

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 12.11.501 and the adoption of) PROPOSED AMENDMENT AND
NEW RULES I through XVI pertaining) ADOPTION
to recreational use on the Madison)
River)

TO: All Concerned Persons

1. On October 20, 2020, at 6:00 p.m., the Fish and Wildlife Commission (commission) will hold a telephonic public hearing via ZOOM meeting platform to consider the proposed amendment and adoption of the above-stated rules. Because there currently exists a state of emergency in Montana due to the public health crisis by the novel coronavirus, COVID-19, there will be no in-person hearing. Interested parties may access the remote conferencing in the following way:

(a) Dial by telephone, 1-646-558-8656
Meeting ID: 966 3461 5176
Password: 373576

The hearing will begin with a brief introduction by staff to explain the use of the telephonic platform. All participants will be muted except when it is their time to speak.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than October 9, 2020, to advise us of the nature of the accommodation that you need. Please contact Jessica Snyder, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-9785; or e-mail jesssnyder@mt.gov.

3. OVERALL REASON: The popularity of the Madison River is documented through estimates on angling pressure and other tools, which indicate that the Madison River is one of the most heavily fished rivers in Montana. Multiple surveys conducted by the department have indicated the need to address crowding on the river. The commission foresees popularity and a need to address crowding continuing to be an issue on the Madison River.

On August 13, 2020, the commission approved initiating rulemaking on two petitions for rulemaking to address recreation management on the Madison River. The language proposed in NEW RULES I through IV and NEW RULE XVI is based on a petition received from the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association. The language

proposed in NEW RULES VI through XVI is based on a petition submitted from the Fishing Outfitters Association of Montana (FOAM).

The proposed rule language differs and may conflict with each other to address the same issue. Members of the public can comment on the various management alternatives of the proposed management of the Madison River. Based on the details provided by the public comment, the commission will make a reasoned and informed decision whether to adopt all, portions of, or none of the proposed language. The commission may also opt to change the proposed rule language prior to final adoption based on the public comment it receives. Public comment will be taken on all management alternatives contained in this rule proposal notice along with the corresponding environmental assessment. The commission will evaluate all comments received and will make a decision which rule language to adopt, if any.

4. The rule proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

12.11.501 LIST OF WATER BODIES The following is a list of specific regulations on bodies of water with the reference where the rules regarding those bodies of water are located:

(1) through (82) remain the same.

(83) Madison River [NEW RULES I through XVI]

(83) through (120) remain the same but are renumbered (84) through (121).

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The commission maintains ARM 12.11.501 as a cross-reference to assist with locating rules pertaining to specific water bodies. If the commission adopts the new rules proposed within this proposal, they will need to be listed in ARM 12.11.501.

5. The rules proposed to be adopted provide as follows:

NEW RULE I MADISON RIVER COMMERCIAL USE CAP (1) The number of commercial use trips are limited to 13,909 per year.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The commission initiated rulemaking on a petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association. The proposed rule language caps the total number of outfitter trips at 2019 levels (13,909 per year),

The proposed rule language contained in NEW RULE I varies from the proposed language in NEW RULE VI below. NEW RULE VI is based on the petition submitted

by FOAM which would cap the number of commercial use trips to the highest number of trips each outfitter reported in the 2019 or 2020 seasons.

NEW RULE II REST/ROTATION OF MADISON RIVER COMMERCIAL USE

(1) Commercial use is prohibited from June 15 to September 30 as follows:

(a) from Lyons Bridge Fishing Access Site to Palisades Day Use Area on Sundays; and

(b) from Varney Bridge Fishing Access Site to Ennis Fishing Access Site on Saturdays.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE II is based on the petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association. The proposed rule language establishes two days per week between June 15 to September 30 for no commercial activity in two sections of the river. The petition states the goal of the proposed rule language is to manage recreational use of the Madison River in a manner that ensures long-term health and sustainability of the fisheries, diversifies angling opportunity while reducing conflicts, and sustains the ecological and economic benefits of the river.

NEW RULE III WALK/WADE SECTIONS OF MADISON RIVER (1) On

Fridays, Saturdays, and Sundays from June 15 to September 30 no watercraft or flotation device can be used to access fishing:

(a) from the outlet of Quake Lake to Lyons Bridge Fishing Access Site; and
(b) from Ennis Fishing Access Site to Ennis Reservoir.

(2) On Mondays, Tuesdays, Wednesdays, and Thursdays from June 15 to September 30 watercraft or flotation device may be used to access fishing but no fishing can occur from watercraft or flotation devices:

(a) from the outlet of Quake Lake to Lyons Bridge Fishing Access Site; and
(b) from Ennis Fishing Access Site to Ennis Reservoir.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE III is based on the petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association. The petition states that revising current fishing access and floating regulations in the walk/wade sections of the Madison River will increase dispersal of recreational use, which reduces crowding across all sections of the Madison River. If this proposed rule language is adopted, the adopted language will replace the language in the current fishing regulations.

The proposed rule language contained in NEW RULE III varies from the proposed language in NEW RULE V below. NEW RULE V is based on the petition submitted by FOAM which proposes the walk/wade sections be from Ennis Bridge to Ennis Lake and on Sundays, Mondays, Tuesdays, and Wednesdays from Raynolds' Pass Fishing Access Site to Lyons Bridge Fishing Access Site.

NEW RULE IV LIMIT DEVELOPMENT ON MADISON RIVER (1) New access acquisitions below Greycliff Fishing Access Site will have limited development to maintain the primitive nature by limiting vessel or float tube access to carry-in only.

AUTH: 87-1-303, MCA
IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE IV is based on the petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association. The petition states the goal of the proposed rule language is to manage recreation use of the Madison River in a manner that ensures long-term health and sustainability of the fisheries, diversifies angling opportunity while reducing conflicts, and sustains the ecological and economic benefits of the river.

NEW RULE V MADISON RIVER WALK/WADE SECTIONS (1) Fishing from boats and vessels is prohibited:

- (a) on Thursday, Friday, and Saturday from Raynolds' Pass Fishing Access Site to Lyons Bridge Fishing Access Site; and
- (b) from Ennis Bridge to Ennis Lake.

AUTH: 87-1-303, MCA
IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE V is based on the petition submitted by FOAM. The proposed rule language changes the walk/wade sections currently in the annual fishing regulations.

Current fishing regulations prohibit fishing from a boat or vessel from Quake Lake to Lyons Bridge Fishing Access Site. The proposed language in NEW RULE V will allow fishing from a boat or vessel within this reach except for three days of the week from Raynolds' Pass Fishing Access Site to Lyons Bridge Fishing Access Site. Fishing from boats or vessels is prohibited from Ennis Bridge to Ennis Lake. If this proposed rule language is adopted, the fishing regulations will need to be changed to reflect the adopted language.

The proposed rule language contained in NEW RULE V varies from the proposed language in NEW RULE III above which proposes a seasonal timeframe for the walk/wade sections and different sections and days.

NEW RULE VI MANAGEMENT OF LIMITED COMMERCIAL USERS (1) A Madison River Special Recreational Use Permit holder will be allocated a number of guided trips that they may operate in a season equal to their highest number of historic use of trips in the 2019 or 2020 season, provided they held a valid Madison River Special Recreational Use Permit prior to June 15, 2020.

(2) A Madison River Special Recreational Use Permit holder with extenuating circumstances that resulted in a temporary reduction in their normal use of guided trips in the 2019 or 2020 season may petition to use their previous historic use to establish their guided trip allocation (examples: military service, injury, illness, etc.).

(3) Madison River Special Recreational Use Permit holders may access up to ten additional flex trips annually two out of every three years.

(4) If use is zero, a Madison River Special Recreational Use Permit holder will not receive historic use allocation nor the flex trip ability to operate.

(5) Guided trips from the Madison River Special Recreational Use Permit trip distribution pool will be distributed to qualified Madison River Special Recreational Use Permit applicants.

(6) If total trips (guided trips plus flex trips) exceed the permitted use allowance, the Madison River Special Recreational Use Permit holder will be subject to disciplinary action or loss of permit. If exceeding trip allowance is habitual, the Madison River Special Recreational Use Permit holder risks losing their permit.

(7) This Commercial Use Management Plan will not incorporate or endorse any form of rest-and-rotation schedules until such time following the third-year evaluation plan that a quantitative analysis of overall recreational use on the river is evaluated and those management options are suggested.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE VI is based on the petition submitted by FOAM. FOAM's petition states managing commercial use is a first step to managing overall crowding on the Madison River. The proposed rule language manages the total number of outfitted trips based on recent historical use during the 2019 or 2020 season. Madison River Special Recreational Use Permit holders with a valid Special Recreational Use Permit prior to June 15, 2020 will be allocated outfitted trips equal to their historic use of trips in the 2019 or 2020 season.

The proposed language in NEW RULE VI varies from the proposed language in NEW RULE I. NEW RULE I caps the number of commercial use trips to 13,909 per year based upon the 2019 historic use of the Madison River by outfitters. The petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association did not propose rule language for flex trips as proposed in NEW RULE VI and VIII.

NEW RULE VII TRANSFERRED PERMITS (1) Madison River Special Recreational Use Permit holders may hold a maximum of two permits. Permits shall remain individual permits to allow transferability of each permit separately; however,

permit holders may request the Commercial Work Group, as provided in [NEW RULE XIV], to combine permits into one on an individual basis.

(2) New permits issued will receive a ten flex trip day permit that allows the operator to operate up to ten days annually while building their historic use unless being transferred from a current Special Recreational Permit which will receive whatever historic use that current Special Recreational Permit holds.

(3) No outfitter can operate more than 10% of total allocated use for all commercial users.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The commission approved a petition for initiating rulemaking to gather public comment on commercial use regulations that allow for new permit holders to get into the business of outfitting on the Madison River even if they have not historically outfitted on the Madison River.

The transfer of individual river use days by outfitters/guides for pay is currently not allowed by law unless a business is transferred in its entirety pursuant to 47-37-310(4), MCA. Transfer of individual river use days by outfitters or guides without pay could be allowed because a "property right would not attach to transferred river-use days." The commission passed this petition to get public comment on this proposal and concept understanding that the petition language did not specify whether outfitters/guides would transfer for pay. The statute would have to be amended to allow outfitters/guides to transfer for monetary gain and that could not happen until the 2021 legislative session if it becomes a bill considered by the legislature.

NEW RULE VIII FLEX TRIPS (1) Madison River Special Recreational Use Permit holders will receive ten flex trips to use annually provided in [NEW RULE VI].

(2) Flex trips are temporary in nature, may be adjusted over time, and are non-transferable.

(3) Outfitters report the use of flex trips just as they would standard trips at year end.

(4) Flex trips can only be used by an outfitter two out of any three consecutive years.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE VIII is based on a petition submitted by FOAM. The petition states that outfitters occasionally need to use the Madison fishery when other fisheries they historically use are closed or not performing due to circumstances not of their control. The proposed language, based on FOAM's petition, provides for flex trips for use by outfitters whose historic trip use has fluctuated greatly from year to year.

NEW RULE IX TRANSFER OF GUIDED TRIPS (1) Madison River Special Recreation Permits specify the number of outfitter historical use allowed by each outfitter each year. Permit holders may only transfer or receive guided trips.

(2) Guided trips may be transferred at the discretion of the outfitter as long as notice is provided to the department and may only be transferred to an already qualified Madison River Special Recreational Use Permit holder.

(3) Flex trips are not transferrable as provided in [NEW RULE VIII].

(4) Each outfitter entering into a transfer of guided trips with one or more other qualified outfitters must do so by completing a transfer request form prescribed by the department. A trip transfer request is not complete or valid and may be cancelled by any licensee that is a party to it prior to being filed with the department.

(5) The records of the department comprise the official records of trips, and each purported transfer of trips is invalid and void that is not reflected in department records.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: Transfer of individual river use days by outfitters/guides for pay is currently not allowed by law unless a business is transferred in its entirety pursuant to 47-37-310(4), MCA. Transfer of individual river use days by outfitters or guides without pay could be allowed because a "property right would not attach to transferred river-use days." The commission passed this petition to get public comment on this proposal and concept understanding that the petition language did not specify whether outfitters/guides would transfer for pay. The statute would have to be amended to allow outfitters/guides to transfer for monetary gain and that could not happen until the 2021 legislative session if it becomes a bill considered by the legislature.

NEW RULE X MANDATORY GUIDED TRIP REDUCTIONS (1) Tier 1 Madison River Special Recreational Use Permit holders with 25 or fewer guided trips are exempt from the following mandatory guided trip reductions.

(2) Tier 2 Madison River Special Recreational Use Permit holders with 26-50 guided trips will drop to 25 guided trips if they have 3 consecutive seasons of use fewer than 26 total trips.

(3) Tier 3 Madison River Special Recreational Use Permit holders with 51-100 guided trips will drop to 50 guided trips if they have 3 consecutive seasons of use fewer than 51 total trips.

(4) Tier 4 Madison River Special Recreational Use Permit holders with over 100 guided trips will receive 80% of their guided trip allocation if they operate less than 80% of their guided trip allocation for 3 consecutive seasons.

(5) Any Madison River Special Recreational Use Permit holder that increases their guided trip allocation by more than 150 guided trips through a transfer will be granted 5 seasons to increase their use before a loss of guided trips is required due to lack of use.

(6) If any Madison River Special Recreational Use Permit holder documents zero use for three consecutive years the permit will be forfeit.

AUTH: 87-1-303, MCA
IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE X is based on a petition submitted by FOAM. The petition recommended a system whereby outfitters who fail to use the total of their historic use allocation will receive a reduced guided trip allocation in subsequent years in order to ensure that the number of users on the river could be available to others. FOAM's petition provides the following information about the percentage of total trips conducted by outfitter: The percentage of total trips conducted by outfitters from 2011 through 2018 revealed consistent and distinct groupings of number of trips outfitters conducted from year to year. During 2018, 100 outfitters (56%) working on the Madison River conducted 25 trips or fewer, 24 outfitters (13%) conducted 26-50 trips; 19 outfitters (11%) conducted 51-100 trips. Twenty-eight (16%) outfitters conducted 100 trips or more. Applying management options to tiers of outfitters, whether guided trips or flex trips, can more effectively manage a distinct group of outfitters without affecting management across all outfitters.

Permit holders' use of guided trips often changes over time. Outfitters that decline over time in their use of guided trips will receive a reduction in their allocation of guided trips. Guided trips which are forfeited will be made available to other qualified permit holders through a trip distribution pool established in NEW RULE XV.

NEW RULE XI PERMIT APPLICATION AND FEES (1) Madison River Special Recreational Use Permit holders will apply annually to renew their Madison River Special Recreational Use Permit.

(2) Application fees will be \$110 per Madison River Special Recreational Use Permit.

AUTH: 87-1-303, MCA
IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE XI is based on a petition submitted by FOAM. Currently, the Bureau of Land Management (BLM) establishes the application fee for the Madison River Special Recreational Use Permit issued to commercial users. The proposed rule language does not increase or decrease the current application fee of \$110. This proposal would establish the fee in the Administrative Rules of Montana. The procedures as outlined in the Montana Administrative Procedure Act would be followed if BLM institutes a change in the future.

NEW RULE XII REPORTING AND USE FEES (1) Madison River Special Recreational Use Permit holders will submit an annual report for each permit.

(2) Annual reports will include trip report logs. There is no need to differentiate between guided trips and flex trips on use logs.

(3) Madison River Special Recreational Use Permit holders will pay 3% of gross revenue less the permit application fee.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE XII is based on a petition submitted by FOAM. The proposed rule language establishes an annual report in order for the department to evaluate the effectiveness of the proposed management plan contained in NEW RULE XIII.

NEW RULE XIII PLAN EVALUATION (1) The Madison River Recreation Management Plan will be quantitatively evaluated by section or reach and across time immediately following the first year of implementation.

(2) Following the first-year evaluation, similar quantitative evaluations will be conducted every three years.

(3) Annual reports will be generated by the department that contain quantitative use data by river section and time as well as financial data.

(4) The annual reports will evaluate:

(a) river use from Madison River Special Recreational Use Permit holders;

(b) satisfaction of Madison River Special Recreational Use Permit holders and generate use data annually; and

(c) the effectiveness of allowing fishing from a boat or vessel for four days per week within this reach.

(5) The no-cost, no-limit stamp will be evaluated pursuant to [NEW RULE XVI].

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE XIII is based on a petition submitted by FOAM. The proposed timeline of quantitative evaluations and reports will allow for amendments due to changing conditions and allow for fixing of any flaws or problems in the plan in a timely manner.

NEW RULE XIV COMMERCIAL USE WORKING GROUP (1) The Madison River Commercial Use Working Group is under the authority of the Region 3 River Recreation Manager.

(2) The Commercial Use Working Group will be comprised of the Region 3 Recreation Manager, a member of the Fish and Wildlife Commission, and at least three Madison River outfitters holding a current valid Madison River Special Recreational Use Permit.

(3) The Commercial Use Working Group will establish an appeal process for conflicts and complaints.

(4) The Commercial Use Working Group may award guided trips to eligible outfitters from the Madison River Special Recreational Use Permit trip distribution pool via lottery.

- (5) The Commercial Use Working Group will review total use and:
- (a) adjust guided trip allocations as needed if Madison River Special Recreational Use Permit holder use declines;
 - (b) review guided trip additions to the Madison River Special Recreational Use Permit trip distribution pool; and
 - (c) review the annual number of flex trips eligible for outfitter use. If the total use of guided trips and flex trips exceeds the combined use levels of 2019 and 2020, the annual number of flex trips available to Madison River Special Recreational Use Permit holders may be reduced.
- (6) The Commercial Use Working Group may assign a fixed number of new permits to be issued. New permits will be awarded to qualified licensed Montana outfitters that have applied for a new permit via a lottery.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE XIV is based on a petition submitted by FOAM. The proposed rule language provides for a working group that takes over some of the authority granted the commission by statute. The commission passed the petition for rulemaking to get public comment for the concepts and proposals, including the working group. The commission will consider whether it could grant authority to the working group.

NEW RULE XV MADISON RIVER SPECIAL RECREATIONAL USE PERMIT TRIP DISTRIBUTION POOL (1) If total trips for a Madison River Special Recreational Use Permit holder is zero for three consecutive years, a permit is forfeited and allotted trips will be placed into the Madison River Special Recreational Use Permit trip distribution pool.

(2) Existing Madison River Special Recreational Use Permit holders that have operated at least 95% of their guided trips in the previous season may apply to receive guided trips from the trip distribution pool via lottery.

(3) Additional guided trips will be considered as part of the total guided trips for that Madison River Special Recreational Use Permit holder.

(4) Additional guided trips may be forfeited in the future due to reduced use due to loss of guided trips.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE XV is based on a petition submitted by FOAM. The proposed rule language would give businesses reasonable opportunity to expand without exceeding the established cap of commercial use trips.

NEW RULE XVI MADISON RIVER USE STAMP (1) Each year all users of the Madison River must obtain a Madison River use stamp at no cost. There will be no limit to the number of stamps to be distributed.

(2) All Madison River stamp holders must report their river use each year.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: The proposed rule language in NEW RULE XVI is based on the petition submitted by FOAM and the petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association. The petition submitted by the George Grant Chapter of Trout Unlimited, the Skyline Sportsmen Association, and the Anaconda Sportsmen Association provided the following information justifying the need to collecting data on the total number of users on the Madison River: On an annual basis, 89% of fishing on the upper Madison comes from non-commercial anglers. Angler use has increased over the past 20 years and in 2017 was 207,000 angler days. Projected estimated use during 2019 was 249,000 angler days. Information on trends in non-angling use of the river is less clear, but overall use on the river has been increasing and is expected to continue to rise, regardless of any cap on commercial use. Instituting a comprehensive data-gathering tool is recommended to obtain more information on all current use and type of use on the river. Such a system could be implemented by requiring an unlimited no-cost river use stamp. Increasing use levels would probably necessitate a cap or limit on all use in the future to help protect the resource and maintain quality of experience.

6. Jessica Snyder has been designated to preside over and conduct this hearing.

7. Concerned persons may submit their data, views, or arguments either orally at the hearing or in writing to: Department of Fish, Wildlife and Parks, Madison River Rules, P.O. Box 200701, Helena, MT, 59620-0701; or e-mail madisonrivercom@mt.gov, and must be received no later than October 30, 2020.

8. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be made by completing the request form at any rules hearing held by the department.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and adoption of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Rebecca Dockter

Rebecca Dockter

Rule Reviewer

Department of Fish, Wildlife and Parks

/s/ Shane Colton

Shane Colton

Chair

Fish and Wildlife Commission

Certified to the Secretary of State September 15, 2020.