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Environmental Quality Council
May 23rd and May 24th, 2001
EXHIBIT 13

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May 24, 2001

Council Members
Environmental Quality Council
State Capitol, Rm. 171
P.O. Box 201704
Helena, MT 59620-1704

HAND DELIVERY

Re: Beaverhead and Big Hole River Rulemaking

Dear Council Members:

In recent weeks you have been provided copies of material from the Legislative Council and from Mr. Lane and Ms. Williams of Fish, Wildlife & Parks concerning the issues raised by the Fishing Outfitters Association of Montana (FOAM) in connection with the biennial rules adopted for the Beaverhead and Big Hole Rivers. There are several key points which we would like to address in connection with this information.

The Environmental Quality Council (EQC), as the rules committee for Fish, Wildlife & Parks, is charged by statute to review compliance of rules promulgated by the agency with the provisions of the Montana Administrative Procedures Act (MAPA) and with the legislative intent and delegation of authority by the statutes relied upon by the agency as authority for promulgating rules. The basis for looking at legislative intent is to ensure that the appropriate separation of powers required by the State Constitution is maintained. Article III, Section 1 of the Montana Constitution provides as follows:

Separation of Powers. The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the other branches except as in this constitution expressly directed or permitted.

The power to make laws is vested in the legislative branch. This power may be delegated to an administrative agency if narrow and specific guidelines are given. In *Douglas v. Judge*, 174 Mont. 32, 568 P2d 530 (1977), the Montana Supreme Court set forth the law regarding delegation of legislative authority:

When the Legislature confers authority upon an administrative agency, it must lay down the policy reasons behind the statute and also provide standards and guides for the grant

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of power which has been made to the administrative agency. (Citations omitted). The following general rule . . . has often been cited by this Court:

“The lawmaking power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the legislature must set limits on such agency’s power and enjoin on it a certain course of procedure and rules of decision in the performance of its function; and, if the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.

It is FOAM’s position that the Montana Legislature made no delegation of authority to Fish, Wildlife & Parks (FWP) to enact broad social conflict rules. This position is supported by the affidavits of former Representative Hal Harper and Senator Jon Ellingson which are attached hereto as Exhibits “A” and “B” respectively which establish the legislative intent for HB 626. The passage of HB 626 by the 1999 legislature resulted in the term “public welfare” being amended into Section 87-1-303 (2), MCA. This provision is being relied upon by FWP as the basis for their authority to regulate social issues on the Beaverhead and Big Hole Rivers. FWP is making a broad interpretation of this term. However, it was the intent of the Legislature that the term “public welfare” not be broadly interpreted to allow for the segregation of classes of individuals and businesses and exclusion of those classes from the rivers of the state of Montana.

EQC as the rules committee for FWP has the obligation to review the biennial rule promulgated by FWP to determine if it is in compliance with the legislative intent of the authorizing statute relied upon by the agency. The statutes governing the actions of a rules committee provides that the committee determine if the rule in question was adopted in compliance with Sections 2-4-302 through 305, of the Montana Code. Section 2-4-305 (3) provides in pertinent part that:

A statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules and the rule implements and relates to a subject matter or agency function that is clearly and specifically included in a statute to which the grant of rule making authority extends.

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An examination of HB 626 discloses no policy statements or specific guidelines for FWP to make broad rules to regulate non-motorized social conflicts on the Beaverhead and Big Hole Rivers. Other attempts to grant this authority this specific authority to FWP contained specific policy statements and guidelines. See, for example, Senate Bill 445 attached hereto as Exhibit "C". It is abundantly clear that no delegation of legislative authority to allow FWP this kind of rulemaking authority was granted or was intended. As such, the biennial rules for the Beaverhead and Big Hole Rivers are invalid.

The other issue which FOAM has raised, in the alternative, is that the biennial rules were of substantial public interest and required that FWP follow the rulemaking provisions of MAPA. FWP relies on an exception to MAPA which provides that MAPA does not need to be complied with when an agency is making seasonal rules regarding the recreational use of water which rules are posted for public notice by way of signs. It is FOAM's position that the exception to MAPA contained in Section 2-4-102 (11) (d) does not apply to the biennial rules. The biennial rules relate to matter of significant public interest and specifically regulate the outfitting industry by setting a moratorium on which outfitters can have the Beaverhead and Big Hole Rivers in their operating plans. The rules further go on to restrict qualifying outfitters to use of these rivers to specific times and places. These rules regulate commercial activity of members of the outfitting industry and thereby go well beyond recreational use of water.

EQC is required to determine if the provisions of MAPA should have been followed. An agency is required to comply with MAPA when it enacts "rules of significant public interest". This term has been defined as actions regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving substantial fiscal impact to or controversy involving a particular class or group of individuals. Clearly, Montana outfitters constitute a class or group of individuals that are fiscally impacted by the biennial rule and it is unquestioned that significant controversy surrounds this issue. See Affidavits of Nicholas J. St. George and Greg Smith attached as Exhibit "D".

Finally, exceptions to MAPA are to be narrowly construed. See Section 1.3.204 (2), Administrative Rules of Montana. A narrow construction of 2-4-102 (11), MCA, does not support the use of the exception to MAPA in this case. FOAM requests that EQC determine that FWP did not have legislative authority to enact the biennial rules and, in the alternative, that the biennial rules are invalid as the procedural provisions of MAPA were not followed.

Very truly yours,



Thomas R. Anacker

enc.

AFFIDAVIT

STATE OF MONTANA)
 :SS.
County of Lewis and Clark)

Harold "Hal" Harper, being first duly sworn upon his oath, deposes and says that:

1. He served as a member of the Montana House of Representatives during the 56th Montana Legislature held during 1999 and represented House District 52 in Helena. Affiant's address is 9 Comstock Road, Helena, Montana 59601-5524.

2. During the 56th Montana Legislature, Affiant was the sponsor of House Bill 626. Affiant's purpose and intent as sponsor of HB 626 was to enact a law which regulated the operations of motor boats and jet skis. This bill was requested by Affiant's constituents who felt deprived of the complete use of their cabins on lakes because of the operations of motorized watercraft and who also wanted a pro-active method to avoid conflicts between motor boat and jet ski operators with the public. Affiant also intended to provide an expansion of the Department of Fish, Wildlife & Park's ("Department") authority to manage river conflicts that may develop in the future. However, Affiant did not intend that the expansion of the Department's authority would be to an extent that would cover circumstances such as are covered by the Smith River Management Act and which were included in HB 445, namely provisions that specifically identify and limit classes of recreational users and classes of commercial outfitters.

3. Affiant was the sponsor of the Smith River Management Act Bill. That Bill contained specific statements of policy and intent as well as specific and detailed guidelines to be followed by the Department. Affiant believes that specific legislation would be required which contained similar detail to the Smith River Management Act before the Department

Exh. A.

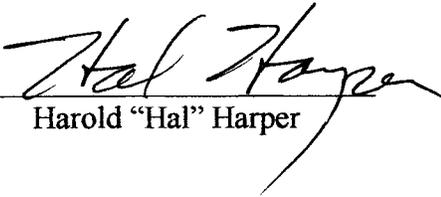
would have authority to promulgate rules which deny a class of business operators and/or a class of anglers from a river in the State of Montana.

4. SB 445 was the bill introduced in the 56th legislative session that was intended to provide the specific authority to the Department to address social conflicts on the Beaverhead and Big Hole Rivers by regulating access to the rivers by certain commercial users. SB 445 was vetoed and did not make it into law.

5. Affiant is aware that the Department is utilizing the language contained in Section 87-1-303, MCA, which was added as a result of the passage of HB 626 as the authority to regulate social conflicts and crowding issues on the Beaverhead and Big Hole Rivers. These issues are being regulated by excluding an identified class of outfitters and an identified class of anglers from the rivers. Affiant, as the sponsor of HB 626, did not intend a delegation of authority to the Department to the extent it could segregate classes of commercial and recreational users and restrict them from the rivers of the state. Affiant observes that there is an inequity between the detailed guidelines contained in the Smith River Management Act which govern conflict issues on that river and the lack of detail contained in HB 626 which the Department is applying to the remainder of the rivers in the state.

FURTHER AFFIANT SAYETH NOT.

DATED this 27th day of May, 2001.


Harold "Hal" Harper

STATE OF MONTANA)
 :SS.

County of Lewis and Clark)

SUBSCRIBED AND SWORN to before me this 24th day of May, 2001.

[SEAL]

Thomas R. Anacker
Notary Public for the State of Montana
Residing at: Bozeman, MT
My commission expires: 6/29/02

COPY

AFFIDAVIT

STATE OF MONTANA)
 :SS.
County of Lewis and Clark)

EXHIBIT #13

Jon Ellingson, being first duly sworn upon his oath, deposes and says that:

1. He is currently a Montana State Senator in the 57th Legislature representing Senate District Number 33 from Missoula, Montana, and has an address of 430 Ryman Street, Missoula, Montana 59802.

2. In the 56th Montana Legislature held in 1999, he also served as a State Senator from Senate District Number 33 from Missoula. During that legislative session, Affiant was a member of the Senate Fish and Game Committee.

3. During the 56th Montana Legislature, the Senate Fish and Game Committee held a hearing and took executive action on House Bill 626 introduced by Representative Hal Harper, HD 52, Helena. Affiant was present and participated during the Senate Fish and Game Committee hearing on HB 626 on April 8, 1999, and was present and participated during the Senate Fish and Game Committee executive action which also occurred on April 8, 1999.

4. It was Affiant's intent as a Montana legislator that HB 626 was to be a law that regulated potential conflicts between motorized and non-motorized recreational users on Montana's waters and was to be a law which granted specific authority to the Fish, Wildlife and Parks Commission to establish speed limits for the operation of personal watercraft. Attached to this Affidavit, as Exhibit "A", is a copy of the passed version of HB 626 which contains a legislative intent statement. Affiant has reviewed said legislative intent statement and hereby states that the statement correctly and accurately reflects Affiant's understanding of the purpose, scope and intent of HB 626.

5. During the executive action taken on HB 626 on April 8, 1999, the Senate Fish and Game Committee added a conceptual amendment to the bill. Affiant made the motion to conceptually amend HB626. The scope and purpose of this conceptual amendment was to specifically grant the Fish, Wildlife and Parks Commission authority to establish speed limits for motorized watercraft on Montana waters under circumstances where safety was not necessarily an issue. It was not Affiant's intent nor the intent of the Senate Fish and Game Committee, according to Affiant's understanding, that the conceptual amendment grant the Fish, Wildlife and Parks broad and unlimited authority to regulate any and all social conflicts on Montana's waters outside those specifically provided for in HB 626.

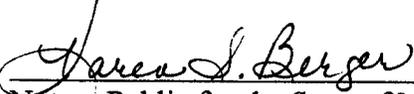
FURTHER AFFIANT SAYETH NOT.

DATED this 19th day of April, 2001.


Jon Ellingson

STATE OF MONTANA)
 :SS.
County of Lewis and Clark)

SUBSCRIBED AND SWORN to before me this 19th day of April, 2001.


Notary Public for the State of Montana
Residing at: Helena
My commission expires: 12/20/2002

[S E A L]

HOUSE BILL NO. 626

EXHIBIT #13

INTRODUCED BY H. HARPER, J. ELLINGSC

1
2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REDUCING POTENTIAL CONFLICTS BETWEEN RECREATIONAL
5 USERS OF MONTANA WATERS BY REVISING CERTAIN LAWS ON MOTORBOAT AND PERSONAL
6 WATERCRAFT OPERATION; REVISING THE RESTRICTION ON OPERATION OF A VESSEL IN PROXIMITY
7 TO AN ANGLER, WATERFOWL HUNTER, OR DIVER; DESIGNATING CERTAIN RIVER STRETCHES AS
8 NO-WAKE ZONES; PROHIBITING THE USE OF PERSONAL WATERCRAFT ON DESIGNATED RIVER
9 STRETCHES AND ON WATERS RESTRICTED BY RULE OF THE FISH, WILDLIFE, AND PARKS
10 COMMISSION; ALLOWING THE FISH, WILDLIFE, AND PARKS COMMISSION TO ADOPT RULES FOR THE
11 OPERATION OF PERSONAL WATERCRAFT AND THE RESOLUTION OF CONFLICTS BETWEEN USERS OF
12 MOTORIZED AND NONMOTORIZED BOATS ON MONTANA WATERS; AND AMENDING SECTIONS
13 23-2-525, 23-2-531, AND 87-1-303, MCA; AND PROVIDING AN EFFECTIVE DATE."

14
15 WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating
16 the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

17 WHEREAS, the increased recreational use of Montana waters by every manner of recreationist,
18 motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river
19 users; and

20 WHEREAS, in other states, conflicts between recreational users of waters have escalated to the
21 point of violence and even deaths of recreationists; and

22 WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible
23 use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy
24 their pursuit of happiness through peaceful relaxation; and

25 WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that
26 measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters
27 before this state experiences similar problems.

28
29 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
30

1 Section 1. Section 23-2-525, MCA, is amended to read:

2 "23-2-525. Restricted areas. (1) ~~No A person shall so~~ may not anchor a vessel or other obstacle
3 for fishing or pleasure purposes on any body of water over which the state has jurisdiction in such a
4 position ~~as to obstruct~~ that obstructs a passageway ordinarily used by other vessels.

5 (2) ~~No A person shall~~ may not operate a pleasure vessel within 20 feet of the exterior boundary
6 of a water area ~~which~~ that is clearly marked by buoys or some other distinguishing device as a bathing
7 or swimming area. Swimming areas ~~shall~~ must be marked with white buoys having international orange
8 markings in conformance with the uniform state waterway marking system by the owners of such ~~the~~
9 areas.

10 (3) ~~No A person shall may not, without permission, operate or knowingly permit any person to~~
11 ~~operate~~ a vessel within ~~50-200-50-100~~ 75 feet of a person engaged in fishing OR HUNTING WATERFOWL,
12 unless unavoidable. If unavoidable, the vessel must be operated at not greater than no-wake speed OR AT
13 A MINIMUM SPEED NECESSARY TO MAINTAIN UPSTREAM PROGRESS while within 200-50-100 75 feet of the person
14 engaged in fishing OR HUNTING WATERFOWL.

15 (4) (a) ~~No A person shall~~ may not purposely, knowingly, or negligently operate a motorboat upon
16 the waters of this state within ~~100~~ 200 feet of a tow-float or buoy displaying a "diver-down" symbol, red
17 with a white slash, on a flag.

18 (b) The motorboat may enter the ~~100-foot~~ 200-foot safety zone by use of sail or oar. In an
19 emergency or if there is insufficient water on either side of the ~~100-foot~~ 200-foot safety zone to pass by
20 and stay out of the zone, the operator may use power within the zone but may not exceed no-wake
21 speed. The burden of proving that an emergency exists or that there is insufficient water is on the
22 operator.

23 (c) The fish, wildlife, and parks commission may by rule determine areas where establishment
24 of a ~~100-foot~~ 200-foot safety zone is not allowed in order to provide for diver safety or the regulation of
25 water traffic."

26
27 Section 2. Section 23-2-531, MCA, is amended to read:

28 "23-2-531. Personal watercraft operation. In addition to applicable provisions in this part, a
29 person may not operate a personal watercraft:

30 (1) unless a person operating or riding on the vessel is wearing a United States coast guard

1 approved type I, II, III, or V personal flotation device;

2 (2) if the vessel is equipped by the manufacturer with a lanyard type engine cutoff switch unless
3 the lanyard is attached to the operator's person, clothing, or personal flotation device as is appropriate
4 for the specific vessel;

5 (3) (a) except as provided for standup personal watercraft in subsection (3)(b) OR WHEN TOWING
6 A WATERSKIERS FROM OR TO A DOCK OR SHORE, at greater than no-wake speed within ~~100~~ 200 feet of a dock,
7 swimmer, swimming raft, nonmotorized boat, or anchored vessel on a lake or ~~within 50 feet of a dock,~~
8 ~~swimmer, swimming raft, nonmotorized boat, or anchored vessel on a river, except as provided in~~
9 ~~23-2-525(4) river;~~ or

10 (b) at greater than ~~minimum maneuvering no-wake speed for a standup~~ THE MINIMUM SPEED
11 NECESSARY TO OPERATE A personal watercraft when leaving or returning directly from or to a dock or shore
12 for the purpose of launching or docking, ~~except when towing a waterskier from or to a dock or shore;~~ or

13 (4) on any surface waters restricted in whole or in part by rule of the fish, wildlife, and parks
14 commission;

15 (5) in a reckless or negligent manner. Actions prohibited in 23-2-523 are considered reckless
16 operation."

17
18 **Section 3.** Section 87-1-303, MCA, is amended to read:

19 "87-1-303. Rules for use of lands and waters. (1) The commission may adopt and enforce rules
20 governing uses of lands that are acquired or held under easement by the commission or lands that it
21 ~~operates under agreement with or in conjunction with a federal or state agency or private owner. The~~
22 rules must be adopted in the interest of public health, public safety, and protection of property in
23 regulating the use of these lands. All lease and easement agreements must itemize uses as listed in
24 87-1-209.

25 (2) The commission may adopt and enforce rules governing recreational uses of all public fishing
26 reservoirs, public lakes, rivers, and streams that are legally accessible to the public or on reservoirs and
27 lakes that it operates under agreement with or in conjunction with a federal or state agency or private
28 owner. These rules must be adopted in the interest of public health, public safety, PUBLIC WELFARE, and
29 protection of property and public resources in regulating swimming, hunting, fishing, trapping, boating,
30 including but not limited to boating speed regulations, the operation of motor-driven boats, the operation

1 of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats,
 2 waterskiing, surfboarding, picnicking, camping, sanitation, and use of firearms on the reservoirs, lakes,
 3 rivers, and streams or at designated areas along the shore of the reservoirs, lakes, rivers, and streams.
 4 Areas regulated pursuant to the authority contained in this section must be areas that are legally
 5 accessible to the public. These rules are subject to review and approval by the department of public health
 6 and human services with regard to issues of public health and sanitation before becoming effective.
 7 Copies of the rules must show that endorsement."
 8

9 NEW SECTION. Section 4. Designation of certain river stretches as no-wake waters -- PERSONAL
 10 WATERCRAFT USE PROHIBITED. (1) In the interest of public health, safety, welfare, and protection of property
 11 and public resources, THE USE OF PERSONAL WATERCRAFT IS PROHIBITED ON ~~the following waters of the state~~
 12 ~~are limited to a controlled no-wake speed:~~

13 ~~_____ (a) from the headwaters of the Missouri River downstream to its confluence with Pruett~~ PREWETT
 14 ~~Creek, except in Missouri River reservoirs, and including all tributaries but not their reservoirs; and~~

15 ~~_____ (b) from the point where the Yellowstone River enters Montana downstream to its confluence with~~
 16 ~~the Clark's Fork of the Yellowstone~~ STILLWATER ~~River, including all tributaries of the Yellowstone River and~~
 17 ~~the Clark's Fork of the Yellowstone~~ STILLWATER ~~River but not their reservoirs.~~

18 (2) THE WATERS FROM HAUSER DAM DOWNSTREAM TO BEAVER CREEK ARE LIMITED TO A CONTROLLED
 19 NO-WAKE SPEED.

20 (3) THIS SECTION DOES NOT APPLY TO THE USE OF THE DESIGNATED WATERS FOR SEARCH AND RESCUE,
 21 OFFICIAL PATROL, OR SCIENTIFIC PURPOSES.

22 (4) This section may not be construed to limit the authority of the commission or department to
 23 enact by administrative rule or to enforce any other restrictions on any surface waters in the interests of
 24 public health, safety, welfare, or protection of property or public resources or the resolution of conflicts
 25 between users of motorized and nonmotorized boats.
 26

27 NEW SECTION. Section 5. Codification instruction. [Section 4] is intended to be codified as an
 28 integral part of Title 87, chapter 1, part 3, and the provisions of Title 87, chapter 1, part 3, apply to
 29 [section 4].
 30

1 NEW SECTION. Section 6. Effective date. [This act] is effective ~~July~~ JUNE 1, 1999.

2 - END -

1999 Montana Legislature

EXHIBIT #13About Bill -- Links

SENATE BILL NO. 445

INTRODUCED BY C. SWYSGOOD, B. TASH



AN ACT REQUIRING GUIDES, PROFESSIONAL GUIDES, AND OUTFITTERS WHO WISH TO OPERATE ON MONTANA RIVERS TO OBTAIN AND DISPLAY AN OUTFITTER BOAT TAG; PROVIDING RESTRICTIONS ON OUTFITTING AND GUIDING ACTIVITY ON THE BEAVERHEAD AND BIG HOLE RIVERS; URGING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO FACILITATE A CONSENSUS PROCESS FOR ADDRESSING RIVER CONFLICTS AND TO DEVELOP RIVER RECREATION MANAGEMENT PLAN PROPOSALS AND SUGGESTING REQUIREMENTS TO BE INCLUDED IN THE PLANS; ESTABLISHING AN ACCOUNT; REQUIRING THE FISH, WILDLIFE, AND PARKS COMMISSION TO DEVELOP RULES REGARDING IMPLEMENTATION OF RECREATION RESOURCE MANAGEMENT PLANS FOR THE BEAVERHEAD AND BIG HOLE RIVERS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Outfitter boat tag — legislative findings — requirements — administration. (1)

Because of increased concern as to the use levels on certain rivers in Montana and the user conflicts, resource and property damage concerns, and demands upon limited public facilities related to those use levels, the legislature finds it necessary to distribute river recreation use as well as the economic benefits gained from river use through the requirements of this section.

(2) Beginning March 1, 2000, a person may not operate as a guide, professional guide, or outfitter on the waters of this state without first obtaining an outfitter boat tag, as required by this section. The tag must be displayed, in a manner visible to enforcement personnel, on watercraft used for outfitting or guiding activity on these rivers. The tag assigned must include the licensee's number and be of a distinctive color and design, read from left to right in Arabic numerals and block characters of good proportion and at least 3 inches tall, excluding border or trim.

(3) The board shall issue a tag to a person if that person meets all of the following requirements:

(a) The person has a valid guide, professional guide, or outfitter license issued by the board.

(b) Except as provided in subsection (3)(d), the operating plan on file with the board as of January 1, 1999 under which the person will operate includes either the Beaverhead or Big Hole River.

(c) The operating plan under which the person will operate has been amended to reflect all of the following for outfitting and guiding activity on the Beaverhead or Big Hole Rivers:

(i) An outfitter will limit launches to two boats at each state or federal river access site each day.

(ii) An outfitter's total annual use of the Beaverhead and Big Hole Rivers will not exceed the greater of either:

(A) the outfitter's annual average use for the years 1995 through 1998; or

(B) the outfitter's actual use for the year ending December 31, 1998.

(iii) A commercially launched watercraft will not contain more than four persons.

(d) A licensed outfitter who had applied to include the Beaverhead or Big Hole River in the outfitter's operating plan prior to March 31, 1999, but who has not generated any historical use on the Beaverhead or Big Hole River may also be issued a tag to operate on those rivers pursuant to this section. If historical use is the recommended measurement of use in determining future commercial use allocation on the Beaverhead River or the Big Hole River by an outfitter pursuant to this subsection (3)(d), historical use may include only that outfitter's actual use during 1999 or a total of 250 launches, whichever is less.

(4) For the purposes of subsection (3), a launch is the equivalent of 2 client days.

(5) In calculating the use pursuant to subsection (3)(c)(ii), an outfitter shall use the same time periods for both rivers and may not combine periods of use from both rivers for one river's calculations.

(6) Subject to subsection (7), an outfitter who has had an operating plan on file with the board prior to January 1, 1999, that includes either the Beaverhead or Big Hole River or an outfitter who meets the qualifications of subsection (3)(d) is allowed a minimum of 90 total launches each year, allocated proportionately between the Beaverhead and Big Hole Rivers based on the outfitter's actual historic use on each river or on the use specified in subsection (3)(d), if applicable.

(7) The board shall develop rules that limit the number of outfitters that are guaranteed a minimum of 90 launches. The rules must address how the application of historical use pattern information maintained by the board is used to determine the limits.

(8) From the third Saturday in May through Labor Day of any year, a commercial outfitter or guide may not launch any boats on Saturdays in the following areas:

(a) on the Big Hole River from Jerry Creek fishing access site to the salmonfly fishing access site; and

(b) on the Beaverhead River from Clark Canyon Dam to the Henneberry fishing access site.

(9) It is the responsibility of the relevant outfitter to provide to the board the operating plan <http://161.7.127.14/bills/billhtml/SB0445.htm>

amendment required by subsection (3), including documentation for the calculation of allowed launches. The board shall process an application for amendment as provided by rule and may reject an application for inadequate proof of claimed historic river use levels.

(10) An outfitter's boat tag must be issued for \$10 to a Montana resident who has met the criteria of this section and applicable rules. Nonresidents shall pay \$250 to purchase or renew a tag, if otherwise qualified. A tag is valid for the licensing year in which it is issued and is not transferable. Issuance of a tag may not be construed as conferring a property right. The board shall deposit and use tag sale proceeds as provided in subsection (12).

(11) The board shall develop rules to administer and enforce this section.

(12) There is an account in the state special revenue fund. Money collected from the purchase of tags pursuant to this section must be deposited in the account for use by the board of outfitters to be expended for the preparation and issuance of outfitter boat tags and appropriate signage. In addition, money received in the form of gifts, grants, donations, or appropriations from any other source may also be deposited in the account and used for commercial use mitigation measures that include leasing or other arrangements with landowners for installation and maintenance of waste management and for streambank and soil stabilization related to waste management. Funding for commercial use mitigation measures must be jointly administered by the board of outfitters and the department of fish, wildlife, and parks.

Section 2. Development of recreation resource management plan -- rules. (1) The legislature urges the department of fish, wildlife, and parks to facilitate a group of interested parties from throughout the state to participate in a consensus process for addressing conflicts on the Beaverhead and Big Hole Rivers and to develop proposed recreation resource management plans for the Beaverhead and Big Hole Rivers.

(2) Should use allocation be allowed for outfitters in the management plan, the legislature urges that those allocations be governed by the following requirements:

(a) Any allocations for use to outfitters may not be based on historical use and may not displace historical public recreational use.

(b) Allocations for use to outfitters are not private property and must be reallocated when use is discontinued.

(3) The legislature urges that the proposed plans be presented to the commission by January 1, 2001, for commission consideration.

(4) (a) Upon receipt of the proposed management plan and after due consideration, the commission shall adopt rules implementing recreation resource management plans for the Beaverhead and Big Hole Rivers, based on the proposals developed under subsection (1). Rules must be adopted pursuant to Title 2, chapter 4, part 3.

(b) The rules must include provisions for the adequate regulation and enforcement of the recreation resource management plan. If commercial use allocation is the method selected and historical use is the measurement of use, the rules must provide that commercial use generated after January 1, 1999, may not be included in determining commercial use allocation, except as provided in [section 1(3)(d)].

(c) Rules must include provisions for a suitable waste management plan along the rivers.

(5) If watershed groups, community forums, area stakeholders, recreationists, and other interested parties experience increased concern as to the use levels on another river in Montana and as to user conflicts, resource and property damage concerns, and demands upon limited public facilities related to those use levels, a similar recreation resource management plan may be proposed for that other river and presented to the commission for consideration. If implementation of a similar resource management plan results in a reduction in recreational use on the river under consideration, rules must provide that the reduction will be made in commercial and nonresident use rather than in noncommercial, resident use. Any rules developed by the commission pursuant to a similar recreation resource management plan must be adopted pursuant to Title 2, chapter 4, part 3.

Section 3. Codification instruction. (1) [Section 1] is intended to be codified as an integral part of Title 37, chapter 47, part 3, and the provisions of Title 37, chapter 47, part 3, apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 87, chapter 1, and the provisions of Title 87, chapter 1, apply to [section 2].

Section 4. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 5. Effective date. [This act] is effective on passage and approval.

- END -

Latest Version of SB 445 (*SB0445.ENR*)
Processed for the Web on April 26, 1999 (3:19PM)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted. See the status of the bill for the bill's primary sponsor.

[Status of this Bill](#) | [1999 Session](#) | [Leg. Branch Home](#)
[This bill in WP 5.1](#) | [All versions of all bills in WP 5.1](#)

Prepared by Montana Legislative Services
(406)444-3064

COPY

AFFIDAVIT

STATE OF MONTANA)
 :SS.
County of Beaverhead)

Nicholas J. St. George, being first duly sworn upon his oath, deposes and says that:

1. He is a resident of the State of Montana and has an address of 610 N. Montana Street, Dillon, Montana 59725.

2. That he is the majority shareholder in a Montana corporation known as Watershed, Inc., which own a fly fishing shop in Dillon called the Watershed Fly Fishing Adventures.

3. During March of 1999, Affiant purchased the assets of a local Dillon area fly shop known as the Fishing Headquarters, owned by Dick Sharon, a licensed outfitter in the State of Montana. Mr. Sharon had a long history of outfitting on the Beaverhead and Big Hole Rivers in southwest Montana. These rivers are the local rivers for a fly shop located in Dillon, Montana. The asset purchase included all assets such as inventory, client lists, guiding and outfitting equipment, but did not include the outfitting license, as that license is not transferable. Affiant has been a guide in the State of Montana since ¹⁹⁷⁹1990 and is otherwise qualified to obtain an outfitting license.

4. In June of 1999, the Montana Fish, Wildlife and Parks Commission enacted a biennial River Management Rule for the Beaverhead and Big Hole Rivers. The biennial rule placed a moratorium on the number of outfitters that could operate on the Beaverhead and Big Hole Rivers. If an individual did not have documented operational use on the rivers prior to December 31, 1998, and was not licensed with the Beaverhead and Big Hole Rivers included in his operating plan by July1, 1999, that individual was prohibited from obtaining an outfitting license which would allow operation on the Beaverhead and Big Hole Rivers.

5. Affiant purchased the assets of the Fishing Headquarters in March of 1999 with the intention of owning and operating a full service fly fishing shop which would include outfitted guiding as a centerpiece of its operations and also a centerpiece of its revenue generating

activities. The primary locations for the outfitting operation would have been the Beaverhead and Big Hole Rivers. At the time Affiant purchased the fly shop business, he did not have a history of operational use which could be documented on the Beaverhead and Big Hole Rivers.

6. The 1999 biennial rule and its 2001 replacement prohibit Affiant from obtaining an outfitting license for his fly shop business to operate on the Beaverhead and Big Hole Rivers during the peak periods of the fly fishing season.

7. Affiant's ability to operate his business to provide full services to his customers in his fly shop's service area is limited by the biennial rule which in turn negatively impacts his ability to earn revenue.

DATED this 21 day of May, 2001.

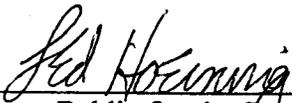


Nicholas J. St. George

STATE OF MONTANA)
 :ss.
County of Beaverhead)

SUBSCRIBED AND SWORN to before me this 21 day of May, 2001.

[S E A L]



Notary Public for the State of Montana
Residing at: Dillon
My commission expires: 10/5/01

use on the rivers prior to December 31, 1998, and was not licensed with the Beaverhead and Big Hole Rivers included in his operating plan by July 1, 1999, that individual was prohibited from obtaining an outfitting license which would allow operation on the Beaverhead and Big Hole Rivers.

5. At the time Affiant purchased the fly shop business, he did not have a history of operational use which could be documented on the Beaverhead and Big Hole Rivers.

6. The 1999 biennial rule and its 2001 replacement prohibit Affiant from obtaining an outfitting license for his fly shop business to operate on the Beaverhead and Big Hole Rivers during the peak periods of the fly fishing season.

7. Affiant's ability to operate his business to provide full services to his customers in his fly shop's service area is limited by the biennial rule which in turn negatively impacts his ability to earn revenue. The gross receipts from Affiant's fly shop have dropped from approximately \$128,000.00 in 1998 to approximately \$60,000.00 per year during 1999 and 2000. The continued existence of Affiant's business is in jeopardy as a result of the restrictions contained in the biennial rule. Loss of Affiant's business would be a severe blow to the well being of Affiant's family as well as a loss to the community of Twin Bridges.

DATED this 24 day of May, 2001.

Greg Smith
Greg Smith

STATE OF MONTANA)
 :ss.
County of Madison)

SUBSCRIBED AND SWORN to before me this 24 day of May, 2001.

Karen A. Neff
Notary Public for the State of Montana
Residing at: Silver Star
My commission expires: 03/10/03

[SEAL]