



# The FOAMLINE

VOL. 12, #1

FISHING OUTFITTERS ASSOCIATION OF MONTANA

SPRING

## FOAM OFFERS HEALTH INSURANCE AGAIN

*Our Goal: Excellent Coverage at Competitive Rates*

In 2002, FOAM offered a group health insurance program for our members. Enough people were interested to seek out rates, but too few people were willing to sign up and the deal died.

Over the summer, FOAM is again asking members to decide if they're interested in a group health insurance policy. We need 120 or so members willing to consider trying our plan before we can seek rates and health coverage details. **IF YOU'RE INTERESTED, CALL THE FOAM OFFICE (406-763-5436) BEFORE SEPTEMBER.**

If about 120 members show interest, we'll gather their names, addresses, ages, and some basic health information so an insurance underwriter can assess our "risk". Next, our insurance agent will shop for plans that suit our needs, then let us know the rates, deductibles, and details of coverage. During September, we can mail this information to the interested members, who then decide if they like the terms and join up or not.

If at least 120 members sign up for the offered plan, we've got coverage. We need 120 people participating on a constant basis for the plan to work because that's

the smallest group an insurer will consider. And, once the plan is going, if consistent participation drops below 120, the plan dies. Sounds picky, but that's the deal in this tight insurance market.

Take this summer to think about whether you want to try better coverage at a competitive rate when comparing per-dollar cost to coverage and deductibles. Don't let this one get away. **GIVE US A CALL**, and we'll do our best to build a health insurance program as another benefit of FOAM membership.

## HELP UPDATE FOAM MEMBERSHIP LISTS

*Database, Directory, Website All Need Correct Data*

FOAM needs any changes in your address, phone, and email. We periodically publish a FOAM Membership Directory and we'd like to keep it up to date.

Outfitters, please contact the FOAM office (406-763-5436 or [rcunningham@montana.net](mailto:rcunningham@montana.net)) with any changes in your website listing - new rivers, services, new website address. Guides who have become outfitters can contact FOAM to put your website listing in the FOAM website searchable database to connect you with potential clientele. Check it out at [www.foam-montana.org](http://www.foam-montana.org)

## GUIDE COLUMN by Garrett Munson

FOAM Guide-at-Large Director

It was a fairly busy winter for FOAM, with many hot legislative topics coming up that needed our attention. Robin Cunningham will update you on the details in this newsletter. At this writing, most of the potentially negative bills were diverted, and some legislation that we may have to live with will pass into law. I think that Robin, FOAM's lobbyist, did a great job staying on top of things and represented us well.

The biggest development that may have a direct long-term effect for guides is the recommendations that come from the River Recreation Advisory Council. The RRAC has put out some draft recommendations, and their final recommendations should be coming out soon after their final meeting in mid-May. If the FWP Commissioners adopt the RRAC's recommendations, which is not a certainty by any means, we will have a good idea of what to look for down the line. From my viewpoint, I think we can anticipate recreation management of our rivers to some degree in the

foreseeable future. Rivers like the Bighorn, Missouri, and Blackfoot are almost certain to be addressed by the state due to their high use levels.

Management plans, as already seen on the Beaverhead and Big Hole rivers, will have a direct impact on our livelihood and the days that we spend on the river. I believe this impact can be managed in many different ways, and while some of what happens is by and large out of our control, the opportunity to be proactive and involved in the process is certainly available. Now is the time for us to get involved with the organizations in our communities that are best suited to become players in the process. This takes some commitment of time and energy and a willingness to put forth the effort to protect and sustain our industry for the future. I encourage you to get involved in whatever way you can and be a participant in the changes that seem likely to come sooner rather than later.

Have a great and safe season.

*Garrett Munson*

## 2003 SESSION LEGISLATIVE WRAP-UP

### *Bills Affecting our Industry, Stream Health and Fisheries*

While economic woes and budget wrangles dominated this spring's session, a few bills changed the fishing service industry in one big and several small ways. Here's a summary of successful and failed legislation that FOAM tracked since early January.

#### KEY LEGISLATION

##### **HB 411 - Transferability of Use**

Rep. Steve Gallus (D, Butte) promoted House Bill (HB) 411 to overcome the Fish, Wildlife & Park's Commission "no transfer" policy covered in the Beaverhead, Big Hole River Management Rules. The bill, now encoded as law, allows the transfer of river-use days "allocated to (an) outfitter from historical use of or river-related activities on restricted-use streams" from one fishing outfitter to another as part of the sale or transfer of a business. FOAM, the Montana Outfitters and Guides Association (MOGA), local businesses, and several area legislators backed Rep. Gallus' idea. Of course, several amendments were added to the original concept, including the warning that the FWP Commission could still change the nature of allocated river use in the future and the new owner would have to comply. Also, for any use to be available, the fishing outfitting business would have to be sold "in its entirety."

Another amendment added in the House Fish & Game Committee would have returned any such allocated use "to the public" if the FWP Commission ever allocated the public instead of outfitters, but this idea was removed on the House floor during the first vote on the bill.

FOAM's lobbyist originally thought the transfer of river-use days would be meaningless without an "opportunity to outfit" on either the Beaverhead or Big Hole rivers. However, at a statewide River Rec. Advisory Council meeting, Bob Lane, FWP's attorney, reasoned that the bill allowed the transfer of river-use days, that river-use days constituted "historical use," and that the opportunity to outfit was based on such historical use. Therefore, he concluded, transfer of use forms the basis for the opportunity to outfit.

FOAM suggested to the Board of Outfitters that, if the new owner wanted to audit the days they would be receiving, the transferring outfitter should pay for the audit,

not all outfitters through an increase in license fees. This idea may become part of new MBO rules.

##### **SB 407 - 4% Recreation Tax**

Originally slated as a recreation and tourism tax bill, this one's been through so many revisions, it is almost unrecognizable. To our benefit, the proposed 4% tax on guided services has been dropped from the list. Only an increase in cigarette and lodging taxes remains. Its alternative, SB 470, a general sales tax, was dropped in the melee of final legislation, as were other taxation income and reduction bills.

#### OTHER LEGISLATION

##### **HB 137**

This bill adjusted FWP law to allow the department to dedicate *at least* 50% of the revenue received for Fishing Access sites (FAS's) for maintenance and the balance for acquisition. The current law was scheduled to alter that ratio to *at least* 75% for acquisition and 25% for maintenance. FOAM joined others in backing this idea, because we have many deteriorating FAS's that need help before FWP gets any new ones.

##### **HB 174**

In an overhaul of several professional boards, this bill changed MBO statutes so that no "proprietorship, partnership, or corporation" could obtain an outfitting license in its name. Consequently, only an individual can qualify for an outfitting license.

##### **HB 175**

This bill changed the authority of the Environmental Quality Council to include oversight of so-called "attached to" entities - that is, groups attached to agencies already under the EQC's oversight powers. The FWP Commission is just such an entity, as discovered during FOAM's administrative challenge of the Beaverhead, Big Hole Rules, when the commission was considered exempt from the oversight of the EQC.

##### **SB 108 - Independent Contractor Law**

This bill amends independent contractor law so that I.C. exemptions last only two years, not three and reduces the fee for an exemption from \$25 to \$17. Another bill, SB 270, calls for a study by the Dept. of Labor & Industry of the entire I.C. / employee relationship and exemptions.

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#### BOARD of DIRECTORS

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

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495-0487

**Region 5** (Madison)  
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**Region 6** (Gallatin)  
Matson Rogers  
556-1197

**Region 8** (Bighorn, Ft. Peck)  
Matt McMeans  
666-2326

**Guide-at-Large Director** Garrett Munson 447-7174

### SB 130

FWP-sponsored and carried by Sen. Dan McGee (R, Laurel), this bill proposes to move administration of state trust recreational lands from the Dept. of Natural Resources and Conservation (DNRC) to FWP. IF, and it's a big if, DNRC and FWP can form an agreement "to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping" on state lands, then FWP would increase the price of conservation licenses \$2 for both residents and nonresidents, earmark \$1.50 of that to state lands, 50 cents to the license agent, and drop all fee and permit requirements for hunting, fishing, and trapping on state lands. All this becomes void if DNRC and FWP can't come to an agreement, terminate any agreement early, or if a court finds any agreement between the agencies invalid.

### SB 253

Sen. Jim Elliot (D, Trout Creek) sponsored a new ten-day nonresident fishing license to fill the gap between the two-day and season licenses now available. The 10-day'er, called a B5 license, costs \$43.50 after purchase of a conservation license, currently \$7.

### SB 287 (Failed)

Sen. Mike Sprague (R, Billings), along with FWP, sought to gain some revenue by requiring owners of oar- or paddle-powered watercraft to pay a per-boat fee of about \$5 in order to use state FAS's. A contingency of kayakers, canoeists, and others opposed the idea, saying they didn't want or need new FAS's for their sport and didn't want to pay the fee. FOAM, TU, and anglers argued that their fishing license dollars were already paying for these sites.

TU was worried that any revenues from this bill wouldn't make it to FAS's and successfully maneuvered FWP into allocating a big chunk of the income to FAS's instead of parks.

Interestingly, in January, FWP had submitted their budget to the Appropriations Committee and faced some opposition to appropriating money for the River Recreation Coordinator, Charlie Sperry. Through typical budget rearrangements, the authority (not the money) to rehire Sperry wound up in SB 287. When the bill failed, FWP may have lost the spending authority and Sperry could be out of a job. FWP may well rearrange their budget somehow and reappropriate spending authority for Sperry, since his work is key to developing statewide river management plans.

After all this, the bill was left hanging in the House when it failed to pass a second floor vote amid complaints about FWP's revenue and spending during tough economic times.

### SB 336

A counterpart to several other House bills, Sen. Dale Mahlum (R, Missoula) carried a proposal to allow people registering their car or truck to opt into a \$4 fee split

three ways: \$3.50 for state parks, 25 cents for FAS's, and a quarter for maintenance of Virginia City and Nevada City. It also provides that persons who opt to pay the fee are exempt from paying day-use fees to Montana state parks.

### HJ 20

House Joint Resolution 20, brought by Rep. Don Roberts (R, Billings), urged performance audits of several professional boards, but not the MBO. It also allows the Legislative Audit Committee to audit "the efficiency and effectiveness of the Department of Labor and Industry's procedures for administering the activities of professional boards." FOAM thinks this is appropriate, considering DL&I's suggested budget that may require the board to hike license fees for outfitters and guides.

FOAM testified on several environmental or conservation bills, hoping to stem the apparently overwhelming tide of reactionary, reversionist thinking about the environment. Frequently joining with TU, Montana Wildlife Federation, and others, we argued against several bills. Among them were:

- **HB 467** making almost impossible the designation of any new Outstanding Quality Waters (roughly equivalent to federal "Wild and Scenic" designation) in Montana, and
- **SB 720**, a bill that would have forced FWP to provide unreasonably detailed grounds for their infrequent objections to irrigators' requests to the Dept. of Natural Resources and Conservation for changes in appropriation rights. HB 467 passed into law unchanged, while SB 720 dropped all the language regarding objections to appropriation changes.

Toward the end of the session, three bills passed that may have long-term consequences on our streams: **HB 676, 677, 678**, all three concerned with exempting certain "non-projects" from the terms of the Streambed Act, which holds that the waters of Montana "need to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and in so doing to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved."

Among actions not defined as "projects" are certain changes in a stream for "customary and historic maintenance and repair of existing irrigation facilities that do not significantly alter or modify the stream *or for livestock grazing activities.*" And, the bills combine to allow local conservation districts to review such "non-projects" for suitability without use of the Montana Administrative Procedures Act (MAPA) requirements for specific public participation and to limit reparations or fines for breaking the Streambed Act protections to no more than \$7,000.

It was a tough session for our resources and the agencies that monitor them, but we did experience some

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positive conservation efforts, including **HB 129** that continued support for Cutthroat restoration.

FOAM works hard during the legislative sessions to keep our members up-to-date via email on the almost daily changes occurring there. We'd like to thank those members who testified on behalf of our industry and the resources protection we advocate for the long-term success of our industry and personal recreation. Our association would not be the same without you.

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## **RIVER RECREATION ADVISORY COUNCIL PREPARING FINAL RECOMMENDATIONS**

### *Statewide Perspective Keys on Planning, not Mechanisms*

After eight meetings in several locations around Helena, the River Recreation Advisory Council (RRAC) will come together one more time on May 14th to iron out final recommendations on how Montana should manage its river recreation. The recommendations will be sent to the FWP Commission for their review, then out for public comments, and finally scheduled for commission adoption.

The RRAC sweated out consensus on important guidelines for *their* own thinking and decision-making on how to make recommendations for a suitable process. Guidelines include:

- River resources come first; recreation should not compromise long-term conservation
- Find a balance between quality and quantity of recreation
- Provide for a full variety of recreation experiences
- Management should be based on sufficient and credible physical, biological, social and economic data and meet the ends of the affected stakeholders "through reasonable balance and equitable distribution of opportunity"
- All users should share the cost of access and management
- Current law provides the public the right to recreate on streams from legal access; FWP may regulate, limit, or restrict types of use and these regulations, limits, and restrictions may change over time
- Any allocation of use does not guarantee a person or business continued allocation in the future
- Recognition that it is important to protect Montana residents' current and future privilege to use river recreational resources
- Believe that non-residents should have reasonable and equitable opportunities to enjoy Montana's river resources
- Believe that angling and non-angling commercial river-service providers are an important industry in Montana and should be regulated (this may include licensing, permits, or qualifications, if necessary - FOAMLINe Editor)
- Consistent processes and strategies among managing agencies (federal and state - Ed.) facilitate protection of the river resource and equity for users
- Commercial river-service providers should have opportu-

nities to compete for paying customers and that viable and diverse types of commercial services should be encouraged through management processes

- Commercial service providers have a responsibility to pay for their use of public access but should not bear the burden alone
- River management solutions must be technically and socially feasible, legal, affordable, measurable, enforceable, and reasonable to administer

Now, these guidelines may or may not be passed on to the FWP Commission as ultimate guidelines for all decisions made by either the commission or other river management groups. The RRAC will decide on this during the May meeting.

Here's a **DRAFT** of the RRAC "*Analysis and Decision-making Framework*" pending final RRAC review in mid-May.

### **I. PURPOSE AND APPROACH**

This Framework is meant to provide the FWP department with a clear recommendation of the important elements of a decision process while providing for the flexibility needed to address specific needs. There is a two-fold recommendation for ensuring consistent, effective statewide river recreation management :

- Top-down process to ensure river recreation management is woven into FWP policies, strategic plans, management plans, work plans, and budgets
- Bottom-up process to ensure collaborative process with appropriate stakeholders (interest categories) yielding decisions that reflect the needs of all stakeholders and the unique characteristics of specific rivers.

This process recognizes that certain conditions may dictate specific actions recommended below occurring simultaneously, and that the entire process should be viewed as a whole approach. Examples may include, but are not limited to, time constraints, limited resources, lack of data, pre-existing data, etc.

### **II. STATEWIDE PLANNING & ANALYSIS**

A. Review current Commission policy and new input, and identify potential problems and consequences of alternative approaches. Develop and adopt a revised statewide River Recreation management policy.

B. Direct the Department to initiate a statewide River Recreation Strategic Management Planning process.

- Delegate authority from FWP Headquarters to Regional Supervisors to perform a reconnaissance and develop a list of rivers to be inventoried and prioritized based on the River Condition Designation System, "RIVCONDS" (Explained at end of this article - Ed.). Refer Regional lists to the FWP Headquarters for prioritization.
- Include the inventory and planning process in State and

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Regional work plans.

- Identify budget and staff needs for planning.
- Develop an implementation schedule.
- Identify and pursue sources of funding.

C. Review existing data. Collect and establish baseline data for rivers within the planning process as prioritized. Inventory and identify existing user groups, their use levels, and overall raw use numbers. Consider the following steps related to data:

- Identify data/survey collection needs, objectives, and methods including social data, and assimilate existing data.
- Where appropriate, offer the public a comment period on a data collection plan.
- Revise data collection plan based on comments.
- Initiate data collection (surveys).
- Utilize survey methods that are defensible and consistent between rivers.
- Summarize data for staff and advisory committee.

### III. ANALYSIS AND DECISION MAKING

A. Convene river stakeholder advisory groups to assist Fish, Wildlife & Parks in their River Recreation Management Plans.

- Regional staff shall identify stakeholder categories from local and broad based interests for specific rivers.
- Regional staff, working in conjunction with identified stakeholder categories and assuring inclusion of a “core” of local and statewide interests and perspectives, shall identify for FWP Dept. and/or Commission approval, specific persons to serve on river stakeholder advisory groups.
- River advisory committees shall establish ground rules that facilitate collaborative discussion, interest based problem solving, and consensus based decision making.
- River-specific advisory committee meetings are open to the general public and the advisory committees shall encourage public participation before decision recommendations are finalized, within the ground rules established by each committee.

Specific River Advisory Committees would perform the following:

1. Based on the state’s prioritization of rivers and the assigned RIVCONDS level, identify recreational opportunities, use levels, compatibility of users and river-specific user conflicts, and establish a timeline for completing a river management plan.
2. Identify the agencies managing use and their management processes. Develop and expand partnerships and, where appropriate, integrate those processes with river planning.
3. Identify gaps in information and gather other pertinent social, political and economic data and identify additional data needs to establish baseline river characteristics.

4. Articulate a vision for the river(s) and set goals and objectives in quantitative and qualitative terms that are intended to achieve the vision. For instance, quantitative examples include “How many people, boats, anglers, canoeists, etc., per river mile? How many cars, trailers fit at the access site? Qualitative examples include “How many other anglers will I tolerate before my sense of a quality experience is unattainable?” or “This river should only be used for X activity.”

5. Help define threshold standards/specific triggers/metrics that relate to achieving the vision, goals, and objectives expressed in quantitative and qualitative terms. Examples of threshold standards include carrying capacity; water quality/quantity; health of the fishery; health of the riverbank; quality of experience, etc.

6. Help evaluate and determine the need for recreation management by examining current data and/or comparing baseline data with at least one successive year’s data to determine the need for management. The sufficiency and credibility of the data should be determined by the group. (FOAM disagrees; a standard should be established for all groups - Ed.).

7. Utilizing the tools in the individual RIVCONDS levels, identify and recommend a variety of management techniques to be applied when thresholds are exceeded.

8. Identify and recommend mechanisms and timetable for monitoring and evaluating river management plans.

9. Hold a public open house and consider public comments in reviewing recommendations.

10. Revisit role and structure of river advisory group.

B. Conduct regional review of advisory committee recommendations within an established timeframe.

- The river advisory committee presents its recommendations to the Region. The Region evaluates the recommendation as to whether it is technically feasible, legal, affordable, measurable, enforceable, and reasonable to administer, and returns its comments to the advisory council.

- Based on the comments of the Region, the advisory council finalizes its recommendations.

- Final recommendations are presented to the FWP Commission with members of the advisory council and the Region present.

C. Conduct public review of recommendations of the advisory committee river goals, objectives and management framework for each river.

D. After reviewing public comments, advisory group finalizes river management recommendations and sends them to the FWP Commission.

E. Commission finalizes River Management Plans.

### IV. ACTION

Implement River Management Plans.

## V. REVIEW AND ASSESSMENT

On a regular basis, review the process, the plan, and cumulative effects and address changes based on monitoring findings. Develop mechanisms to evaluate plan effectiveness and to do cumulative review and monitoring from a statewide perspective.

### RIVER CONDITION DESIGNATIONS (RIVCONDS)

*Condition "Green"* – River is biologically and environmentally healthy with few or no social problems.

*Condition "Yellow"* – When data indicates initial or potential degradation of the resource or social data trends indicate a potential problem.

*Condition "Orange"* – When data shows environmental or biological damage or user levels exceed established thresholds, either in time or place.

*Condition "Red"* – A river with extreme situations of environmental or biological degradation regardless of cause, when prior level tools have proven ineffective, or in emergency or safety situations.

### "RIVCONDS" and

#### SUGGESTED MANAGEMENT TOOLS for each level

*Condition "Green"* - Management actions without restrictions or permits that should be implemented now.

- Enhanced enforcement of current use and distribution everywhere determined by usage and data
- Education toward self-regulation/expectation adjustment
- Open diverse access; more efficient use/development of current boat access/people movement
- Encourage conservation easements/open space; land owner incentives

*Condition "Yellow"* - Actions that further limit activities but not users.

- Commercial registration
- User registration/Identification (visible)
- Enhance/limit infrastructure (access)
- Unlimited permit system on all users (predate)?
- Commercial regulation (when and where)?
- Implement specific use/specific time
- Specific use/specific place

*Condition "Orange"* - Actions that limit user numbers

- Rationing to distribute users
- Limit group size
- Commercial regulation (numbers)
- Limit numbers at specific times
- Permit system limiting users

*Condition "Red"* - Actions that close rivers and streams to use

- River time closure
- River reach closure

### - River closure

No doubt about it, this is relatively complicated theory. During the upcoming RRAC meeting, the group is expected to finalize this draft and discuss possible permit models that may be imposed if user or service provider numbers must be limited based on sufficient and credible data.

Many FOAM members have called the office wondering if the RRAC will recommend a particular permitting system for "all the rivers in Montana." Robin Cunningham, FOAM's representative on the RRAC says, "No. The FOAM Board of Directors has not worked out any specific agreement or consensus for an appropriate statewide permit system nor which group - users or outfitters - should bear the burden. There are several models used in other states, but, remember, those states only impose their models on one or two stretches of specific rivers, not statewide. Montana is again on the leading edge of river recreation thinking when we take such a relatively global (or, at least, statewide) approach."

Some FOAM members think in terms of river-based moratoriums imposed on fishing outfitters, limited commercial use distributed among outfitters based on historical levels, and the added value these controls create for the eventual sale of a business. This is a familiar federal permitting model used for land-based outfitters.

Others think controls should be placed on users, not service providers. Once users had permits, they could chose whether to hire an outfitter or guide or not, with outfitters relying on competition, not exclusion, to promote business. The total population of users is controlled by setting a fixed number of available permits based on river-appropriate conditions. The permits would be distributed not through a chancy lottery, but by offering a percentage of the total at various times in advance. For example, 20% of the permits could be available a year ahead, 20% six months to one month ahead, 30% a month to two weeks ahead, 15% two weeks or less ahead, and 15% available on any particular day.

In response, the moratorium-minded outfitters ask, "If we have controls on users instead of service providers, what about my repeat clients? How can I guarantee them a permit?" Well, if permit distribution started, say, with 20% of the permits available a year in advance, when a client steps out of the boat or heads for the airport, the outfitter could ask, "Do you want to come back this time next year?" If so, the client could immediately apply for a permit. Better yet, if the rules allowed an outfitter to apply for his or her clients, the turnaround time would be much shorter.

Similarly, those who favor this "Free Choice" system wonder, "What's to keep an outfitter from grabbing *all*

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the advance permits?” Montana could build a rule allowing outfitters to apply for permits in the client’s specific name, but warn that, if the client’s name is falsified or the client doesn’t use the permit, that client is barred from applying for a year.

Given that the total number of outfitted clients on any river is probably only 30% of the total number of people on the river, the varying percentages of permits available during various advance periods should satisfy most outfitters. Hopefully, individual outfitters wouldn’t try to apply for all their clients a year in advance, but let the bookings work out as they do now, with some clients booking before leaving the trip they’ve just completed, some booking long in advance, and the rest booking at various times down to the walk-in’s that arrive unexpectedly and want to go that day.

All this is to show possibilities for FOAM members to choose from. The FOAM Board of Directors is open to suggestions. And, remember, all this will be reviewed by the RRAC itself, then the public (resident and non-resident, hopefully), then the FWP Commission, so it’s certainly not a “done deal” by any means. Your thoughts are welcome. Write or call FOAM: PO Box 67, Gallatin Gateway, MT 59730 - (406) 763-5436, 9 to 5.

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## **BEAVERHEAD, BIG HOLE BIENNIAL RULES RE-ADOPTED WITH LITTLE DISCUSSION**

### *Rules Imposed Until RRAC Makes Recommendations*

On April 10, the FWP Commission took final public comment on the proposed readoption of the BH2 Biennial Rules. It all seemed staged, however, because before the meeting, the public received FWP’s “Notice of Adoption” of the rules stating that “The commission *has adopted* new rules II and III exactly as proposed, and has adopted new rules I, IV, and V with the following changes . . . “ (Italics added for emphasis.) FWP’s notice gave rudimentary responses to specific objections to the proposed rules, brushing them aside with bland generalizations and assertions of the commission’s broad “discretion” in rulemaking.

To their credit, several of the commissioners gave their personal take on the rules and the situation. John Brendan from Scobey agreed with comments noting the economic impact of the rules. He described the reduced income for several local businesses in his district when FWP delayed non-resident pheasant season opening day for a week while residents hunted. He mentioned that “the towns around Scobey really felt the decline in business” because of this delay and that he could understand the concerns of business people about these rules. Commissioner Mulligan said he knew that some of the “information” in the public comments was very misguided and noted that the feelings about non-resident use might

have to change when the RRAC recommendations came out.

But, the commission still adopted the biennial rules without much more discussion. Outfitters present were disappointed while Butte and Dillon residents were reportedly “thrilled.”

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## **FOAM LEGAL CHALLENGE SET FOR COURT**

### *BH2 Rules, MAPA, and FWP Authority All in Question*

With the re-adoption of the BH2 rules, FOAM will move ahead with its legal challenge of FWP’s authority and their handling of MAPA when making the biennial rules. FOAM has long held that the commission does not have the broad authority to make rules without substantive reasons derived from specific data. Now we can move ahead into a non-political arena to see if our reasoning holds.

Our previous efforts have centered on rule-making procedures tracked through administrative channels, chiefly, the Environmental Quality Council. However, politics dominated these deliberations, not questions of law, much less reason. We anticipate a judge will apply different standards, legal standards, in his deliberations on these matters. Cutting through all the rulemaking steps and requirements, at the heart of our argument is how the state can justify controls on outfitters and/or nonresidents when there is little or no data to warrant or support these controls.

A current challenge in Arizona has brought new thinking to the issue of nonresident restrictions. Summarizing, the Ninth Circuit U.S. Court of Appeals ruled that limiting nonresident hunting licenses may violate what’s called the “dormant” (unspoken) portion of the Interstate Commerce Clause of the U.S. Constitution. The court reasoned that persons traveling across state lines to spend money on services, specifically, guided services, was protected by the Commerce Clause just as much as persons traveling to purchase goods or products.

At the same time, the court recognized Arizona’s legitimate goal of protecting its wildlife, but saw little connection between this goal and limits on nonresident licenses when taken in light of the Commerce Clause. Several other states, Montana included, attempted to band together and ask the U.S. Supreme Court to hear their arguments against the Arizona district court ruling. The Supreme Court denied the request for a hearing, sending the decision back to the district court to rule on whether Arizona’s license limits comply with a very strict interpretation of the dormant Commerce Clause.

The court found no validity to Arizona’s argument that the state needed the political support of Arizonans to continue managing wildlife and could, therefore, appease that voting public by limiting nonresident licenses. The

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court noted, “The state’s need or desire to engender political support for its conservation programs cannot by itself justify an otherwise invidious classification.” Further, “the Commerce Clause . . . was included in the Constitution to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state’s represented citizens,” concluding, “Arizona must show more than in-state political demand for the discrimination imposed.”

FWP has commonly argued that our state’s non-resident hunting license restrictions set the precedent for any other similar restrictions, including rules that disallow non-resident floatfishing on certain stretches of rivers on certain days. Montana may have a legitimate argument that, for instance, elk are in limited supply and licence controls effectuate a permissible discrimination between resident and non-resident license numbers and hunting opportunities.

This is not true for fishing, however, because the fish pursued are not similarly limited - in fact, biology has little to do with the argument, being replaced with an ill-defined “quality of experience” notion. FOAM wonders if Montana can discriminate against nonresidents purely on a “quality experience” argument, particularly since this idea in action undermines interstate commerce.

The ruling of the appeals court expressed that

“Arizona’s cap on non-resident hunting substantially affects and discriminates against interstate commerce and therefore is subject to strict scrutiny under the dormant Commerce Clause. Arizona has legitimate interests in regulating hunting to conserve its population of game and maintain recreational opportunities for its citizens. We remand for further proceedings (back to district court - Ed.) to determine whether Arizona has met its burden of showing that it has no other means to advance its legitimate interests.” FOAM wonders if Montana can meet this strict scrutiny burden, too, when gauged against vaguely defined state interests.

**Outfitter & guide membership applications  
and insurance questionnaires available soon on  
our website - [www.foam-montana.org](http://www.foam-montana.org)**

*In This Issue*  
\* “Guide Column” by Garrett Munson  
\* Help Update Membership Lists.  
\* Health Insurance Offered Again  
\* Legislative Wrap-up  
\* River Rec. Advisory Council Update  
\* FOAM Legal Challenge Ready for Court