MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILD MONTANA, and MONTANA WILDLIFE FEDERATION, Petitioners, MONTANA ASSOCIATION OF COUNTIES, Plaintiff, v. GREG GIANFORTE, in his official capacity as GOVERNOR OF THE STATE OF MONTANA, and CHRISTI JACOBSEN, in her official capacity as SECRETARY OF STATE, Respondents,	Cause No. ADV-2023-411 **ORDER – MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are competing motions for summary judgment.

Constance Van Kley, Rylee Sommers-Flanagan, and Dimitrios Tsolakidis

represent Petitioners Wild Montana and Montana Wildlife Federation. Michael G. Black represents Plaintiff Montana Association of Counties (MACo). Dale Schowengerdt and Anita Milanovich represent Respondent Greg Gianforte in his official capacity as governor of Montana (Gianforte). Austin Markus James and Clay R. Leland represent Respondent Christi Jacobsen in her official capacity as secretary of state (Jacobsen).

STATEMENT OF FACTS

Petitioners Wild Montana and the Montana Wildlife Federation are conservation organizations. These conservation organizations participate in the legislative process through lobbying and educating state lawmakers on conservation policy. According to the petition, Wild Montana and the Montana Wildlife Federation are long-time supporters of Habitat Montana, a program of the Montana Fish, Wildlife & Parks Department focused on conserving and restoring important habitat for fish and wildlife. The conservation organizations contend they played a central role in developing, lobbying for, and passing Senate Bill 442, which directed recreational marijuana tax revenue to Habitat Montana.

MACo is a non-profit corporation whose members include all fifty-six Montana counties. The objectives of MACo include doing all things necessary and proper for the benefit of Montana counties and initiating litigation in the name of MACo to determine rights of counties and county officials under any constitutional provision or statute. When the Montana legislature considers a bill relating to funding for counties, MACo and its members participate in the legislative process by contacting legislators and making their wishes known. MACo and county officials appeared at the legislature to support Senate Bill 442,

which included allocating marijuana tax revenue to construct, reconstruct, maintain, and repair rural roads by Montana counties.

On May 1, 2023, the legislature passed Senate Bill 442 with a supermajority of legislators having voted in favor. The following day, May 2, 2023, Gianforte vetoed Senate Bill 442. Also on May 2, 2023, after Gianforte vetoed the bill but before the legislature received notice of the veto, the legislature adjourned *sine die*, with the Senate acting first to adjourn. At the time the Senate voted to adjourn, few if any legislators were aware of the governor's veto. Following adjournment and a request from the bill sponsor, Jacobsen refused to initiate the post session override procedure, claiming she had not received a copy of the governor's veto and a statement explaining his reasons for doing so. The legislature was thus deprived of an opportunity to override the veto of Senate Bill 442 and draft the policy contained therein into law.

On June 7, 2023, Wild Montana and the Montana Wildlife Federation filed a petition seeking declaratory judgment and a writ of mandamus ordering Gianforte and Jacobsen to fulfill their duties under Article VI, Section 10(4). Also on June 7, 2023, MACo filed a similar complaint seeking a declaratory order and writ in Cause No. DV-25-2023-413. On July 14, MACo filed a motion to consolidate the cases, resulting in the matter currently before this Court. Petitioners and Plaintiff filed for summary judgment on September 1, 2023. Gianforte filed for summary judgment on October 2, 2023. The Court held oral argument on the motions on December 7, 2023.

PRINCIPLES OF LAW

Summary judgment is warranted when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of

law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. V. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)). To avoid summary judgment, the opposing party's evidence "must be substantial, 'not mere denial, speculation, or conclusory statements.'" *Hadford v. Credit Bureau, Inc.*, 1998 MT 179, ¶ 14, 962 P.2d 1198, 1201 (quoting *Klock* at 174).

ANALYSIS

Petitioners and Plaintiff seek a declaratory order to clarify a narrow procedural ambiguity in Montana's constitutionally established veto process. Additionally, Petitioners and Plaintiff have requested a writ of mandate ordering Respondents to facilitate the veto override procedure by fulfilling their respective obligations contained in Article VI, Section 10(4). Article VI, Section 10 establishes the relevant veto powers, duties, and procedures at issue here. After the legislature passes a bill, it submits the bill to the governor for his signature. Mont. Const. art. VI, § 10(1). The governor then has the power to either sign the

bill into law or veto the bill and send it back to the legislature with a statement of the reasons for the veto (the veto message). *Id*. If the governor vetoes a bill, the legislature has the authority to override the veto with a two-thirds majority. Mont. Const. art. VI, §§ 10(3)-(4).

The constitutionally established procedure for a legislative override depends on the timing of the veto. If the legislature is in session when it receives a veto message, the members of each house present vote on whether to override the veto. Mont. Const. art. VI, § 10(3). On the other hand:

> If the legislature is not in session when the governor vetoes a bill approved by two-thirds of the members present, he shall return the bill with his reasons therefore to the secretary of state. The secretary of state shall poll the members of the legislature by mail and shall send each member a copy of the governor's veto message. If two-thirds or more of the members of each house vote to override the veto, the bill shall become law.

Mont. Const. art. VI, § 10(4). The ambiguity raised by this case addresses the procedure for the override process when the governor vetoes a bill while the legislature is still in session, but the legislature does not receive the veto message until after adjournment.

Whereas the out-of-session veto procedure in Article VI, Section 10(4) references the timing of the actual veto, the Article VI, Section 10(3) in-session procedure applies "after receipt of a veto message." The plain language of these two provisions appears to leave a procedural gap whereby the legislature does not have the opportunity to conduct a vote to override a governor's veto if it does not receive timely notice of a veto *prior to adjournment*. This creates a situation in which the legislature is deprived of a constitutionally delegated

authority on the basis of a procedural anomaly. However, "[t]he intent of the Framers controls the Court's interpretation of a constitutional provision." *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, ¶ 14, 412 P.3d 1058, ¶ 14. Proper interpretation of the veto provisions removes the apparent procedural gap without requiring any additional language or procedure.

"As with statutory interpretation, constitutional construction should not 'lead to absurd results, if reasonable construction will avoid it.'" *Id.* at ¶ 16. Article VI, Section 10 unambiguously grants the governor authority to veto bills and the legislature the authority to override vetoes. Although subject to different procedures, the Framers clearly intended the legislature's veto power to exist regardless of the timing of the veto. Thus, the only question before the Court is which procedure applies when the legislature adjourns prior to receiving the veto message. As a practical matter, the legislature cannot vote to override a veto before it is aware of the veto. Further, the only meaningful difference in whether a veto occurs in-session or out-of-session is which override procedure applies. Therefore, in determining whether a veto is treated as in-session or out-of-session, the determinative factor must be when the legislature receives the veto message rather than when the governor signs the veto.

To give full effect to the Framers' intent, in the event the legislature has not received a veto message prior to adjournment, the governor must transmit the veto message and the secretary of state must conduct the override poll in the manner established by Article VI, Section 10(4). This interpretation clarifies the constitutionally established procedures while ensuring each coequal branch of government retains the ability to exercise its proper authority.

Writ of Mandamus

Petitioners and Plaintiff have requested the Court issue a writ of mandamus directing Gianforte to send the bill and veto message to the secretary of state and Jacobsen to conduct the veto override polling procedures. "A writ of mandamus may be issued by…the district court…to any lower tribunal, corporation, board, or person to compel the performance of an act that the law specially enjoins as a duty resulting from an office, trust, or station." Mont. Code Ann. § 27-26-102(1). A writ of mandamus is "an extraordinary remedy" only appropriate in rare cases. *State ex rel Chisolm v. District Court*, 224 Mont. 441, 442, 731 P.2d 324, 324-25 (1986). A two-part standard applies to the issuance of a writ of mandate. *Id.* at 443. A party seeking a writ must be "entitled to the performance of a clear legal duty by the party against whom the writ is sought. If there is a clear legal duty, the district court must grant a writ of mandate if there is no available speedy and adequate remedy in the ordinary course of law." *Becky v. Butte-Silver Bow Sch. Dist. No. 1* (1995), 274 Mont. 131, 906 P.2d 193, 195 (citing Mont. Code Ann. § 27-26-102). Here, Petitioners and Plaintiff have requested a writ against Gianforte and Jacobsen ordering them to perform the legal duties established by Article VI, Section 10(4).

"A clear legal duty involves a ministerial act. A clear legal duty exists, therefore, only when the law defines the duty with 'such precision and certainty as to leave nothing to the exercise of discretion and judgment.'" *City of Deer Lodge* at ¶ 16, (quoting *Beasley v. Flathead Cty. Bd. of Adjustments*, 2009 MT 120, ¶ 17, 350 Mont. 171, 205 P.3d 812). The governor and secretary of state's duties under Article VI, Section 10(4) meet the definition of clear legal duties for the purposes of a writ. They are purely ministerial acts for the

facilitation of the veto override procedure. As established in the Court's earlier findings on standing, Petitioners and Plaintiff are entitled to the performance of these legal duties. Therefore, they have met the first requirement for obtaining a writ of mandamus.

The Court then considers whether there is an available speedy and adequate remedy in the ordinary course of law. The Court finds there is not. While this declaratory order clarifies the proper procedure under the facts, the writ ensures Respondents will now apply that procedure in relation to Senate Bill 442.

CONCLUSION

If the governor vetoes a bill prior to the legislature's adjournment but the legislature does not receive the veto message while it is in session, the governor and secretary of state must follow the veto override procedures established in Article VI, Section 10(4).

ORDER

IT IS HEREBY ORDERED Petitioners and Plaintiff's motion for summary judgment is **GRANTED.**

/s/ Mike Menahan
MIKE MENAHAN
District Court Judge

cc: Michael G. Black, via email
Constance Van Kley, via email
Rylee Sommers-Flanagan, via email
Dimitrios Tsolakidis, via email

Electronically Signed By:
Hon. Judge Mike Menahan
Tue, Jan 16 2024 11:35:28 AM

Dale Schowengerdt, via email
Anita Milanovich, via email
Austin Markus James, via email
Clay R. Leland, via email

MM/sm/ Order – Motions Summ Judgment