MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BRIAN SCHWEITZER, in his official capacity as Governor, Plaintiff, v. 61st MONTANA LEGISLATIVE ASSEMBLY, HOUSE APPROPRIATIONS COMMITTEE, and SENATE FINANCE AND CLAIMS COMMITTEE, Defendants.	Cause No. CDV-2010-886 **MEMORANDUM AND ORDER RE: DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

On September 16, 2010, Plaintiff Brian Schweitzer, in his official capacity as Governor (Governor), filed a declaratory judgment action against Defendants 61st Montana Legislative Assembly, House Appropriations Committee, and Senate Finance and Claims Committee (Legislature) seeking a determination that Chapter 486, Laws of 2009, introduced as House Bill 676 (HB 676), violates

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Article V, section 11(3), of the Montana Constitution.[1] The Governor filed a motion for summary judgment and supporting brief contemporaneously with the complaint.

The Legislature moved to stay the summary judgment proceedings so that the Court could initially address the Legislature's motion to dismiss pursuant to Rule 12(b) of the Montana Rules of Civil Procedure. On November 9, 2010, the Court granted the motion and stayed the summary judgment proceeding until the motion to dismiss was resolved. The motion to dismiss has been briefed and orally argued, and is now deemed submitted. The Court concludes that the motion should be granted.

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), courts must consider the complaint in the light most favorable to the plaintiff and accept the allegations in the complaint as true. *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be dismissed under Rule 12(b)(6) unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Wheeler v. Moe*, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973). "In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." Id. at 161, 515 P.2d at 683. See also *Buttrell v. McBride Land & Livestock Co.*, 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted.

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[1] All sections of Chapter 486 became effective July 1, 2009.

In this case, the Legislature asserts that the Governor presented with his brief matters outside the scope of his complaint. The Court will not consider such matters for purposes of addressing the Legislature's Rule 12(b) motion.

DISCUSSION

HB 676 was introduced in the 61st legislative assembly at the request of the House Appropriations Committee. The bill was considered during the normal course of the session and passed both houses. The Legislature adjourned *sine die* on April 28, 2009. Following adjournment, HB 676 was delivered to the Governor for signature. He neither signed nor vetoed the bill and by operation of law, it went into effect ten days after it was delivered to him. (Compl., at 2, ¶ 3.)

The Governor asserts that his veto power was compromised by the insertion of multiple subjects or topics in HB 676 and that inclusion of multiple subjects in a non-appropriations bill violates Article V, section 11(3), of the Montana Constitution. He requests a determination from this Court that HB 676 is unconstitutional, but also seeks delay in the application of the Court's ruling until July 1, 2011 to give the 62nd legislative assembly an opportunity to rectify the situation should this Court determine the law to be unconstitutional. (Compl., at 4, ¶¶ 1, 2.) According to his complaint, he anticipates that the 62nd legislative assembly, due to convene in January 2011, will introduce a similar measure as a companion bill to the general appropriations bill necessarily considered in each regular session.

The Legislature's motion to dismiss states that it is made pursuant to Rule 12(b), subdivisions (6) and (7).[2] Rule 12(b)(6) provides:

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[2] Rule 12(b)(7) relates to failure to join a party pursuant to Rule 19 of the Montana Rules of Civil Procedure. Although referenced in the Legislature's motion, Rule 12(b)(7) is not discussed in the briefs, and therefore will not be addressed by the Court.

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
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> . . .
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> (6) failure to state a claim upon which relief can be granted.

In support of its motion, the Legislature raises several issues involving justiciability. Specifically, it argues (1) the Governor lacks standing to sue because he is alleging a conjectural injury; (2) the Governor's complaint is not ripe for adjudication; (3) the Governor's claim is substantially moot, and the Court is not able to provide effective relief; and (4) the Governor is seeking an improper advisory opinion from the Court. The Legislature also argues that it is immune from suit on the basis of (1) statutory legislative immunity, (2) constitutional legislative immunity, and (3) common law legislative immunity. Finally, the Legislature asserts that the doctrine of laches bars the Governor's complaint.

The Governor addresses each of these contentions and maintains that the matters raised in his complaint are in fact justiciable, and that the Court should deny the motion to dismiss so it can address the merits of the real issue before the Court — whether HB 676 is violative of constitutional proscriptions against multiple subjects in non-appropriation bills.

Justiciability is a threshold requirement to jurisdiction. The Montana Supreme Court recently stated the following with respect to justiciability:

> "A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." The central concepts of justiciability have been elaborated into more specific categories or doctrines – namely, advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions – each of which is governed by its own set of substantive rules.

Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 8, 355 Mont. 142, 226 P.3d 567 (citations omitted).

The Legislature contends that the Governor lacks standing to challenge the constitutionality of HB 676 because he has not suffered or alleged the concrete, personalized injury necessary to satisfy standing. In *Armstrong v. State*, 1999 MT 261, ¶ 6, 296 Mont. 361, 989 P.2d 364, the Montana Supreme Court observed the following with respect to standing involving challenges to government action:

> In the context of challenges to government action, we have stated that the following criteria must be satisfied to establish standing: (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

In *Armstrong*, the supreme court cited *Olson v. Dep't of Revenue*, 223 Mont. 464, 726 P.2d 1162 (1986), in which it determined standing was lacking; as well as *Lee v. State,* 195 Mont. 1, 635 P.2d 1282 (1981), where the court concluded that a licensed motorist had standing to sue. In *Olson*, the plaintiffs/appellants were residents of a portion of Yellowstone National Park that was within the exterior boundaries of Montana but not located within a particular county. They challenged the constitutionality of statutes that required residency to run for county office or obtain a hunting or fishing license. The supreme court concluded that where the record reflected the plaintiffs had not attempted to run for office or obtain a license, their claims of injury were too attenuated to satisfy standing. The court stated:

> "At the threshold of every case, especially those where a statutory or constitutional violation is claimed to have occurred, is the requirement that the plaintiff allege 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . ."
> . . .

> At a minimum, the constitutional aspect of standing requires a plaintiff to show that he has personally been injured or threatened with immediate injury by the alleged constitutional or statutory violation. Before we can find a statute to be unconstitutional, "the party who assails it must show, not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

Olson, 223 Mont. at 469, 726 P.2d at 1166 (citations omitted).

Conversely, in *Lee*, *supra*, the supreme court concluded that the complainant, a licensed motorist, was directly affected by the speed limit law and, therefore, had standing to challenge its constitutionality.

In this case, the Governor's complaint states that his veto power was compromised. He does not identify any direct impairment of his veto, only that he did not like what he perceived to be the consequences of a veto. The Legislature insists that the Governor's allegations of injury are thus hypothetical — lacking the degree of particularity necessary to satisfy the requisites of standing. Further, relying on the United States Supreme Court case of *Raines v. Byrd*, 521 U.S. 811 (1997), the Legislature avers that his injury is based only on his official position, not on a personal interest.

In *Raines*, the Supreme Court concluded that individual members of Congress lacked standing to challenge the constitutionality of an act authorizing the President to line-item veto some spending provisions enacted by Congress:

> In sum, appellees have alleged no injury to themselves as individuals . . ., the institutional injury they allege is wholly abstract and widely dispersed . . . , and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. . . . We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by

> someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

Id. at 829-30. The Court held that the congressmen bringing suit did not have a sufficient "personal stake" in the dispute and had not alleged sufficiently concrete injury to establish standing. *Id.* at 830. In reaching its decision, the *Raines* Court was particularly sensitive to the fact that the case involved a constitutional challenge taken by one of the other two branches of government. In this regard, the Court observed:

> We have always insisted on strict compliance with this jurisdictional standing requirement. And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. . . . **In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency.** Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

Id. at 820 (emphasis added).

In the Legislature's view, the instant case presents a controversy akin to that in *Raines*. It argues that the Governor's alleged injury — that passage of HB 676 limited his veto power — consists only of an "abstract institutional" injury. It also contends that the relief sought by the Governor would not remedy his alleged injury, since the veto limitation he alleges occurred as a result of action taken by the 61st legislative assembly, and he urges the Court to take action to prevent a conjectural recurrence. In effect, the Legislature asserts that the Governor orchestrated his own

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injury to effectuate the purposes of this lawsuit. His veto power was not "limited" — he simply chose not to utilize it because he did not like what he perceived to be the consequences.

The Governor maintains that his decision to neither sign nor veto HB 676 is not relevant to his constitutional challenge. Rejecting the application of *Raines* to the facts of the instant case, he argues application of *Coleman v. Miller*, 307 U.S. 433 (1939), in which the United States Supreme Court found that Kansas state legislators had standing to challenge the ratification of a constitutional amendment which they had voted against. In equating this case to the situation in *Coleman*, the Governor maintains that his constitutional veto power was "essentially nullified" when the Legislature sent HB 676 to him for consideration. He argues that, contrary to the Legislature's assertion, the injury was personal and exclusive to him as Governor.

The *Coleman* decision was considered by the *Raines* Court, and distinguished as follows:

> It is obvious, then, that our holding in Coleman stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

Id. at 823. In *Coleman*, the fact that the legislators' votes against ratification would have been nullified cannot be ignored. The *Raines* Court also distinguished its holding in *Coleman* on the basis that the claimed injury in *Raines* was "wholly abstract and widely dispersed," lacking a sufficient "personal stake" in the outcome they sought to achieve. *Id.* at 829-30.

The Governor also points to two Montana decisions in which governors brought suit in their official capacity. The first is *State ex rel. Judge v.*

Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975), a case in which then Governor Judge successfully pursued an original proceeding in the Montana Supreme Court challenging the constitutionality of certain enactments of the legislative finance committee. The second is *Schwinden v. Burlington N., Inc.*, 213 Mont. 382, 691 P.2d 1351 (1984). In that case, Governor Schwinden, some state agencies, and interested non-government associations brought suit against the Burlington Northern railroad in an original proceeding to determine the validity of a corporate license tax. While the Governor correctly points out that these cases represent examples of Montana governors bringing suit in their official capacities, they are not instructive regarding standing because issues of justiciability and standing were not raised in either case.

The facts unique to this case present a matter of first impression as far as this Court can determine. Both parties acknowledge that while federal authority is not controlling, it is persuasive when Montana precedent is lacking. See *Plan Helena*, *supra*.

There can be no doubt that the Governor's constitutionally recognized veto power is critical to effectuate the required functions of that office. In *Romer v. Colo. Gen. Assembly*, 810 P.2d 215 (Colo. 1991), the Colorado Supreme Court recognized this fact when it decided that the governor had standing to bring suit against the legislative assembly because it had ignored his vetoes. The court stated:

> [H]ere the governor asserts that the General Assembly infringed on his power to veto a legislative act, an interest protected by the constitution. If the vetoes were valid, and the legislature simply chose to ignore them, the "delicate constitutional balance between the executive and legislative branches of government" would be upset. The governor has alleged a wrong that constitutes an injury in fact to the governor's legally protected interest in his constitutional power to veto provisions of an appropriations bill. Therefore, the governor has standing to bring this action.

Id. at 220 (citation omitted). Decisions such as *Romer* illustrate the courts' recognition of the fact that a governor's veto power must remain free of constraint from the legislative branch.

However, in this case there was no restriction on the Governor's veto power. While he alleges that the Legislature's actions in passing HB 676 "limited" his veto power,[3] and his brief in opposition to the motion to dismiss asserts that his "constitutional veto power was essentially nullified" and "effectively invalidated" by the Legislature's actions,[4] the fact is that his veto power was never in jeopardy. Instead, he chose not to exercise it and not to sign the bill, both of which were legitimate options.

The Governor's reference to a veto provoking a special session, the outcome of which would have been uncertain, does not support a finding of standing. Standing does not encompass speculative circumstances or speculative injury. The United States Supreme Court stated the following with respect to standing:

> Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? These questions and any others relevant to the standing inquiry must be answered by reference to the [Article] III notion that federal courts may exercise power only "in the last resort, and as a necessity."

Allen v. Wright, 468 U.S. 737, 752 (1984) (citations omitted).

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[3] Compl., at 3, ¶ 9.

[4] Gov. Schweitzer's Br. Opp'n Legislature's Mot. Dismiss, at 8-9.

In this case, the Court cannot restore the Governor's alleged invalidated veto power by nullifying the constitutional validity of a bill already passed and in effect through a prospective ruling to address a legislative enactment that has yet to exist. See *Plan Helena*, ¶ 12.

Because the Court concludes that the Governor lacks standing to bring this action, there is no need to address the other issues relating to justiciability, immunity, or laches.

Based on the foregoing,

IT IS HEREBY ORDERED that the Legislature's motion to dismiss the complaint is GRANTED.

DATED this 29 day of December 2010.

KATHY SEELEY
District Court Judge

pc: Ann Brodsky
Robert Stutz/Jaret Coles/Helen Thigpen
Robert F. James/Cathy J. Lewis

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