancement of the Smith river corridor.

- HB 56 (Warden, Bozeman) Makes permanent FWP's Fishing Access Enhancement Program. Transmitted to Senate.
- HB 173 (Hawks, Bozeman) Require building setbacks along rivers and streams. Dead; voted down in Senate.

On the other hand, we opposed bills that required more fees or blocked access, such as:

- HB 176 (Cohenour, E. Helena) Allow FWP Commission to raise fees by rule rather than the legislature by law. Dead; not transmitted to Senate.
- HB 133 (Barrett, Dillon) Would redefine the term "encroachment" to allow fences to be attached or abut a county road bridge - would allow fences to block public access at bridges. Dead; tabled in committee
- HB 260 (Jones, Big Fork) Requiring boat stickers on "muscle-driven watercraft" to pay for increased fishing access and access maintenance. Dead; not transmitted to Senate

FOAM's lobbyist will be backing the successful bills through the House and Senate, particularly the legislation regarding independent contractors. We may be able to report successes at our Annual Meeting on April 2 (see more later about the meeting on pg. 3).

BEAVERHEAD, BIG HOLE RULES REVISITED

FOAM Requests FWP Commission to Drop Nonresident Float-Angling Restrictions on Big Hole River.

The Beaverhead and Big Hole River Recreation rules were overhauled after FWP assigned local citizens and outfitters to the Citizens Advisory Committee (CAC) according to the newly-adopted (statewide) River Recreation Management rule. The CAC spent four days considering the old rules and how they matched the criteria of the management rule. FOAM was represented by President Matt Greemore from Twin Bridges.

The CAC recommendations were revamped by FWP's legal counsel into the proposed BH2 rules now out for public comment. The new rules include combining two reaches on the Beaverhead river, Barretts to Tash Bridge and Tash Bridge to Selway Bridge, into one reach and limiting outfitters to one boat per day on this longer stretch.

A group of Dillon locals opposes this idea and have apparently convinced FWP to drop this recommendation

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because a Beaverhead County Growth Plan incorporated the idea that one section of the river should be reserved for the exclusive use of the “unguided, unoutfitted public.”

On the Big Hole, the rules propose prohibiting float outfitting from the river’s headwaters to Mudd Creek fishing access site, but dropping the float outfitting restrictions from Notch Bottom FAS to High Bridge FAS.

The CAC recommendations also include a new proposal to redistribute client days taken from the current number of total client days generated from calculations of each outfitter’s best year during ‘peak periods’ of June 1-July 31 on the Big Hole and July 1 - August 31 on the Beaverhead. The pool of unused “temporary” client days would be formed with days forfeited by outfitters who have not used any of their allocated client days for five years before the adoption of the rules and from outfitters who do not use any of their days for any two consecutive years after the adoption of the rules. Outfitters without allocated days would no longer be allowed to operate on the river(s) once associated with these allocated days.

Up to 60 of these new temporary days could be distributed annually to outfitters already within the current moratorium who apply for them and successfully meet the criteria set by FWP. Those criteria are not spelled out completely in the rule proposal, but factors include the applicant’s experience outfitting on the particular river and the number of years the applicant has been licensed in Montana. And, in successive years’ distributions, the department would give preference to applicants who were allocated temporary days the previous year. Several outfitters have ideas that would improve these unformed criteria, and FOAM has requested to help FWP set these criteria once the rules are adopted.

The proposal says these days would be awarded to “one-boat outfitters,” defined as “an outfitter who operates no more than one boat and is the sole guide.” At a public hearing in Bozeman, one fishing outfitter asked if that meant the “one-boater” couldn’t operate more than one boat elsewhere than the Beaverhead and Big Hole. FWP staff suggested that was not the case, but noted the question as one for the commissioners to discuss.

The FOAM board of directors believes that all outfitters, regardless of the size of their operation, should be allowed to apply for these temporary days, with the understanding that the outfitter who was awarded any days had to row the boat and/or guide the clients him- or herself.

The days could only be used on the river where they were originally generated and, once awarded, the successful outfitter couldn’t use more than 2/3 of the awarded temporary days during the peak periods on both rivers.

Once an outfitter has used temporary days for three years, the outfitter may not apply for more days than they

used during the previous three years, and after the outfitter has used the temporary days for five consecutive years, the department may remove these client days from the pool and permanently allocate them to the outfitter.

NONRESIDENT FLOAT-ANGLING RESTRICTIONS

Aside from the changes to the “temporary pool days” proposal, FOAM is urging the FWP Commissioners to drop the nonresident float-angling restrictions on the Big Hole river. We argue that nonresident use has dropped below what was deemed a “crowded” use level in 1997 every year since the original rules were adopted and that nonresident float angling has never been a majority-of-use or crowding problem since this use group was originally restricted in 2001.

The commissioners must understand that just because a problem was identified, but not quantified, by some public members, solutions in the form of restrictions are not appropriate until and unless sufficient data supports the need for them. Plus, there has to be a link between the purported problem and the solution. In this case, we find no data to support the notion that nonresidents of any angling type continue to be a problem and no connection between nonresident float anglers and the amount of use (or proven reduced use) nonresidents, float or otherwise, represent. In short, the rule may discriminate unnecessarily against a user group that’s not responsible for any crowding on the Big Hole.

Unfortunately, the citizen’s committee spent so little time on this aspect of the current rules that they agreed to keep these unwarranted restrictions in place with the new rule proposal. The outfitter members were spread so thin with their multiple roles as local outfitters representing the entire industry, the local outfitters, their individual businesses, and conservation groups that they didn’t have much time left over to spend thinking about nonresidents.

FOAM ANNUAL MEETING SET FOR APRIL 2

Friday, 4/1 is Spring Creek Day; Sat, 4/2, Annual Mtg.

FOAM’s annual Membership Meeting will be held on Saturday, April 2, at the Best Western Yellowstone Inn in Livingston. On Friday, April 1, FOAM has once again reserved DePuy’s spring creek and will have rod, tackle, and boat reps (Clackacraft, Montana Boat Builders, Hyde, etc.) back to show off their latest wares. The Saturday meeting will feature a variety of speakers on topics of interest to FOAM members. They include:

- Mike Volesky (Gov’s Natural Resources Policy Advisor) on our small businesses and how they fit into the new governor’s natural resource plans.
- Jim Kropp (FWP Head of Enforcement) on how we can help the department curb unlicensed outfitters. Also, to talk about coordinating I.C. or employee guide client-logging to help guides and outfitters stay in compliance

with MBO rules.

- Eileen Ryce (FWP Aquatic Nuisance Species Specialist) with a power-point presentation and explanation of FWP's efforts to battle aquatic problem species that harm our fish or their habitat.
- Charlie Sperry (FWP River Recreation Coordinator) bringing us up to date on the department's recent recreation management rules on the Beaverhead, Big Hole, and Blackfoot
- Maggie Connor (Independent Contractor Unit Coordinator) to educate us on just what degree of control an outfitter may exert on a guide with independent contractor status without changing the work relationship from contractor-contractee to employer-employee, and how to comply with the new (and hopefully successful by then) legislation regarding independent contractors.
- Wayne Johnston (E.D. of the Montana Board of Outfitters) to describe outfitter and guide rule violations, how cases are handled, and how penalties are levied.
- Tammy Barnett (MT International Insurance) to field any questions you have about liability insurance or the other coverages they offer.

Of course, we've got lunch planned, the traditional "happy hour" with hor's d'oeuvres, and our raffle. This year, we've contacted Simms, Orvis, Winston, Patagonia, Temple

Fork, Spring Brook, Baileys, Cross Currents, Rio, Froghair, Lyons Books, Montana Fly Co., Parks Reese (artwork) and others to gather a pile of items. We'll hold a special auction at the spring creek on Friday for a few items, then distribute the rest on Saturday to lucky ticket-holders. If you RSVP right away, we'll offer 2-for-1 raffle tickets as part of a special "Early Bird" deal.

The Yellowstone Inn will have a block of rooms held for members; contact them before March 21st to reserve space. There's usually a good turn-out for the spring creek day - last year, members enjoyed the creek, rowed a few new boats around the pond, scarfed down some BBQ, slugged a few beers, and generally had a great time.

We've planned this a little later than last year, so the weather (and the fishing) should be great. Put April 1-2 down in your calendar, reserve a room if you need one, and plan on coming to learn a little, eat, drink, and enjoy your fellow members. You're always welcome - so's your spouse or pal or significant other . . . whatever - we look forward to seeing you there.

CHECK THE ENCLOSED FLIER FOR MORE DETAILS
ABOUT OUR ANNUAL MEETING

In This Issue
* Legislative Roundup (I.C. Issues OK)
* New Beaverhead, Big Hole Rules Review
* FOAM Annual Meeting

FOAM
PO Box 67
Gallatin Gateway MT 59730
406.763.5436
info@foam-montana.org