



The FOAMLINE

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FISHING OUTFITTERS ASSOCIATION OF MONTANA
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SUMMER 2004

HEADS UP ALERT from RICHARD PARKS

Richard is a long-time FOAM member who works with the Northern Plains Resource Council on conservation issues

As you have probably seen in the newspapers, Canyon Resources has purchased a spot on the November ballot to overturn Montana's citizen-enacted restrictions on cyanide mining. We voted it in for good reasons, none of those reasons have changed, and nothing in I-147 changes those facts. Watch the upcoming September FOAMLINe for more information on this critical water quality issue.

FWP SEEKING PUBLIC COMMENTS ON NEW PROPOSED RIVER RECREATION POLICY

July, August Public Meetings Held in 10 Cities Statewide

The Montana Dept. of Fish, Wildlife & Parks Commission has tentatively adopted a statewide River Recreation Management Policy under the Montana Administrative Procedures Act (MAPA). The policy is available at www.fwp.state.mt.us/fishing/riverrecreation.asp or by calling 406-444-3888. FWP will hold public meetings starting at 6:30 p.m. in these locations:

- July 26, Great Falls, FWP HQ, 4600 Giant Spgs Rd
- July 27, Kalispell, Outlaw Hotel, 1701 Hwy 93 South
- July 29, Missoula, Doubletree Hotel, 100 Madison
- Aug 4, Helena, Jorgensons, 1714 11th Avenue
- Aug 5, Butte, Red Lion Hotel, 2100 Cornell Avenue
- Aug 10, Dillon, UMW, Mathews Hall, 710 S. Atlantic
- Aug 11, Bozeman, Holiday Inn, 5 Baxter Lane
- Aug 17, Billings, Conv. Center, 1223 Mullaney Lane
- Aug 18, Miles City, FWP HQ, Industrial Site W
- Aug 19, Glasgow, FWP HQ, Rural Route 1, 4210

Written comments must be sent by August 31 via email to: csperry@state.mt.us or by mail to: River Recreation Management Rules, Attn: Charlie Sperry, MFWP, 1420 E. Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701.

This policy is the final bureaucratic form of the recommendations built by the River Recreation Advisory Council and adapted by FWP for the FWP Commission's approval. According to the FWP press release, "Under the proposed rules, future river management decisions must consider the public's interests and data on river conditions. A citizens advisory committee would help develop local management plans to include local interests and the unique

characteristics of a river or stream. The rules also provide direction on such issues as river outfitting, resident and nonresident use, and rationing and allocation of river recreation."

FOAM has worked for about a decade to get FWP to this point in their river management capability and policy. This policy is the best effort to date for aligning data with individual interests when designing a management plan for a single river or stream.

Our concerns lie with the unbridled authority of the FWP Commission to ignore or adapt the recommendations of even the citizen committees. Yes, the commission is the ultimate authority - we're not questioning that - we're simply asking that the commission respect the work of the RRAC and be willing to stick to the decision-making process outlined in the RRAC recommendations. In short, we'd like to see that authority tempered with reason and respect for data, interests, and continuity of management.

Equally important is the need for balancing the two drivers in these management decisions: data and public interest. The commission saw no need to require a minimum standard or threshold of data, defaulting to the "best information available at the time." As happened on the Big Hole, we think public interest (read "demand") could overturn nonexistent, weak, contrary, or short data trends and yield a management plan that favors one interest over another. We've advocated for several years of data covering all use and user groups on a specific stream or river, not just FWP's angling pressure estimates and angler satisfaction surveys.

So, get the proposed policy, read it, go to a local meeting, think how this policy could work for or against your personal and business interests, then offer your comments by August 31.

FOAM, FWP LEGAL CHALLENGE UPDATE

Judge Salvagni's Decision Available by Early Fall

On Friday, June 11, FOAM, FWP, and the Butte-area sportsman's groups offered oral arguments on their cross-motions over our legal challenge to FWP's authority to regulate river recreation.

FOAM argued that the legislative subcommittee adding 'public welfare' to prior statutes that mentioned 'public health and safety' didn't include the broad and general topic of all river recreation - in fact, public welfare

was included to deal with jet-ski speed limits when safety wasn't at issue.

We also argued that FWP didn't follow the legal requirements of MAPA when they skipped the point-by-point rationale for each aspect of the Big Hole rule, that FWP violated state and federal laws by ostensibly denying nonresidents access to the Big Hole via access sites built with federal Land and Water Conservation Fund money, and that barring nonresident floating anglers on certain days on the Big Hole without considering other alternative, less discriminatory means violated the federal Interstate Commerce clause of the U.S. Constitution.

While Bob Lane, counsel for FWP, argued that FWP's "broad authority" enables the department and commissioners to make any rules they chose to regulate river recreation, Judge Salvagni asked if this authority would allow FWP to select 'only native-Americans' for special treatment and how that was 'any different' from the rules settled only on nonresident floating anglers and outfitters.

Last, Sarah McMillan, attorney for the Butte sportsmen's groups and the local TU chapter, argued that FOAM had no standing to represent nonresident anglers.

Judge Salvagni's written decisions and rulings could come before fall, though typically District Court Judges are so busy that such rulings can take quite a while. FOAM will send out a special notice to our members as soon as we receive the definitive ruling.

How the possible results of our legal challenge will work in the context of the proposed river management policy is anyone's guess, though, of course, we'd like to see FWP's authority clearly defined by the legislature - defined, that is, along the lines of the RRAC recommendations regarding data-driven decision-making - and no purported "broad authority" without reasonable guidelines.

The question of legal authority and river management policy will certainly come into focus on the new Beaverhead, Big Hole rules when they're up for review next spring, if not before. With the governor's race, legislator elections, the upcoming legislative session, and the new management policy all developing at the same time, this will be an interesting and challenging fall and winter for FOAM. If you have any comments for your directors or FOAM in general, please don't hesitate to call 406-763-5436 or email info@foam-montana.org.

Thanks for all your support, questions, and suggestions over the years while this river management situation has developed and played out. Next spring, we'll know a little better how to plan for the future of our businesses.

NEW INDEPENDENT CONTRACTOR RULES

Recent Determination and Division Requirements Could Make I.C. Exemption Tougher to Prove and Receive

A current "determination" or decision regarding an individual's employment status combined with new I.C. application rules and possible new legislation could spell big changes in I.C. status.

The determination was made in the case of a hunting guide who felt he was not fairly compensated for work he completed. The hunting outfitter claimed that the guide was an I.C. and disputed the wage claim.

By law, any such dispute is turned over to a compliance specialist in the Independent Contractor Central Unit of the Employment Relations Division of the Dept. of Labor & Industry. This person gathered statements from both parties and reviewed current Board of Outfitters, I.C., and employee laws, specifically the issues of control, furnishing of equipment, method of payment, right to fire, and independently established businesses.

The specialist determined that the guide ran an independently established business, but only partially provided equipment, was paid a daily wage with reimbursement for expenses, and could be fired by the hiring outfitter. These last factors alone might have shown that an employee-employer relationship existed, but there's more to this case.

Significant for our members is the fact that the specialist determined that Board of Outfitter laws and rules prevent "similarly situated individuals" (people who render services for an employer under circumstances substantially the same as those under which the subject individual's services were performed) from being considered an I.C. The specialist argued that since a guide cannot

- be licensed without the endorsement of an outfitter
 - guide clients without a supervising outfitter, and that
 - guide licenses are mailed to the endorsing outfitter, and
 - guides cannot collect fees without express consent,
- then, the guide is under the control of the endorsing outfitter or any other outfitter who signs the guides' license and is not an I.C. exempt from workers compensation requirements. FOAM wonders about some of the logic involved.

This case was determined in August of 2003, and I.C. exemption rules have changed as of July 1, 2004. In the past, I.C. applicants needed only to sign an affidavit saying they could provide proof that they complied with all the in's and out's of I.C. exemption status. Now, the applicant must provide sufficient proof *before* they are granted I.C. status. The cost is still \$17 and the exemption,

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once granted, is valid for two years.

Lastly, during the 2003 legislative session, there were hearings on I.C. exemption status that boiled down to a resolution for an interim (between the legislative sessions) study of independent contractor laws and regulations with an eye to "improving" the situation.

From what FOAM has heard, the I.C. Central Unit managers are interested in tightening up the I.C. requirements, with the possibility of detailed investigations of up to six weeks before I.C. exemptions are determined, and an application fee of \$200.

Combine the specialists determination that MBO law and rule may imply automatic control over the guide that disallows I.C. exemption with these possibly stringent I.C. guidelines, and our industry is in for some change.

Many fishing outfitters have required guides to become I.C.'s to avoid a lot of bookkeeping and additional expense, and guides like it because they get hired and a little more pay, sometimes. But, according to regulations, an I.C. must be "engaged in an independently established trade, occupation, profession, or business," and being forced into such a business status does not fit the "independently established" part of the regulation.

On the other hand, the outfitters who have guides as employees have been paying Workers Compensation rates near 20% of the daily guiding fee and they complain that their less-compliant fellow outfitters are "skating free, but on thin ice."

So, Now What Can I Expect? What Can FOAM Do?

Since FOAM first heard about these recent changes, we've been working on some early solutions, but they've all got flaws or are nearly impossible to work out. Here's some possibilities and their problems:

1) Try to join the ranks of the professions that are exempt from workers compensation, like cosmetologists and barbers, real estate, securities, and insurance salespersons and several other narrowly-defined groups.

Problem: These groups have been exempt for nearly 30 years and few new professions have gained this status. With the Workers Comp Fund running deficits again and considering the relatively low number of individuals involved in guiding, the political reality is that we stand very little chance of joining these ranks via legislation.

2) Employ the little-used "Professional Guide" licensing process to develop some testing, qualifications, and standards that the Board of Outfitters can use to license guides and remove the requirement for endorsement by outfitters. This could resolve the "control" issue noted by the specialist.

Problem: With many I.C.'s already acting like unlicensed outfitters, this status may bring them one step closer to being outfitters without having to pay the fees and fill the requirements as outfitters do.

3) Make I.C. status available only to outfitters.

Problem: If you thought there were a lot of outfitters now, wait until these I.C. guides move up in license status.

FOAM will work with the MBO to explore the possibilities of replacing the individual endorsement aspect of the guide-outfitter relationship with some specific state-determined qualifications without endorsement while skirting the possible "everything but licensed" outfitter status this could become.

If you have any suggestions, please contact your director or the FOAM offices.

BLACKFOOT SPECIAL USE PERMITS OK'd

BLM, FWP Working on Site-specific Requirements

As part of their on-going watershed level management, the Bureau of Land Management and Fish, Wildlife & Parks has worked with citizens and outfitters to hash out river recreation guidelines. Mentioned first in the Winter, 2003, FOAMLINE, this process culminated in recommendations to the BLM Missoula Field Office via the Western Resource Advisory Council (WRAC).

Robin Cunningham, FOAM's representative on the WRAC, was that body's liaison with the BLM and the Blackfoot Recreational Steering Committee (RecSterCom) who worked out the final recommendations for special recreation permits (SRP's) required by the BLM for all commercial, competitive, and group events on the Blackfoot. Cunningham presented the recommendations to the WRAC for their approval during July, and the WRAC endorsed the recommendations unanimously.

These recommendations are based on a river-stretch analysis completed long ago by the RecSterCom, applying varying group sizes and determining appropriate activities for each stretch of the river. Since this is only the first year of the SRP's, there was no rationing of use for any of the categories, though the RecSterCom expects to deal with this issue soon in order to keep within their own river-reach use structure guidelines.

FWP is involved because, according to the RRAC recommendations, they are supposed to coordinate with federal land management agencies when dealing with Montana rivers. This Blackfoot SRP process is the first coordinated effort on river recreation and serves as a model for future cooperation. BLM expects FWP to help administer the SRP's "on the ground."

Speaking of that, note that SRP's only apply to BLM and FWP access sites along the river, not the river surface itself. This distinction is important, since FOAM doesn't think FWP can restrict activity on the river itself, separate from their access sites. However, the BLM argues their authority extends to waters more than a mile in length that run along BLM holdings - that is, even if someone puts in and takes out on private ground, the BLM says it can regulate them if they float by BLM land along the river. Some Missoula outfitters argue that BLM can't really do this, but they are immediately referred by BLM personnel to the BLM legal affairs chief in Washington, D.C.

With the approval of the WRAC, the SRP process must now go before the FWP Commission for their approval, since this is a cooperative deal. That presentation and vote could happen this fall.

This Blackfoot SRP process is just one more stick on the pile of river recreation issues FOAM is involved with. Our growing experience from the Beaverhead, Big Hole, and now Blackfoot river management recommendation development puts our association in good stead to coordinate and work with any future citizen advisory committees on other rivers. Our decade-long involvement has been formative for FWP and our members, and we want to keep it that way.

A NOTE TO REGION 6 & 7 FOAM MEMBERS

And for Outfitters on the Yellowstone River near Livingston

As mentioned in the last FOAMLINe, the fishing access sites at Carter Bridge above Livingston and Hwy 89 Bridge on the road to White Sulfur Springs east of Livingston on the Yellowstone river are being monitored for vehicles parked along the roadway. The Montana Dept. of Transportation is working with FWP in asking people to keep from parking vehicles along these roadways when the fishing access sites parking areas are full. Any rigs found on the roadways will be ticketed and towed by the Park County Sheriff's Office under authority from the Park Count Commission.

FWP says it may open up the south side of their access at Hwy 89 bridge by scraping a shallow ramp from the access road down to the lower ground elevation, but nothing is immediately planned for Carter Bridge, though FWP will try to negotiate with a local landowner for more ground.

The shuttle drivers involved may be most hard hit,

since they typically take orders long before a crowded parking lot develops. So, avoid Carter Bridge or Hwy 89 sites if you can when you know the river will be active, like weekends, and give your shuttler a break.

This "limited vehicle" entry technique is another way of controlling people on our rivers. Familiar to Missoula anglers at the Scotty Brown bridge, with its limited parking spaces, this idea may well spread throughout the state where people collect to get to the water. FWP can't just be expected to instantly provide more and more access, though they are determined to deal with the land they've already got while constantly searching for land - and the money to buy it - along our riverways. Controlling access via limited vehicle parking could well lead to fishing access site fees, just like the BLM has recommended along the Blackfoot.

It seems like these issues just keep piling up like driftwood at the head of a gravel bar. We've got to keep informed and involved if we want our industry to survive, much less thrive. Your involvement is important, so take the time to help by commenting on the river rec. policy, talking to your fellow FOAM members about I.C. status and thinking about ways to resolve local or statewide issues.

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