Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave.
Suite 518
Helena, MT 59601
Telephone: 406.457.5496
dale@landmarklawpllc.com

Anita Milanovich
General Counsel
OFFICE OF THE GOVERNOR
1301 East 6th Ave.
Helena, MT 59601
Telephone: 406.444.5554
anita.milanovich@mt.gov

Counsel for Greg Gianforte, in His Official capacity as Governor of Montana

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILD MONTANA, and MONTANA WILDLIFE FEDERATION, Petitioners, vs. 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, *and*	Cause No. DDV 2023-411 Hon. Mike Menahan DEFENDANT-RESPONDENT GOVERNOR GIANFORTE'S BRIEF SUPPORTING MOTION TO DISMISS PETITION AND COMPLAINT

MONTANA ASSOCIATION OF COUNTIES, Plaintiffs, vs. GREG GIANFORTE, in his official capacity as GOVERNOR OF the STATE OF MONTANA, and CHRISTI JACOBSEN, in her official capacity as SECRETARY OF STATE, Defendants.	Cause No. DDV 2023-413 Hon. Mike Menahan

Introduction

On May 2, 2023, the 87th and final day of the 68th regular legislative session, the Governor vetoed Senate Bill 442 ("SB 442"). Plaintiffs Montana Association of Counties (MACo), Wild Montana and Montana Wildlife Federation (collectively, "Lobbying Organizations") challenge that veto, asserting this Court should essentially write for the Legislature specific rules it must follow when one body of the Legislature adjourns sine die before considering a veto message from the Governor. They acknowledge that the current rules adopted by the Legislature governing its internal affairs and procedures do not address that scenario. They base their claims to mandamus and declaratory relief on the conjecture that, had the Legislature been out of session when the Governor vetoed SB 442 (even though the House read the veto message over the rostrum and passed other legislation later that same afternoon), the Legislature may have overridden the veto if polled.

The Lobbying Organizations present a non-justiciable political question and they lack standing. They ask this Court to infringe upon the constitutional powers of the Legislature by writing on behalf of the Legislature specific rules to address procedures for when one body

adjourns sine die before considering a veto while the other body continues to conduct business. The Governor did precisely what he was supposed to do under article 6, § 10 of the Montana Constitution, applicable statutes, and the legislative rules, and the Lobbying Organizations cannot claim otherwise.

There is no private right of action under mandamus or the Uniform Declaratory Judgment Act to force this Court to draft and referee procedures the Legislature uses to determine when it is in session and the mechanics of how it votes to override vetoes. Even if the Court believes it could lawfully fill a perceived gap in the Legislature's rules and statutes governing the legislative process, the Lobbying Organizations lack standing because there is no private cause of action for the relief they seek.

Background

SB 442, sponsored by Sen. Lang, created two accounts in the state special revenue fund: 1) a county road habitat access account, and 2) a habitat legacy account with funds, if appropriated, to be earmarked for county roads and wildlife habitat.[1] The Senate passed SB 442 by a vote of 49-1 on third reading on April 4, 2023, the House passed it with amendments by a

[1] Senate Bill 442 (2023), https://legiscan.com/MT/text/SB442/2023 (last visited August 18, 2023). Neither the bill title nor its content contains an appropriation. (*See, e.g., id.* ("AN ACT GENERALLY REVISING THE DISTRIBUTION OF MARIJUANA TAXES; REVISING THE ALLOCATION OF THE MARIJUANA STATE SPECIAL REVENUE ACCOUNT; TRANSFERRING TAX REVENUE FROM MARIJUANA SALES TO THE DEPARTMENT OF TRANSPORTATION FOR THE FUNDING OF COUNTY ROAD CONSTRUCTION AND MAINTENANCE; PROVIDING A CALCULATION BASED ON THE ROAD MILES, STATE AND FEDERAL LAND AREA, AND BLOCK MANAGEMENT ACRES IN COUNTIES AND CONSOLIDATED CITY-COUNTIES; ESTABLISHING A HABITAT LEGACY ACCOUNT; REVISING THE MONTANA WILDLIFE HABITAT IMPROVEMENT ACT; AMENDING SECTIONS 15-70-101, 16-12-111, 87-5-801, 87-5-802, 87-5-803, 87-5-804, 87-5-806, 87-5-807, AND 87-5-808, MCA; AND PROVIDING AN EFFECTIVE DATE."); *id.* at Sec. 1(2) ("Money deposited in the account is subject to appropriation by the legislature"); *id.* at Sec. 3(4) ("The amount of funds received from 16-12-111(4)(h) and deposited in the county road habitat access account provided in section 1] is subject to legislative appropriation …").)

vote of 82-17 on third reading on April 26, 2023, and the Senate passed it as amended by a vote of 48-1 on third reading on May 1, 2023.[2] It was transmitted to the Governor's office on May 2, 2023.[3]

That same day, the Governor vetoed the bill and returned the vetoed bill with his statement of reasons to the Legislature. (*See* Wild Montana Compl. ¶ 38; MACo Compl. ¶ 33. The Senate adjourned sine die at 3:29 p.m. that afternoon without official action taken on the veto.[4] The veto message was read across the House rostrum at 8:39 p.m. that evening.[5] The House adjourned sine die shortly thereafter, at 9:14 p.m.[6]

Despite clear legislative session activity in response to the Governor's veto, the Lobbying Organizations ask this Court to determine as a matter of law that "the legislature was not in session" at the time of the Governor's veto, in a misguided effort to trigger the provisions of MCA § 5-4-306(2) and thereby compel the Governor to return SB 442 to the Secretary of State for purposes of a poll. (Wild Montana Compl., Prayer for Relief, ¶¶ 1-3; MACo Compl. ¶¶ 46-47, 59.) But in fact, what they ask is that the judicial branch compel the executive branch to thwart the Constitution, statutes, and duly adopted legislative processes for the sole purpose of furthering the Lobbying Organizations' own financial interests. The Governor respectfully asks this Court to decline to wade into this political question and dismiss these actions.

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[2]Montana Legislature Detailed Bill Information: SB 442, http://laws.leg.mt.gov, available at https://perma.cc/DQ9H-HRSA (last visited August 18, 2023).
[3] *Id.*
[4] *Agenda*, Senate Floor Session, https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230502/-1/46267#agenda_, available at https://perma.cc/Q7J2-S3YB (last visited Aug. 18, 2023).
[5] *Agenda: Messages from the Governor*, House Floor Session, https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230502/-1/46180#agenda_, available at https://perma.cc/9QC3-P53L (last visited Aug. 18, 2023).
[6] *Id.*

ARGUMENT

Legal Standard

"The plaintiff carries the burden to plead adequately a cause of action." *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. Under Rule 12(b)(6), the Court should dismiss an action where the filing party "fail[s] to state a claim upon which relief can be granted; …" Mont. R. Civ. P. 12(b)(6). A cognizable claim for relief "generally consists of a recognized legal right or duty; infringement of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. "A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Deming v. Deming*, 2023 MT 29N, ¶ 5, 411 Mont. 391(quoting *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 15, 337 Mont. 1). No such facts support the Lobbying Organizations' claim and they lack any cognizable claim for relief.

I. The Lobbying Organizations ask this Court to resolve a nonjusticiable political question.

The question the Lobbying Organizations present is a non-justiciable political question because it is grounded in a non-self-executing provision of the Constitution and raises a question committed to the political branches. Separation of powers is fundamental to Montana's system of government. The Montana Constitution expressly provides that:

> [t]he 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 others, except as in this constitution expressly directed or permitted.

Mont. Const. Art. III, § 1. The political question doctrine is a prudential standing rule that "limits the exercise of judicial authority consistent with the separation of powers." *Bullock v. Fox*, 2019

MT 50, ¶ 43, 395 Mont. 35, 435 P.3d 1187. It "embodies the notion that courts generally should not adjudicate matters more appropriately in the domain of the legislative or executive branches or the reserved political power of the people." *Id.* Non-self-executing clauses of the Constitution are non-justiciable political questions. *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 281 P.3d 548. A constitutional provision is not self-executing if is directed to the political branches. *Id.*; *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241.

The Lobbying Organizations' complaints invoke Montana Constitution article 5, § 10, which is unambiguously directed to the Governor and the Legislature:

> **Section 10. Veto power.** (1) Each bill passed by the legislature, except bills proposing amendments to the Montana constitution, bills ratifying proposed amendments to the United States constitution, resolutions, and initiative and referendum measures, shall be submitted to the governor for his signature. If he does not sign or veto the bill within 10 days after its delivery to him, it shall become law. *The governor shall return a vetoed bill to the legislature with a statement of his reasons therefor*.
>
> (2) The governor may return any bill to the legislature with his recommendation for amendment. If the legislature passes the bill in accordance with the governor's recommendation, it shall again return the bill to the governor for his reconsideration. The governor shall not return a bill for amendment a second time.
>
> (3) If after receipt of a veto message, two-thirds of the members of each house present approve the bill, it shall become law.
>
> (4) (a) *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 therefor 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.
>
> (b) The legislature may reconvene as provided by law to reconsider any bill vetoed by the governor when the legislature is not in session.
>
> (5) The governor may veto items in appropriation bills, and in such instances the procedure shall be the same as upon veto of an entire bill.

Mont. Const. art. VI, sec. 10 (emphasis added). Nothing in this provision is directed to the courts. *Brown*, ¶ 23. Because it is directed to the Legislature and the Governor, it is not self-

executing, and the resolution of the Lobbying Organizations' claims concerning it is a non-justiciable political question. *Id.* That alone ends the dispute in this Court.

What the Lobbying Organizations want this Court to do is set forth *additional* rules establishing what happens to a veto when one body adjourns sine die before considering the veto. That is beyond this Court's authority. The Legislature was indisputably in session when the Governor vetoed SB 442. One need look no further than the House's own actions, which the Lobbying Organizations acknowledge, to confirm this. (*See, e.g.,* MACo Compl,, Decl. of Marty Malone, ¶ 7.) The House read the Governor's SB 442 veto across the rostrum on the last day of session, at 8:39 p.m. The House then chose to adjourn sine die at 9:14 p.m., taking no action on the veto. The House's actions—reading the bill across the rostrum and taking no action on the veto—suggest not that it thought "the legislature is not in session" and that the matter would (or should) be polled, but instead, a choice not to take the matter up. Perhaps House leadership knew that an override was impossible because the Senate had already adjourned sine die, and so a vote would be an exercise in futility, as an override requires two-thirds support in both houses. *See* MCA § 5-4-306. This is, of course, speculation. But the House's actions are not; it acknowledged the veto while the Legislature was in session.

The Lobbying Organizations seem to suggest that the veto is not effective until it is read over the rostrum (Wild Montana Compl., ¶¶ 27, 39; MACo Compl., ¶ 33) but there is nothing in the Constitution or statutes that supports that assertion. *See* MCA § 5-4-306(1). The Legislature's rules direct that the veto message should be read over the rostrum, Joint Rule 40-220, but no authority suggests the veto is only effective when read over the rostrum.

The Lobbying Organizations also suggest that the joint rules, which direct that the originating body must first vote on a matter, are significant.[7] Notably, this provision only applies to amendatory vetoes: "The Governor's recommendations for amendment must be considered first by the house in which the bill originated."[8] And this argument simply underscores the non-self-executing nature of the provision in question. Even if the Legislature's rules could, for argument's sake, have the effect of undermining the Legislature's ability to override a veto while in session, the appropriate remedy is not for the Court to construct a legal obligation or otherwise affect the Governor's authority and duties under the Montana Constitution. Nor does it obligate the Court to construe an indefensible interpretation of the Montana Constitution. *See infra* Part III. If that is the effect of legislative rules,[9] it is the province of the Legislature to review and revise its rules. The Governor is not somehow exercising power that belongs to the Legislature, as Petitioners allege. (Wild Montana Compl. ¶ 3.)

What the Lobbying Organizations really raise, then, is a political question whose remedy lies with the Legislature. The Court should dismiss these actions.

II. There is no private right of action authorizing the Lobbying Organizations' claims [and they lack standing.]

There is no private right of action in Montana to compel this Court to manage veto procedures between the executive and legislative branches. "Whether a private right of action exists for enforcement of compliance with a statutory duty or requirement is fundamentally a

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[7] *Joint Rule 40-230*, Rules of the Montana Legislature, *available at* https://leg.mt.gov/content/Sessions/68th/2023-Rules.pdf, available at https://perma.cc/WLT4-QMQW (last visited Aug. 18, 2023).

[8] *Id.*

[9] This is not the first time a governor's veto of a widely supported bill was delivered to the legislature on the last day the Legislature was in session. For example, on April 28, 2011—the last day of the 62nd legislative session—Governor Schweitzer vetoed three bills supported by two-thirds of the Legislature: HB 59, HB 358, and SB 110. None were subsequently polled.

matter of legislative intent determined from applicable statutory construction principles." *Larson*, ¶ 27.

Neither the provisions of Title 5, Chapter 4, part 3 governing vetoes nor any other statute grants private parties the right to sue over a veto. To determine that a statute grants an implied private right of action depends on whether 1) whether an asserted private remedy is consistent with the express language of the statute as a whole; 2) the language shows the intent of the Legislature to create a private remedy; 3) allowing a private remedy would produce or avoid absurd results; and 4) an agency has construed it to contain a private enforcement right. *Faust v. Utility Solutions, LLC*, 2007 MT 326, ¶ 24, 340 Mont. 183, 173 P.3d 1183; *Larson*, ¶ 29.

None of these factors support a private right of action here. Nothing in Title 5, Chapter 4, Part 3 contemplates or suggests that private parties can enforce procedures concerning when a bill is vetoed and whether the Legislature was in session or not in session. There is no judicial enforcement provision whatsoever. *Faust*, ¶ 25. The statute's plain language is directed solely at the Governor and the Legislature and no legislative history suggests Title 5, Chapter, 4, Part 3 was meant to include any private right of action. It would be absurd to read a private right of action into the veto procedures of the Governor and Legislature and give private parties the right to litigate when the Legislature is in session or when it was not in session, or how the internal rules of the Legislative branch are to operate.

Thus, the Lobbying Organizations have no right to a declaratory judgment or a writ of mandamus to enforce those rules. A party seeking a writ of mandamus "first must establish that he is entitled to performance of a clear legal duty by the party against whom it seeks the writ" *City of Deer Lodge v. Chilcott*, 2012 MT 165, ¶ 14, 365 Mont. 497, 285 P.3d 418. Similarly, to maintain a declaratory judgment claim, the Lobbying Organizations must show a right to relief

contemplated by the applicable statutes. *Mitchell v. Glacier County*, 2017 MT 258, 389 Mont. 122, 406 P.3d 427. The Lobbying Organizations are not entitled to a legal duty by the Governor to veto certain procedures.

III. The Lobbying Organizations ask this Court to violate established rules of statutory construction to determine the Legislature was out of session

Even if this question were one for this Court, the Lobbying Organizations invite this Court to violate well-established rules of statutory construction to secure their relief.

The Montana Supreme Court comprehensively addressed these well-established rules in *Montanans for Laws v. State,* 2007 MT 75, ¶¶ 46-47, 336 Mont. 450, 154 P.3d 1202, noting that when resolving disputes of statutory or constitutional construction, the plain meaning controls and it is the duty of the Court "not to insert what has been omitted nor to omit what has been inserted." (quoting § 1-2-101, MCA).

The Lobbying Organizations would have the Court ignore these maxims in its interpretation of Mont. Const. art. VI, sec. 10 (excerpted above) and Montana Code § 5-4-306, which states:

> **5-4-306. Return when legislature not in session.**
>
> …
>
> (2) *If the legislature is not in session when the governor vetoes a bill, the governor shall return the bill with the reasons for the veto to the secretary of state*. If the bill was not approved by two-thirds of the members voting on the final vote on the bill, the secretary of state shall within 5 working days of receipt of the bill and veto message mail a copy of the title of the bill and the veto message to each member of the legislature. If the bill was approved by two-thirds of the members voting on the final vote on the bill, the secretary of state shall poll the members of the legislature. The secretary of state shall within 5 working days of receipt of the bill and veto message send by certified mail to each legislator, at an address provided by the legislator, a copy of the bill and the veto message, a ballot, a return envelope, instructions for casting a vote, and notice of the date by which each legislator shall return a vote. The date for return must be within 30 days after the date on which the bill, veto message, and voting instructions are sent. A legislator may cast and return a vote by delivering the ballot and return envelope in person or by mailing the ballot in the return envelope by regular mail, postage paid, or by

> sending the ballot by facsimile transmission to the office of the secretary of state. A legislator may not change the legislator's vote after the ballot is received by the secretary of state. The secretary of state shall tally the votes within 1 working day after the date for return of the votes. If two-thirds or more of the members of each house vote to override the veto, the bill becomes law.
>
> (3) The legislature may reconvene to reconsider any bill vetoed by the governor when the legislature is not in session by using the statutory procedure provided for convening in special session.

(Emphasis added). In particular, the Lobbying Organizations contend that this Court should determine the Legislature was "not in session" when SB 442 was vetoed, (MACo Comp. ¶ 27), and ask the Court to compel the Governor to comply with the procedures applicable to bills vetoed in that instance. But the plain meaning of the Legislature "not in session" requires that the Court reject Lobbying Organizations' request.

The "legislative power is vested in a legislature consisting of a senate and a house of representatives." Mont. Const., art. V, sec. 1. Both bodies are the Legislature, and both bodies are vested with legislative power. *Id.* (*See* Wild Compl. ¶ 2 ("Also on May 2, the Legislature, beginning with the Senate, voted to adjourn *sine die.*").) The Senate is the Legislature. The House of Representatives is the Legislature. If either body acts, it is a legislative act. Nothing in the language suggests that both must exercise legislative power simultaneously for there to be a "legislature in session." Indeed, that the Montana Constitution later requires each body to secure the consent of the other to "adjourn or recess for more than three days or to any place other than that in which the two houses are sitting," Const., art. V, sect. 10(5), acknowledges that legislative activity can occur when one house is exercising its legislative power while the other is not. Moreover, because either body engaging in official action is "the legislature," coordination between the two is necessary. *See, e.g.,* Mont. Const. art. V, sec. 6 (limiting the number of days

"[t]he legislature shall meet each odd-numbered year in regular session [to] not more than 90 legislative days").[10]

For this reason, the Legislature was "in session" on May 2, 2023, not only as to both bodies until the Senate adjourned sine die, but thereafter until the House likewise adjourned sine die later that evening. This conclusion is a simple one based on the plain language of the Montana Constitution.

To conclude otherwise yields absurd results. If the Lobbying Organizations are correct and the Legislature is not in session when one body adjourns sine die, the subsequent actions of the other body have no legal, legislative effect. This would mean that HB 2, which the Senate passed before it adjourned sine die (and which contains other appropriations that actually benefit the Lobbying Organizations), immediately died when the Senate adjourned sine die because the House's subsequent (and necessary) passage had no legislative effect. Indeed, it would mean that all the numerous bills passed in the House, taken up after the Senate adjourned sine die, are dead.

Conversely, when, as noted above, the Legislature is obligated to "meet each odd-numbered year in regular session of not more than 90 legislative days," Mont. Const. art. V, sec. 6, the 90-day limitation would only apply when both bodies convene concurrently—one body alone, however, would be free to meet for as long as it likes.

These outcomes defy common sense. The House can conduct the business of the Legislature after the Senate adjourns sine die (and vice versa). And that additional business is subject to the "90 legislative day" limitation imposed on the Legislature. But the Legislature

[10] *See also* 2023 Joint Rule 10-20(1) ("If either house is in session on a given day, that day constitutes a legislative day."), https://leg.mt.gov/content/Sessions/68th/2023-Rules.pdf, available at https://perma.cc/WLT4-QMQW.

cannot be "in session" under these circumstances, including the last day of legislative session, while simultaneously be "not in session" should the governor deliver a veto that same last day. Such an incompatible interpretation of the same circumstances is indefensible as a matter of law.

The Lobbying Organizations' claims should be dismissed.

IV. The Lobbying Organizations seek a remedy with which the Governor cannot comply.

The Lobbying Organizations' request for relief from the Court is to declare "the Governor's veto of SB 442 ineffective until the Governor returns the bill and his veto letter to the Secretary to allow for a poll of the Legislature," (Wild Montana Compl. ¶ 49), and "require[e] the Governor to return the bill and his veto letter to the Secretary of State; …", (Wild Montana Compl. Prayer for Relief ¶ 2). (*See also* MACo Compl. ¶ 41.) As the actions of the House make clear, the Governor does not have bill—the Legislature does.[11] The vetoed bill was returned to the Legislature while it was in session within the time period as provided in law. *See* Mont. Const., art. VI, sec. 10(1). There is no further action the Governor has authority to take and there is nothing in the Montana Constitution or statutes that authorize the Governor to retrieve a veto already delivered to the Legislature. The Lobbying Organizations seek relief from this Court with which it is impossible for the Governor to comply. Lobbying Organizations are unable to secure the relief they seek. Their claims should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Lobbying Organizations' complaints with prejudice.

[11] MACo asserts that "t[h]e Governor has retained the bill and continues to retain the bill" without any support for its contention. (MACo Compl. ¶ 35.)

Respectfully submitted,

/s/ Anita Milanovich
Anita Milanovich
General Counsel
OFFICE OF THE GOVERNOR
1301 East 6th Ave.
Helena, MT 59601
Telephone: 406.444.5554
anita.milanovich@mt.gov

/s/ Dale Schowengerdt
Dale Schowengerdt
LANDMARK LAW PLLC
7 West 6th Ave.
Suite 518
Helena, MT 59601
Telephone: 406.457.5496
dale@landmarklawpllc.com

Counsel for Greg Gianforte, in his official capacity as Governor of Montana

Certificate of Service

I certify that on August 18, 2023, a true and correct copy of the foregoing was electronically filed and served by email upon the parties listed below:

Constance Van Kley
Rylee Sommers-Flanagan
Upper Seven Law
P.O. Box 31
Helena, MT 59624
constance@uppersevenlaw.com
rylee@uppersevenlaw.com

Counsel for Wild Montana and Montana Wildlife Federation in Cause No. DV-25-2023-411

Michael G. Black
BLACK LAW OFFICE
7 West Sixth Avenue, Suite 514
Helena, MT 59601
blacklaw@blackfoot.net

Counsel for Montana Association of Counties in Cause No. DV-24-2023-413

/s/ Dale Schowengerdt

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 08-18-2023:

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: Wild Montana, Montana Wildlife Federation
Service Method: eService

Constance Van Kley (Attorney)
PO Box 31
Helena MT 59624
Representing: Wild Montana, Montana Wildlife Federation
Service Method: eService

Anita Yvonne Milanovich (Attorney)
1301 E 6TH AVE
HELENA MT 59601-3875
Representing: Greg Gianforte
Service Method: eService

Clay Richard Leland (Govt Attorney)
1301 E 6TH AVE
HELENA MT 59601-3875
Representing: Christi Jacobsen
Service Method: eService

Austin Markus James (Govt Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Christi Jacobsen
Service Method: eService

Electronically Signed By: Dale Schowengerdt
Dated: 08-18-2023