

Madison River Negotiated Rulemaking Committee:
Report to the Fish and Wildlife Commission

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Background

At its 19 April 2018 meeting, the Montana Fish & Wildlife Commission (Commission), after hearing from outfitters, a representative of the Fishing Outfitters Association of Montana (FOAM), and former Executive Director of the Madison River Foundation, voted unanimously to reject Fish, Wildlife & Parks' (FWP) Madison River Recreation Plan. Testimony at the Commission meeting centered on the fact that the majority of the proposed restrictions were solely on commercial use - outfitted use accounts for less than 13% of the total annual use on the Madison River - and that the proposed changes would have little effect on overall crowding. The Commission directed FWP to provide them with a new plan or strategy that would incorporate non-commercial use and better address the issue of crowding.

At that time, representatives from the Fishing Outfitters Association of Montana (FOAM) recognized and agreed that limits on outfitted use in some form are needed on the Madison River. They also stated that they understand that the proportion of commercial use on the Madison River increases during specific time periods, such as during the Salmonfly hatch. FOAM representatives testified that they looked forward to providing input towards a plan that distributed commercial and non-commercial use in a manner that protects the Madison River resource and the quality of the fishing experience for all those using the Madison River.

Establishment of the NRC and Initial Concerns

Following recommendations from FWP during December 2018, the Commission named 10 members to a Negotiated Rulemaking Committee (NRC) that would be responsible for formulating much of the next Madison River Recreation Management Plan. Soon after the members were named, FOAM expressed their concerns of the make-up of the NRC and sent a letter to the Commission stating that "the Commission fell short on adequately representing the business interests of Ennis and West Yellowstone, the communities most affected by this recreation management plan." Further, FOAM thought that having both the Executive Director and a board member of the Madison River Foundation as members on the NRC, this violated the Commission's own directive for equal representation of interests on the NRC. FOAM thought that although members cannot be removed from the NRC, perhaps an additional member or two may be added. Because the inherent bias brought to the NRC by multiple members affiliated with the Madison River Foundation and the omission of local economic interests, FOAM wanted to see the Commission appoint additional members to the NRC, perhaps representatives from the Ennis and West Yellowstone business communities. As discovered within the first two NRC meetings, others had concerns over membership composition of the NRC including the Montana Outfitters and Guides Association and the Ennis Chamber of Commerce.

FOAM's Town Hall Style Meetings

Prior to the NRC meetings formally starting, FOAM, in an effort to provide our outfitter representatives – Julie Eaton, Scott Vollmer, and Mike Bias - with guidance on how outfitters want this plan to be

shaped, hosted a series of four informational meetings in Gallatin Gateway, Dillon, Ennis, and West Yellowstone.

The purpose of these informational meetings, to date, was to share with Madison River Special Recreation Permit (SRP) holders what FOAM had learned about the negotiated rulemaking process and to hear from SRP holders regarding any ideas or concerns they may have. These initial informational meetings were solely intended to be a forum for an exchange of ideas to prepare for the NRC meetings. The meeting format was a brief presentation on the timeline and process of the NRC, pertinent points of FWP Madison Plan proposed last April 2018, some Madison River use data, and possible components of a new plan. The meetings were facilitated by FOAM Board Members.

Informational meetings were scheduled as follows: January 2nd, Gallatin Gateway Community Center, Gallatin Gateway; January 3rd, Search and Rescue Building, Dillon; January 4th, Ennis Library, Ennis; and, January 9, Povah Community & Senior Center, West Yellowstone. Summary meetings following each series of NRC meetings were also held and facilitated by FOAM.

At the informational meetings, attendees were asked to respond to a written survey. The survey contained eight management options that have been used in other river recreation management plans or in the proposed FWP Plan presented to the Fish & Wildlife Commission in April 2018 that was ultimately rejected. Respondents were asked to rank the eight management options from best to worst. Best were management options respondents could support or accept and worst were options respondents would oppose completely.

The management options respondents were asked to rank were:

- Upper (Quake Lake to Lyons Bridge) and Lower (Ennis FAS to Ennis Lake) river closure to vessel or float tube access;
- Rest and rotation of certain reaches of river from commercial use;
- Cap the number of SRP Holders (at what year?);
- Limit boats per outfitter per day on the entire Madison River;
- Limit commercial launches per site, and limit commercial launches in a section of river;
- Allocation;
- Limit launches to time of day; and,
- Peak season limits, e.g. BH2.

Respondents were also asked to elaborate on any of the above issues. Over 50 surveys were returned. Of those, 43 were able to be ranked. Several returned surveys included detailed comments and

recommendations not easily incorporated into ranked responses. Detailed notes of outfitter's verbal comments were recorded as well. Several outfitters and guides submitted detailed management recommendations via email as well.

The majority of written responses were from SRP Holders (n = 28, 65%), six respondents did not hold a Madison SRP, and 9 were unknown. Because respondents were asked to rank the eight management options from best to worst, results were presented as the frequency of each management option by rank. Following are each management option and their frequency of being ranked from first to eighth.

1. Allocation as a management option was consistently ranked first by 33% of the respondents.
2. Capping the number of SRP Holders as a management option was as second by 26% of the respondents.
3. Boats per outfitter consistently ranked third as a management option among respondents (26%).
4. Launches per site was the fourth ranked management option by respondents (21%).
5. Incorporating some sort of peak season management option was ranked fifth by respondents (19%).
6. Incorporating some sort of time of day to launch for outfitters as a management option was ranked sixth by respondents (12%). However, determining rank between the fifth and sixth worst management options was close.
7. Incorporating some type of Rest & Rotation management option was ranked as the second-worst management option to incorporate into a Madison River Recreation Management Plan by 28% of the respondents.
8. Any type of river closure for access to fishing from a vessel or float tube was ranked worst by over 37% of the respondents.

NRC Meetings

The 10-member Madison River NRC charged with formulating the Madison River Recreation Plan met for the first time on January 14th and 15th, 2019. The first two meeting consisted of meeting the NRC members, going over what the NRC was, and listening to presentation from FWP Recreation Managers and Fisheries Biologist. The first two meetings were conducted without a facilitator as the one selected by FWP was a federal employee and unable to work during the federal government shutdown.

The 10 member NRC consisted of:

Tim Aldrich, Montana Fish and Wildlife Commissioner
Don Skarr, FWP representative
Jim Slattery, Campfire Lodge Owner, and Madison River Foundation board member
Lauren Wittorp, Madison River Foundation executive director
Mark Odegard, private citizen, Ennis
Charlotte Cleveland, private citizen, Bozeman
Julie Eaton, outfitter
Scott Vollmer, outfitter
Melissa Glaser, scenic tour operator, Ennis
Michael Bias, outfitter and executive director Fishing Outfitters Association of Montana

During these first two NRC meetings, Rebecca Dockter, FWP Legal Counsel, provide the committee with an explanation of Negotiated Rulemaking Act. She also confirmed the question that “Agency” refers to the FWP Commission. Ms. Dockter then explained that consensus was defined as an alternative or option one could live with.

Mr. Scott Vollmer, concerned with having two representatives of the Madison River Foundation on the NRC wanted clarification that expansion of committee membership can happen at any time ring the process. We were also informed that we would report to the Commission on rules agreed on via consensus and actions where we cannot come to consensus. We were also informed that the Commission, upon completion of a draft rule, could do as they wish with this rule, Commissioner Aldrich said the Commission intends to use the rule and begin the ARM procedures with a public comment period. Commissioner Aldrich further explained that the rejected April 2018 FWP plan was the starting point, and the revision of this rule is wide open.

We proceeded with the selection of facilitator, Dr. Mike Mitchell, USGS, via teleconference as he was on furlough. Dr. Mitchell informed us that he uses structured decision making but emphasizes NRC is ultimately in charge of how we proceed. He also emphasized that all perspectives need to be represented when generating a management plan for the Madison River using the SDM process. The NRC agreed to accept him as facilitator, but he suggested that we not proceed until the facilitator is physically present. FWP did not have a substitute facilitator at that time. The NRC decided to continue with Day 1 agenda until complete, if government shutdown is not over by Jan 21, they will e-mail an alternate plan.

We defined our Charter as:

Use a Negotiated Rulemaking Rule process (MCA 2-5-101-110) to revise the River Recreation Plan as presented to the Commission on April 19, 2018.

We had NRC meetings scheduled for 14 and 15 January 2019, but those meetings were cancelled because the federal government shutdown was still in effect and our facilitator was unavailable. Also, FWP had not chosen an alternative facilitator.

Our next meetings, the first official meetings with the facilitator occurred on 19 and 20 February 2019. During our first day we began working on a problem statement. By the end of the second day, we had formulated our problem statement. We then began working through a series of fundamental objectives that would be met by a successful management plan.

The NRC failed to reach consensus to add any additional members. However, there was concern from the outfitters that the vote for additional members was conducted anonymously. The concern was if that vote set precedent for future NRC votes on consensus, how would the committee members know how the other members felt and begin to negotiate? The facilitator assured us that there would not be much voting in the SDM process and to trust the process to work.

The 5th and 6th meetings of the NRC were held at the downstairs conference room of the Sportsman's Lodge in Ennis on Wednesday and Thursday, 6 & 7 March. At these meetings, we continued working on our problem statement. We added a large portion to the problem statement with background information on how we got here provided by Tim Aldrich. Concerns were addressed with identification of user groups. We added to the problem statement a concern about addressing education of users on river etiquette. We added to the problem statement a concern of commercial users that a biased interpretation of the data will result in an undue burden on them.

During the Ennis meetings, we also revisited and worked further on our objectives. We added in the maximizing of the health of the: fishery, riparian habitat, water quality; added small and large commercial interests; added minimizing social conflicts through education at: FAS, on the water, off the water; added minimizing administrative burden; added minimizing the displacement of users in the Madison and to other users; and, added the minimization of privatizing access.

Towards the end of the 6th meeting, FOAM had made a request to hold the next two meetings in West Yellowstone. Our recent meetings were well-attended by public members of the Ennis community. FOAM thought it appropriate that we give the members of the West Yellowstone an equal opportunity to attend an NRC meeting in their community. However, the remaining two meetings were scheduled for Bozeman.

Our 7th and 8th official NRC meetings were held in Bozeman on 25 and 26 March, 2019. These were the last scheduled meetings of the NRC. On Wednesday, 26 March, the Committee had finished its eighth, and originally the last scheduled meeting, of the entire series of meetings without any proposed rule or recommendations for the Fish & Wildlife Commission. The goal was to be done with a negotiated rule by the April 25th Commission meeting so they would be able to get a Madison River Recreation rule out for public review and approval by the 2020 fishing year.

Through our last six meetings with the facilitator we formulated our problem statement, formalized our objectives, and offered – but did not discuss among the group – various alternatives that might meet our identified fundamental objectives. Not until our last meeting, on Wednesday, March 26th, did we begin discussing – negotiating, and at times arguing - the application of our alternatives towards some type of proposed rule. By the end of that meeting, after 5pm, the negotiator realized that perhaps negotiated rulemaking by the structured decision-making process was not going to work for the Madison and that

perhaps conflict resolution and fact-finding would be a more appropriate process to come to some consensus on a proposed rule.

At the meeting on the 26th, several alternatives were proposed – proposed, but only briefly discussed among the NRC. FWP proposed implementing a Madison River use stamp for all anglers planning on using the Madison – capping non-resident use at some percentage of the estimated 207,000 user-days estimated in 2017. Tim Aldrich, Commissioner, proposed managing commercial use through an average launches per outfitter per day, but exactly how to calculate average number of launches per day and what effect the average launches per day per outfitter would have on the commercial use distribution was not assessed.

FOAM supported – and continues to support - Mel Glasser's plan of a tiered permit system for outfitters with 1-25 days, 26-50 days, 51-100 days, being in permitted in tiers, and over 101 days outfitters would receive historic use as an allocated system of commercial use across the year. We also proposed an evaluation period of one, three, and five years for any of the proposed rules allowing for an adaptive management system, able to adjust use into the future if warranted. We were discussing a possible two-day per week closure to fishing access by boats on the Quake Lake to Pine Butte section, but status quo on the channels, and lower river sections.

At the end of the last meeting, Lauren Wittorp of the Madison River Foundation, did not want any monetization of permits to occur, would not budge on closure to boats on the channels and lower river closure to commercial use. FOAM did not support any kind of 'citizens day' as proposed by Charlotte Cleveland, resident public angler. With the structured decision-making process, we seemed to run out of time to get to the brass tacks of recommending any kind of plan. By the end of our NRC meeting on 26 March, we discussed having another NRC meeting and agreed to coordinate and schedule that meeting among the committee members via email, discussed tentatively to be held during the first two weeks of April.

On the promptings of Lauren Wittorp and FOAM, during the last week of March, several members of the NRC – Julie Eaton, Mel Glaser, Jim Slattery, Mike Bias, Scott Vollmer, and Lauren Wittorp - met to discuss management alternatives. Among alternatives discussed was an evaluation plan that entailed gathering all user numbers through the first year and evaluating how the plan worked, this scenario had just occurred in the West Fork Bitterroot program. The plan – if adaptive – would look at use numbers and be able to be adjusted or better defined if objectives were not being met or accomplished. At that meeting as well, the Madison River Foundation said they could live with a tiered, or allocative, plan if it incorporated some mechanism for opportunity for entry for new outfitters.

At this time there were discussions among the NRC members about a meeting possibly by the 9th of April. That week, Jason Fleury, FOAM director for the Gallatin Region, and I worked with Mel Glaser, Ennis NRC member, and met with Scott Vollmer, and Andrew Puls (former River Ranger) to refine the tiered system to something that perhaps could be agreeable among outfitters and others.

We – FOAM - thought we had a majority of outfitters buy in on some type of tiered allocative system, it allowed for great flexibility among the fewer user day outfitters, it had no cumbersome administrative

burden, it capped outfitter use at around 13,700 trips (over 12,000 trips were run in 2018), it had a great evaluation schedule, it allowed for some transfer of days, and allowed for opportunity for entry. Of course, these were all just proposed ideas for a Madison River Recreation plan at this point and not brought before the NRC.

The NRC members' schedules were not looking good for an NRC meeting on April 9th. The next NRC meeting was scheduled for May 2nd, 2019 in Bozeman. That was the next available day all of us could meet, including the facilitator.

Since our April 1st meeting, through discussions with Mel Glaser, FWP seemed somewhat adamant on not going with any sort of allocation system as it monetizes permits. They favored their idea of managing overall use on the Madison through a Madison River use stamp – similar to getting tags for hunting districts. Tim Aldrich had continued some idea of average launches per day per outfitter. However, I did meet with Tim Aldrich on April 11th and he seemed to be backing away from the average launches per day per outfitter, but favored the idea of managing commercial use through some system of launches per day or boats per reach. And, Charlotte Cleveland seemed content to implementing some type of “citizen’s day” restricting non-resident angler use on the Madison River.

The challenges continued into May 2019 as Lauren Wittorp quit her executive director position at the Madison River Foundation. Also, by mid-April, we found out that Lauren Wittorp had also resigned from the NRC.

During the ninth NRC meeting on May 2nd, 2019, the Committee failed to reach a consensus to continue efforts to provide the Commission with a revised rule for a recreation management plan. Following the March 26th meeting this year, the facilitator – who had been leading the NRC through a Structured Decision Making (SDM) process – conceded that perhaps SDM was not the process to follow and that conflict resolution or joint fact-finding processes would be more applicable. Members of the NRC agreed to try another meeting using new facilitators, working towards a revised rule. During the May 2nd meeting, some of the remaining nine members of the NRC agreed to continue meeting to formulate a revised rule, but at least a couple of members voted to disband. By rules of consensus, committee members must all agree to continue.

What went wrong?

I think strongly that the NRC was an equitable and transparent way to formulate a new Madison River Management Plan. However, generating a plan using Structured Decision Making proved to be the incorrect process.

At least two major factors contributed to the NRC failing to generate a new Madison River Recreation Management Plan. First, generating a new Madison River Recreation Management Plan clearly required more than eight meetings. Recreation management is a complicated issue considering the scope of use on the Madison and all the stakeholders we were attempting to manage. The complicated issue coupled with several members of the committee that were not as knowledgeable about management

alternatives and their affects on other alternatives led to valuable time being used to educate those members. For example, some members of the NRC were completely unaware of the April 2018 management plan and required adequate time to make themselves familiar with that plan, an important prerequisite for generating alternatives to that plan. This required much work and time from individual NRC members.

The capability of the NRC and timeframe – eight meetings - for completing a draft plan was grossly and unfairly underestimated by FWP, the Commission, and the facilitator. Our first two meeting consisted of background information presented by FWP. The second two meetings, led by the facilitator, generated only a lengthy problem statement and comprehensive list of fundamental objectives. Meetings five and six further defined the problem statement, and only at the end of the sixth meeting did we only begin to list management alternatives. Note, we were still directed by the end of the sixth meeting to only list alternatives, not to discuss or analyze alternatives among NRC members in any way. By the end of the seventh meeting, we had only touched on tradeoffs or advantages or disadvantages on management alternatives. Discussing the management alternatives and how they affected each other and their managed constituents only began during the eighth and final scheduled meeting. This proved to be extremely frustrating for committee members and disappointing as some of us felt as though we failed FWP, the Commission, and the public. Some members had a strong desire and were willing to continue to work on and formulate a plan regardless of the established timeframe.

The second contributing factor, I think, that led to the NRC disbanding was deeply rooted anchoring bias and complete unwillingness to compromise - or negotiate alternatives - by some members of the committee. One documented example of this was the Madison River Foundation (MRF). At the end of our second meeting in January, the MRF published their list of management alternatives and desired outcomes for the Madison Recreation Management Plan in their newsletter. They recommended: a ban of glass containers; a walk-in, wade only section from Quake Lake to Lyons Bridge; personal watercraft ONLY from Ennis town site to Ennis Lake; no commercial use from Grey Cliffs to the Jefferson River from June 15 - September 15; and, cap the number of commercial days. All of these alternatives were firmly adhered to throughout the NRC meetings and continued through the end of the eighth meeting. Negotiating recreation management alternatives proved to be challenging when members of the committee refused to negotiate or consider alternatives. This issue was exacerbated by the consensus policy that allowed any member to simply say no to any alternative without offering another alternative or option of their own.

Going Forward

We think that the negotiated rulemaking process, or a version of such a process, can be an effective method to generate a new Madison River Recreation Management Plan. We think a more reasonable timeframe to consider management alternatives and assess management options is warranted.

Composition of the committee should be industry and management professionals first. Have them generate a draft plan that is then reviewed by the public or other members of the recreation

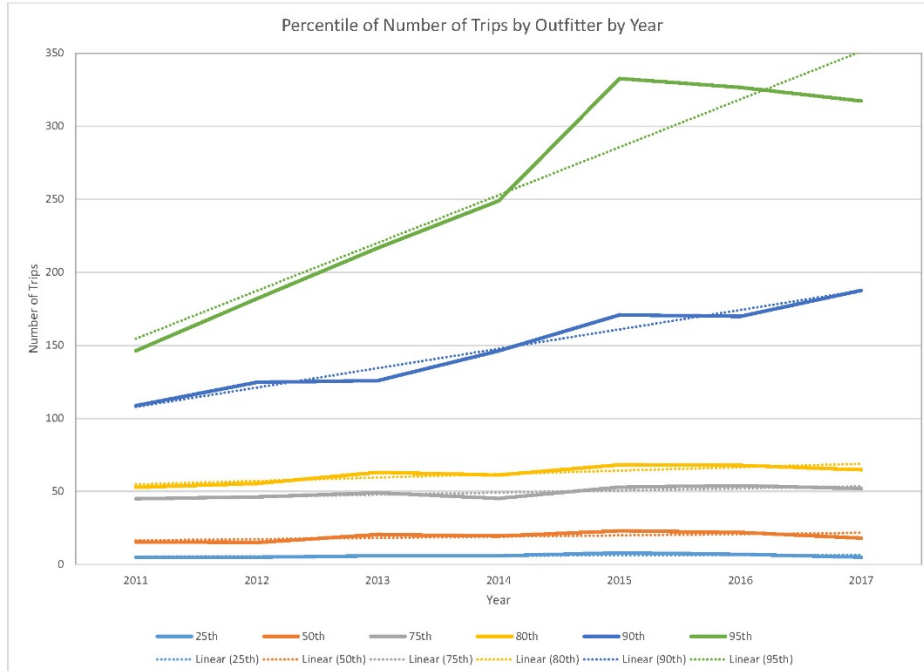
community. Following review of this plan by FWP, then bring it before the Commission, then public comment.

Going forward we would recommend:

Identify your recreation management goals or objectives first. For example, are you going to manage commercial use via some type of allocative system? If not, the only other way to manage boat distribution along the river may be via some launches per day or boats per section type management alternative. If managers would rather not allocate trips across outfitters, an alternative to manage the number of launches per site. This has been a proven method of managing distribution on the Beaverhead and Big Hole Rivers in Montana and is incorporated successfully in Idaho on the South Fork and Henry's Fork Rivers.

If you are going to manage commercial use, or outfitters, on the Madison River, an allocative process limiting total number of outfitted trips is a viable option to consider. This alternative has many benefits. First, through an allocative process the number of trips allocated remains known through time. Incorporating adaptive management into this alternative, allows the known number of trips to be adjusted through time as well.

Based on our analysis of the FWP commercial use data from 2011 through 2017, capping the number SRP Holders as a management option would have very little effect on the overall number of outfitted trips. The figure below shows the 25th, 50th, 75th, 80th, 90th, and 95th percentiles of number of trips by outfitter by year. The 25th (light blue), 50th (orange), 75th (gray), and 80th (yellow) percentiles remain flat from year to year. This shows that the number of trips by 80 percent of the outfitters from year to year remains the same, the number of trips conducted by 80% or less of the outfitters in 2017 was 65 trips. During 2017, 80% consisted of 140 outfitters. This chart also shows convincingly most of the increase in total number of trips from 2011 to 2017 occurred in the top 5% of outfitters, or 9 outfitters total. During 2011 there were 151 active outfitters, during 2017 there were 175 active outfitters, an increase of 24 outfitters; however, 80% of those are conducting 65 trips or fewer a year.



From our surveys of outfitters throughout the Madison region, two proposed management alternatives were unacceptable, incorporating some type of rest & rotation or any type of river closure for access to fishing from a vessel or float tube. These two alternatives were consistently ranked worst management options available. A rest and rotation system may work well for a 150-mile long river like the Big Hole River, but would do little to alleviate crowding on a river that has a total float section length of 39 miles. Incorporating a 4-day or 3-day rest and rotation schedule across a 39-mile river effectively puts all commercial use along 75% or 66% of a river's length. How does increasing boat numbers by 25% or 33% reduce crowding?

FOAM continues to support the FWP and Commission in their efforts to formulate a Madison River Recreation Management Plan and would continue to welcome our involvement in any such process. Thank you for the opportunity to provide you with our thoughts on the Madison River Negotiated Rulemaking Committee.