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January 12, 2022

via e-mail & hand delivery

Matthew Pollack
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101-4125

Re: *Russell Black, et al. v. Bureau of Parks and Lands, et al.*
Law Docket No. BCD-21-257

Dear Mr. Pollack:

Enclosed for filing please find Director Cutko's and the Bureau of Parks and Lands' Opposition to Senator Black's Motion to Dismiss and a Notice of Appearance as Co-Counsel in the above-captioned matter.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Laura E. Jensen
Assistant Attorney General

Enclosures

cc: James T. Kilbreth, Esq. (*via email and first-class mail*)
Nolan L. Reichl, Esq. (*via email and first-class mail*)

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
DOCKET NO. BCD-CV-21-257

RUSSELL BLACK, *et al.*,	)	
	)	**DIRECTOR CUTKO'S AND**
Appellees/Cross-Appellants,	)	**THE BUREAU OF PARKS**
	)	**AND LANDS' OPPOSITION**
v.	)	**TO SENATOR BLACK'S**
	)	**MOTION TO DISMISS ALL**
BUREAU OF PARKS AND LANDS, *et al.*,	)	**APPEALS AS MOOT**
	)	
Appellants/Cross-Appellees	)	

On December 23, 2021, appellees/cross-appellants Senator Black, et al. (collectively, Senator Black), asked this Court to dismiss as moot all appeals in the above-captioned matter based on the retroactive application of L.D. 1295, I.B. 1 (Dec. 19, 2021) (codified as amended at 12 M.R.S. § 1852(4)), "An Act to Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" (I.B. 1). Because this Court has yet to decide whether I.B. 1 is constitutional—the issue presented in *Avangrid Networks, Inc., et al. v. Bureau of Parks and Lands, et al.*—and because I.B. 1 does not render this matter moot and, even if it did, two exceptions to the mootness doctrine would apply, this Court should deny

Senator Black's motion to dismiss. Alternatively, if this Court determines that this matter is moot, it should vacate the trial court's judgment.

Argument

I. Until This Court Determines Whether I.B. 1 Is Constitutional In *Avangrid Networks*, I.B. 1 Should Not Apply To This Appeal.

The basis for Senator Black's motion to dismiss is the application of a newly enacted, retroactive law to this appeal. Senator Black asks this Court to apply 12 M.R.S. § 1852(4) as amended by I.B. 1, arguing (incorrectly) that it renders this matter moot. To determine whether it should apply a newly enacted statute to a pending appeal, the Court "examine[s] (1) whether the Legislature expressed the intent to make the statute retroactive in its application and (2) whether that retroactive application violates any provisions of the Maine Constitution." *MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 21, 40 A.3d 975; *see United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (discussing an appellate court's obligation to apply a newly enacted, retroactive law to an appeal "[i]f the law be constitutional"); *see also State v. L.V.I. Grp.*, 1997 ME 25, ¶¶ 14-16, 690 A.2d 960 (considering whether a retroactive law violated several clauses of the Maine Constitution); *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1061 (Me. 1986) (examining whether a retroactive law was permissible pursuant to the Contract Clause of the Maine Constitution),

abrogated on other grounds by DeMello v. Dep't of Envtl. Prot., 611 A.2d 985 (Me. 1992).

As the Court is aware, the second factor of this test—the constitutionality of I.B. 1—is the subject of separate pending litigation.[1] *See* Procedural Order, *Avangrid Networks, Inc., et al. v. Bureau of Parks and Lands, et al.* (Jan. 3, 2022) (Gorman, J.); Order Granting Mot. to Report Interlocutory Ruling, *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, BCD-CIV-2021-00058 (Me. Sup. Ct., Dec. 28, 2021); *see also* HQ Energy Services (U.S.) Inc.'s Request for Leave to File a Response to Appellees'/Cross Appellants' Motion to Dismiss All Appeals as Moot (Dec. 30, 2021) (stating that plaintiffs in the I.B. 1 litigation challenge I.B. 1 based on the separation of powers, the Contract Clause, and vested rights). Until it resolves the constitutionality of I.B. 1 in that litigation, this Court should not determine whether the law as amended by I.B. 1 applies to this appeal. It would be contrary to the interests of justice if the Court were to dismiss this appeal as moot now based on I.B. 1 and then, in a few months, rule that I.B. 1 is unconstitutional. The Court should therefore decline Senator Black's request to apply the newly enacted, retroactive law here and deny the motion to dismiss.

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[1] As to the first factor, the people made clear their intent that the amendments in I.B. 1 apply retroactively.

II. I.B. 1 Does Not Render The Bureau's Appeal Moot Or Preclude This Court From Resolving The Important Issues It Presents.

In any event, application of the newly enacted, retroactive law in I.B. 1 would not render the Bureau's appeal moot. The judgment from which Director Cutko and the Bureau of Parks and Lands (collectively, the Bureau) appeal is far reaching, affecting much more than the 2020 lease between the Bureau and Central Maine Power Company and the construction of transmission lines on public reserved lands. If the Court rules that the Bureau's appeal is moot, the Court should nevertheless resolve the issues raised by the Bureau pursuant to the "collateral consequences" and "great public concern" exceptions to the mootness doctrine.

a. The Underlying Order Has Significant Consequences Reaching Far Beyond The Scope of I.B. 1.

Even if I.B. 1 applies retroactively, this appeal remains justiciable because ample "practical effects flow[] from the resolution of the litigation to justify the application of limited judicial resources." *Brunswick Citizens for Collaborative Gov't v. Town of Brunswick*, 2018 ME 95, ¶ 7, 189 A.3d 248 (citations and quotation marks omitted).

The underlying trial court Decision and Order dated August 10, 2021 (the Order), imposes a broad new process requirement, obligating the Bureau to make reduction and substantial alteration determinations in writing as part of

"a public administrative process" before executing a lease or "conveying any property interest in public lands." (A. 44-47.) This new public administrative process must also "allow any citizen of Maine . . . to obtain judicial review of decisions in which no reduction or substantial alteration is found." (A. 47.) The Bureau has never engaged in such a process.

Because the trial court concluded that this new process requirement "arise[s] by implication from Article IX, Section 23" (A. 46), that implication would apply to all designated lands, *see* 12 M.R.S. 598-A (2021), including public reserved lands and nonreserved public lands, and the conveyance of *any property interest* in those lands (A. 44).[2] (*See also* Red Br. 46-47 (acknowledging that the newly announced public process requirement arises from Article IX, Section 23).) The import of the Order thus reaches far beyond the scope of I.B. 1, which is concerned only with certain leases on public reserved lands and the construction of transmission lines. The resolution of this appeal thus has significant practical effects on the State of Maine's management of all designated lands and on anyone with property or contractual interests in designated lands.[3]

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[2] Because Article IX, Section 23 applies equally to legislative decisions, this new process requirement would likely also apply to the Legislature.

[3] Senator Black is mistaken in stating that no practical effect will flow from this Court's decision because the "remedy the Bureau seeks is a remand so that it can make a substantial

For example, without engaging in any public administrative process, the Bureau has issued approximately 355 leases and licenses for public reserved lands and nonreserved public lands pursuant to 12 M.R.S. §§ 1834, 1838, 1848, and 1852.[4] (A.R. VIII0089-90.) Should the underlying judgment stand, the validity of these existing leases and licenses will be open to challenge. (*See* Reynolds Green Br. 1-3 (discussing the "unmistakable import" of the Order for camp lot leaseholders).) The parties to the leases and licenses will also be subject to new and potentially burdensome process requirements in renewing the leases and licenses.[5] (*See id.*)

Additionally, this Court's holding as to whether the newly announced public administrative process arises by implication from Article IX, Section 23 will have significant practical effects on the Bureau and other executive branch agencies that hold and manage designated lands.[6] If the trial court's conclusion

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alteration determination." (Mot. to Dismiss at 19.) The Bureau seeks vacatur of the Order and requests remand only in the alternative. (Bureau Blue Br. 50.)

[4] These leases and licenses serve a variety of purposes, including residential camp lots, commercial sporting camps and campgrounds, utilities, agriculture, telecommunication facilities, dams, boat access, game warden camps, and university camps. (A.R. VIII0089-90.)

[5] Many of the existing leases and licenses are due to be renewed on December 31, 2022. (*See* A.R. VIII0089; Reynolds Green Br. 2.)

[6] These agencies include the Department of Inland Fisheries and Wildlife, the Baxter State Park Authority, and agencies holding lands gifted to the state for certain purposes or acquired through the Land for Maine's Future Board. *See* 12 M.R.S. § 598-A.

on this point stands, these agencies—which have never before engaged in such a public process when managing or conveying property interests in designated lands—will need to make fundamental changes that will likely require the addition or reallocation of resources.[7] If, however, Article IX, Section 23 does not impose an administrative process requirement, as the Bureau contends, such a holding may inform legislative action on L.D. 1075. *See* L.D. 1075, An Act to Protect Public Lands (130th Legislature 2021) (carried over to the next legislative session on July 19, 2021) (requiring the Bureau to adopt rules establishing an evaluation process for making its reduction and substantial alteration determinations); *see also An Act to Protect Public Lands: Hearing on L.D. 1075 Before the J. Standing Comm. on Agriculture, Conservation, and Forestry*, 130th Legis. 1 (2021) (testimony of Andy Cutko, Director of the Bureau of Parks and Lands).

b. This Appeal Satisfies Two Exceptions To The Mootness Doctrine.

Alternatively, if the Court concludes this appeal is moot, it should nevertheless consider the matter pursuant to the "collateral consequences" and "great public concern" exceptions to the mootness doctrine. *See Mainers for*

[7] In addition to property conveyances, the underlying judgment may affect land management activities of agencies holding designated lands.

Fair Bear Hunting v. Dep't of Inland Fisheries & Wildlife, 2016 ME 57, ¶ 7, 136 A.3d 714 (setting forth three exceptions to the mootness doctrine).

i. Collateral Consequences Exception

First, "sufficient collateral consequences will result from the determination of the questions presented so as to justify relief."[8] *Id.* As discussed above, the issue of whether the public administrative process requirement arises by implication from Article IX, Section 23 has significant collateral consequences for the Bureau, other state agencies, anyone with a property or contractual interest in designated lands, and the Legislature. (*See* Bureau Blue Br. 1-2 (identifying this as a central issue on appeal).) That the validity of the existing 355 leases and licenses on designated lands will be open to challenge should the underlying Order stand will have "more than conjectural and insubstantial consequences in the future." *Sordyl v. Sordyl*, 1997 ME 87, ¶ 6, 692 A.2d 1386 (quotation marks omitted), *overruled by Chretien v. Chretien*, 2017 ME 192, ¶ 6, 170 A.3d 260. In addition, the obligation to engage in a public administrative process whenever it conveys a property

[8] Senator Black is also mistaken in implying that the collateral consequences exception to the mootness doctrine only "comes into play in criminal cases." (Mot. to Dismiss at 21.) This Court has considered that exception in other contexts. *See, e.g., Clark v. Hancock Cty. Comm'rs*, 2014 ME 33, ¶ 14, 87 A.3d 712 (considering the exception in an 80B appeal); *Nat'l Council on Comp. Ins. v. Superintendent of Ins.*, 538 A.2d 759, 763 (Me. 1988) (considering the exception in a workers compensation appeal).

interest in designated land would present real and substantial consequences for the Bureau and the other agencies with jurisdiction over designated lands.

ii. Great Public Concern Exception

Second, "the appeal contains questions of great public concern that, in the interest of providing future guidance to the bar and public," the Court should address. *Mainers for Fair Bear Hunting*, 2016 ME 57, ¶ 7, 136 A.3d 714. To determine whether this exception applies, this Court "examine[s] whether the question is public or private, how much court officials need an authoritative determination for future rulings, and how likely the question is to recur." *A.I. v. State*, 2020 ME 6, ¶ 11, 223 A.3d 910 (quotation marks omitted); *see King Res. Co. v. Envtl. Imp. Comm'n*, 270 A.2d 863, 870 (Me. 1970) (describing the second of these factors as "the desirability of an authoritative determination for the future guidance of public officers").

Because this appeal raises issues relating to the meaning and effect of Article IX, Section 23, the management of designated lands, and the functioning and resources of executive branch agencies, it plainly presents questions of public concern. The issue of whether a public administrative process inheres in Article IX, Section 23 and what such a process may entail is one of first impression that, as discussed above, has far reaching and significant consequences. (*See also* A. 27.) It is not fact specific and is likely to recur if the

underlying judgment stands and the existing leases and licenses are challenged. *See Mainers for Fair Bear Hunting*, 2016 ME 57, ¶ 9, 136 A.3d 714. A ruling on this appeal would thus have authoritative value. *See id.*; *Clark v. Hancock Cty. Comm'rs*, 2014 ME 33, ¶ 15, 87 A.3d 712 (considering, in concluding the great public concern exception was not satisfied, that "[t]he crux of the dispute . . . is fact-specific and does not lend itself to an 'authoritative determination' on the general subject of the Commissioners' authority"); *cf. Consumers for Affordable Health Care, Inc. v. Superintendent of Ins.*, 2002 ME 158, ¶ 21, 809 A.2d 1233 ("Because of the potentially large detrimental results to the public, the organizations, and the administrative agency, an authoritative resolution of the issues is appropriate."); *King Res. Co.*, 270 A.2d at 870.

III. If This Court Grants The Motion To Dismiss, It Should Also Vacate the Underlying Trial Court Judgment.

"A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Thanks But No Tank v. Dep't of Envtl. Prot.*, 2013 ME 114, ¶ 11, 86 A.3d 1 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994)). If this Court grants Senator Black's motion to dismiss the Bureau's appeal, it should vacate the underlying Order because this appeal will have been rendered nonjusticiable as a result of circumstances outside the

Bureau's control (I.B. 1) and dismissal will effectively prevent the Bureau from obtaining review of important issues on appeal. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (explaining that the practice of vacating judgments underlying nonjusticiable appeals in these circumstances "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance"); *see also Anderson v. Green*, 513 U.S. 557, 560 (1995) (describing the inquiry into whether the party seeking relief caused the appeal to become nonjusticiable as pivotal to the vacatur determination).

The equities weigh in favor of vacatur.[9] If this Court dismisses this appeal as moot, the Bureau will be unable to relitigate the important question of whether a requirement to hold a public administrative process before conveying an interest in designated lands arises from Article IX, Section 23 unless and until someone appeals such a conveyance; the Bureau cannot obtain appellate review of its own action. *See Thanks But No Tank*, 2013 ME 114, ¶ 11,

[9] Although Maine requires a showing of equitable entitlement to vacatur even when an appeal becomes moot due to happenstance, this appears to be the minority approach. *See MacNabb v. Kysylyczyn*, No. A20-1172, 2021 WL 3722084, at *4 (Minn. Ct. App. Aug. 23, 2021), review denied (Nov. 16, 2021) (aggregating cases and noting that the majority "reason that vacatur is fair for the appellant when the case is mooted by happenstance, without requiring further showing from the appellant" but the minority "require a further showing by the appellant before concluding that vacatur is fair").

86 A.3d 1; *cf. Fox Islands Wind Neighbors v. Dep't of Envtl. Prot.*, 2015 ME 53, ¶ 9 n.7, 116 A.3d 940. Thus, without vacatur, the Bureau would be left to institute the public process announced in the Order without judicial recourse for an indeterminate amount of time. Vacatur serves the public interest in cases such as this, where dismissal would leave a constitutional question unanswered and cause the Executive Branch and Legislature to make fundamental changes to the management of public lands with little meaningful guidance. *See Thanks But No Tank*, 2013 ME 114, ¶ 11, 86 A.3d 1; *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (reasoning, in granting vacatur, that "a constitutional ruling in a qualified immunity case is a legally consequential decision"); *U.S. Bancorp Mortg. Co.*, 513 U.S. at 27 ("*Munsingwear* establishes that the public interest is best served by granting relief when the demands of orderly procedure cannot be honored." (Quotation marks and citation omitted.)); L.D. 1075, An Act to Protect Public Lands (130th Legislature 2021). Vacatur would "prevent an unreviewable decision from spawning any legal consequences, so that no party is harmed." *Camreta*, 563 U.S. at 713.

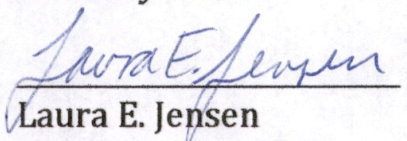
Conclusion

For the reasons stated above, the Court should deny Senator Black's motion to dismiss the Bureau's appeal. The Bureau has no objection to this Court granting Senator Black's motion to dismiss his own cross-appeal.

Dated: January 12, 2022

Respectfully submitted,

AARON M. FREY
Attorney General



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CERTIFICATE OF SERVICE

I, Laura E. Jensen, hereby certify that I have on this day, January 12, 2022, caused to be served a copy of Director Cutko's and the Bureau of Parks and Lands' Response in Opposition to Senator Black's Motion to Dismiss on counsel of record by electronic mail and U.S. mail, first class postage prepaid, at the following addresses:

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Dated at Augusta, Maine, this 12th day of January, 2022.

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