STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.

v.

BUREAU OF PARKS AND LANDS, et al.

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT

APPENDIX – VOLUME I of II

JAMES T. KILBRETH, Esq.
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Counsel for Appellees

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Portland, ME 04101

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Of Counsel:

THOMAS A. KNOWLTON
Deputy Attorney General

Counsel for Appellants

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Case Summary

Case No. BCD-CV-2020-00029

RUSSELL BLACK ET AL VS ANDY CUTKO ET AL

Location:	**Business Court**
Judicial Officer:	**Murphy, M. Michaela**
Filed on:	**06/23/2020**
Case Number History:	**BCDWB-CV-2020-00029**
UTN Number:	**AOCSsr-2020-0031904**
Other:	**AUGSC-CV-2020-00094**
Law Court Appeal Case Number:	**BCD-21-257**

Case Information

Case Type:	Civil
Subtype:	Declaratory Judgment
Case Status:	**08/10/2021 Closed**

Assignment Information

Current Case Assignment

Case Number	BCD-CV-2020-00029
Court	Business Court
Date Assigned	08/30/2021
Judicial Officer	Murphy, M. Michaela

Previous Case Assignments

Case Number	BCDWB-CV-2020-00029
Court	Business Court
Date Assigned	06/23/2020
Judicial Officer	Murphy, M. Michaela
Reason	BCD Case Number Update

Party Information

		Lead Attorneys
Plaintiff	**ACKLEY, KENT**	**Kilbreth, James** ***Retained***
	BENNETT, RICHARD A	**Kilbreth, James** ***Retained***
	BERRY, SETH	**Kilbreth, James** ***Retained***
	BLACK, RUSSELL	**Kilbreth, James** ***Retained***
	BUZZELL, EDWIN	**Kilbreth, James** ***Retained***
	CARUSO, GREG	**Kilbreth, James** ***Retained***
	CUMMINGS, CHARLENE	**Kilbreth, James** ***Retained***

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	GRIGNON, CHAD	**Kilbreth, James** ***Retained***
	HARLOW, DENISE	**Kilbreth, James** ***Retained***
	HAYNES O/B/O OLD CANADA RD, ROBERT	**Kilbreth, James** ***Retained***
	JOHNSON, CATHY	**Kilbreth, James** ***Retained***
	JOSEPH, RON	**Kilbreth, James** ***Retained***
	NATURAL RESOURCES COUNCIL OF MAINE	**Kilbreth, James** ***Retained***
	NICHOLAS, JOHN R Jr.	**Kilbreth, James** ***Retained***
	O'NEIL, MARGARET	**Kilbreth, James** ***Retained***
	PLUECKER, WILLIAM	**Kilbreth, James** ***Retained***
	SAVIELLO, THOMAS B	**Kilbreth, James** ***Retained***
	SMITH, GEORGE	**Kilbreth, James** ***Retained***
	STEVENS, CLIFFORD	**Kilbreth, James** ***Retained***
	TOWLE, TODD	**Kilbreth, James** ***Retained***
Defendant	**BUREAU OF PARKS AND LANDS STATE OF ME**	**Parker, Lauren E** ***Retained***
	CENTRAL MAINE POWER	**Reichl, Nolan L** ***Retained***
	CUTKO DIR PARKS AND LANDS, ANDY	**Parker, Lauren E** ***Retained***

Events and Orders of the Court

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Party: Plaintiff ACKLEY, KENT

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Party: Plaintiff STEVENS, CLIFFORD
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06/23/2020 Attorney-Retained-Entered
Party: Plaintiff TOWLE, TODD
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06/24/2020 Transfer-Application To Transfer To Bcd-Sent To Bcd
Created: 08/26/2020 4:34 PM

07/17/2020 Supplemental Filing-Amended Complaint-Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
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Plaintiff BENNETT, RICHARD A;
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Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;

Case Summary

Case No. BCD-CV-2020-00029

Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
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07/28/2020 Motion-Determine Course Proceedings-Filed
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Plaintiff BERRY, SETH;
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Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
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Defendant CUTKO DIR PARKS AND LANDS, ANDY
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Party: Defendant CENTRAL MAINE POWER
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08/19/2020 Motion - Other Motion - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 11/23/2020 1:39 PM

08/20/2020 Other Filing - Application to Transfer to BCD - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET

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Created: 08/26/2020 4:34 PM

08/24/2020 Hearing-Pretrial/Status-Scheduled
Created: 08/26/2020 4:34 PM

08/24/2020 Hearing-Pretrial/Status-Held
Created: 08/26/2020 4:34 PM

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08/25/2020 Order-Conference Report & Order-Entered (Judicial Officer: Murphy, M. Michaela)
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08/25/2020 Transfer-Application To Transfer To Bcd-Accepted (Judicial Officer: Murphy, M. Michaela)
Created: 08/26/2020 4:34 PM

08/25/2020 Order - Transfer to BCD Accepted - Entered (Judicial Officer: Murphy, M. Michaela)
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Created: 08/27/2020 12:57 PM

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Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;

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Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
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09/17/2020
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Plaintiff CARUSO, GREG;
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Plaintiff HARLOW, DENISE;
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09/17/2020 Attorney-Retained-Entered
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Created: 09/18/2020 2:00 PM

09/18/2020
Other Filing-Opposing Memorandum-Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 09/18/2020 2:41 PM

09/22/2020
Other Filing-Reply Memorandum-Filed
Party: Defendant CENTRAL MAINE POWER
Created: 09/23/2020 3:28 PM

09/22/2020
Other Filing-Reply Memorandum-Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 09/23/2020 3:28 PM

10/01/2020
Other Filing-Reply Memorandum-Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 10/01/2020 2:04 PM

10/01/2020
Other Filing-Reply Memorandum-Filed
Party: Defendant CENTRAL MAINE POWER
Created: 10/02/2020 8:34 AM

10/21/2020 Hearing-Other Hearing-Scheduled (Judicial Officer: Murphy, M. Michaela)
Created: 10/02/2020 12:57 PM

10/21/2020 Hearing-Other Hearing-Held (Judicial Officer: Murphy, M. Michaela)
Created: 10/22/2020 10:25 AM

10/21/2020 **Other Hearing** (Judicial Officer: Murphy, M. Michaela)
Resource: Location Legacy Hearing Location
Created: 01/01/0001 12:00 AM

10/22/2020 Order-Conference Report & Order-Entered (Judicial Officer: Murphy, M. Michaela)
Created: 10/22/2020 10:26 AM

10/29/2020 Note-Other Case Note-Entered
Created: 11/06/2020 12:55 PM

10/30/2020 Order-Court Order-Entered (Judicial Officer: Murphy, M. Michaela)
Created: 10/30/2020 3:12 PM

10/30/2020 Motion-Motion To Dismiss-Denied (Judicial Officer: Murphy, M. Michaela)

Case Summary

Case No. BCD-CV-2020-00029

Party: Defendant CENTRAL MAINE POWER
Created: 10/30/2020 3:12 PM

11/05/2020 Other Filing-Transcript Order Form-Filed
Party: Defendant CENTRAL MAINE POWER
Created: 11/06/2020 2:44 PM

11/06/2020 Other Filing-Transcript Order Form-Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 11/06/2020 2:46 PM

11/06/2020 Other Filing-Transcript Order Form-Sent To Reporter/ER (Judicial Officer: Young, Danielle)
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 11/06/2020 2:47 PM

11/06/2020 Other Filing-Transcript Order Form-Sent To Reporter/ER (Judicial Officer: Young, Danielle)
Party: Defendant CENTRAL MAINE POWER
Created: 11/06/2020 2:45 PM

11/12/2020 Other Filing - Transcript - Filed
Created: 11/19/2020 11:21 AM

11/20/2020
Other Filing - Other Document - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 11/24/2020 9:19 AM

11/30/2020
Motion - Motion To Clarify - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 12/02/2020 1:08 PM

12/04/2020
Responsive Pleading - Response - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 12/04/2020 4:07 PM

12/04/2020
Responsive Pleading - Response - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 12/08/2020 2:06 PM

12/09/2020
Other Filing - Memorandum of Law - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 12/10/2020 9:19 AM

Case Summary

Case No. BCD-CV-2020-00029

12/09/2020
Other Filing - Memorandum of Law - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 12/10/2020 9:20 AM

12/09/2020
Responsive Pleading - Objection - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 12/10/2020 9:22 AM

12/21/2020 Granted (Judicial Officer: Murphy, M. Michaela)
Created: 01/06/2021 9:50 AM

12/21/2020 Granted (Judicial Officer: Murphy, M. Michaela)
Created: 01/06/2021 9:51 AM

12/21/2020
Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 12/21/2020 1:02 PM

12/21/2020
Denied in Part (Judicial Officer: Murphy, M. Michaela)
Created: 12/21/2020 1:39 PM

12/21/2020 Denied in Part (Judicial Officer: Murphy, M. Michaela)
Created: 12/21/2020 1:43 PM

12/21/2020
Granted (Judicial Officer: Murphy, M. Michaela)
Created: 05/05/2021 1:59 PM

12/29/2020
Order - Hearing/Conference Record - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 12/29/2020 1:01 PM

12/29/2020 **Pretrial/Status**
Created: 01/01/0001 12:00 AM

01/07/2021
Other Filing - Proposed Order - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;

Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 01/08/2021 12:04 PM

01/07/2021
Motion - Other Motion - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 01/08/2021 9:19 AM

01/15/2021
Responsive Pleading - Opposing Memorandum - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 01/15/2021 6:26 PM

01/15/2021
Responsive Pleading - Opposing Memorandum - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 01/15/2021 6:36 PM

01/19/2021
Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 01/19/2021 8:54 AM

01/19/2021
Motion - Motion to Substitute Parties - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 01/19/2021 3:08 PM

01/22/2021
Responsive Pleading - Answer to Amended Pleading - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 01/22/2021 3:51 PM

01/27/2021
Order - Hearing/Conference Record - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 01/28/2021 8:16 AM

01/27/2021 **Pretrial/Status**

Case Summary

Case No. BCD-CV-2020-00029

Created: 01/01/0001 12:00 AM

01/29/2021
Other Filing - Memorandum of Law - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 01/29/2021 4:27 PM

01/29/2021
Other Filing - Memorandum of Law - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 01/29/2021 4:27 PM

01/29/2021
Other Filing - Memorandum of Law - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 01/29/2021 5:16 PM

02/05/2021
Other Filing - Memorandum of Law - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 02/05/2021 4:38 PM

02/05/2021
Other Filing - Memorandum of Law - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 02/05/2021 4:39 PM

02/05/2021
Responsive Pleading - Reply Memorandum - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;

Case Summary

Case No. BCD-CV-2020-00029

Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 02/08/2021 8:32 AM

02/10/2021
Responsive Pleading - Answer & Affirmative Defense - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 02/10/2021 5:10 PM

02/12/2021 **Oral Argument Hearing**
Created: 01/01/0001 12:00 AM

02/16/2021
Other Filing - Transcript & Audio Order Form - Filed
Party: Plaintiff BLACK, RUSSELL
Created: 03/09/2021 12:49 PM

02/22/2021
Granted in Part (Judicial Officer: Murphy, M. Michaela)
Created: 02/22/2021 1:56 PM

02/22/2021
Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 02/22/2021 2:02 PM

03/05/2021
Other Filing - Transcript - Filed
Created: 03/09/2021 12:53 PM

03/17/2021
Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 03/17/2021 3:36 PM

03/24/2021 **Case Management Conference**
Created: 01/01/0001 12:00 AM

04/02/2021
Other Filing - Notice of Withdrawal of Counsel - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 04/02/2021 1:52 PM

04/02/2021
Letter - From Party - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 04/05/2021 8:21 AM

04/02/2021
Letter - From Party - Filed
Party: Defendant CENTRAL MAINE POWER

Case Summary

Case No. BCD-CV-2020-00029

Created: 04/05/2021 8:21 AM

04/02/2021
Letter - From Party - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET
Created: 04/05/2021 8:22 AM

04/09/2021
Order - Hearing/Conference Record - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 04/09/2021 10:33 AM

04/09/2021 **Case Management Conference**
Created: 01/01/0001 12:00 AM

04/12/2021
Responsive Pleading - Objection - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 04/13/2021 8:29 AM

04/14/2021
Responsive Pleading - Response - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 04/15/2021 7:53 AM

04/14/2021
Other Filing - Stipulation - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 04/15/2021 7:53 AM

04/14/2021
Other Filing - Other Document - Filed
Party: Plaintiff ACKLEY, KENT;

Case Summary

Case No. BCD-CV-2020-00029

Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 04/15/2021 7:56 AM

04/16/2021
Responsive Pleading - Opposing Memorandum - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 04/16/2021 2:47 PM

04/16/2021
Responsive Pleading - Objection - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 04/16/2021 2:47 PM

04/21/2021
Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 04/21/2021 10:33 AM

05/04/2021
Appeal - Notice of Appeal to Law Court - Filed $175
Party: Defendant CENTRAL MAINE POWER
Created: 05/04/2021 12:07 PM

05/05/2021 Appeal - Notice of Appeal - Sent to Law Court
Created: 05/05/2021 2:07 PM

05/11/2021 Appeal - Notice of Appeal - Sent to Law Court
Created: 05/11/2021 3:03 PM

05/11/2021
Appeal - Notice of Appeal to Law Court - Filed $175
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 05/11/2021 2:58 PM

05/21/2021
Appeal - Record on Appeal - Due in Law Court
Created: 05/21/2021 3:10 PM

06/04/2021 Appeal - Record on Appeal - Sent to Law Court
Created: 06/04/2021 8:04 AM

06/04/2021 *CANCELED* **Oral Argument Hearing** (Judicial Officer: Murphy, M. Michaela)
Continued
Created: 01/01/0001 12:00 AM

06/08/2021
Appeal - Mandate/Order - Filed
Created: 06/08/2021 2:57 PM

06/08/2021 Appeal - Record on Appeal - Received from Law Court
Created: 06/08/2021 2:58 PM

Case Summary

Case No. BCD-CV-2020-00029

06/09/2021 **Case Management Conference**
Created: 01/01/0001 12:00 AM

06/09/2021
Other Filing - Proposed Order - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 06/09/2021 2:10 PM

06/10/2021
Order - Scheduling Order - Entered (Judicial Officer: Duddy, Michael)
Created: 06/11/2021 9:27 AM

06/16/2021
Motion - Other Motion - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 06/16/2021 11:37 AM

06/16/2021
Motion - Motion to Dismiss - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 06/16/2021 3:01 PM

06/16/2021
Motion - Motion for Judgment as a Matter of Law - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 06/16/2021 3:59 PM

Case Summary

Case No. BCD-CV-2020-00029

06/16/2021
Other Filing - Other Document - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 06/16/2021 4:05 PM

06/16/2021
Other Filing - Other Document - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 06/17/2021 8:23 AM

06/16/2021
Motion - Motion for Judgment as a Matter of Law - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;

Case Summary

Case No. BCD-CV-2020-00029

Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 06/17/2021 8:24 AM

06/18/2021
Granted (Judicial Officer: Murphy, M. Michaela)
Created: 06/18/2021 1:06 PM

06/18/2021
Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
Created: 06/18/2021 1:07 PM

07/02/2021
Brief - Brief - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 07/02/2021 2:15 PM

07/02/2021
Responsive Pleading - Opposing Memorandum - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 07/02/2021 3:31 PM

07/02/2021
Responsive Pleading - Opposing Memorandum - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 07/02/2021 3:32 PM

07/02/2021
Brief - Brief - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 07/06/2021 8:28 AM

07/02/2021
Responsive Pleading - Opposing Memorandum - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 07/06/2021 8:57 AM

07/12/2021
Responsive Pleading - Reply Memorandum - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 07/12/2021 3:10 PM

07/12/2021
Responsive Pleading - Reply Memorandum - Filed

Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 07/13/2021 10:17 AM

07/12/2021
Responsive Pleading - Reply Memorandum - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 07/13/2021 10:19 AM

07/12/2021
Responsive Pleading - Reply Memorandum - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 07/13/2021 10:21 AM

07/15/2021
Other Filing - Stipulation - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 07/16/2021 9:12 AM

07/16/2021
Oral Argument Hearing
Created: 01/01/0001 12:00 AM

07/23/2021
Letter - From Party - Filed
Party: Defendant CENTRAL MAINE POWER
Created: 07/23/2021 9:46 AM

Case Summary

Case No. BCD-CV-2020-00029

07/23/2021
Letter - From Party - Filed
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 07/23/2021 3:42 PM

07/26/2021
Letter - From Party - Filed
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 07/26/2021 1:54 PM

07/29/2021
Other Filing - Transcript - Filed
Created: 07/29/2021 8:06 AM

08/10/2021
Granted (Judicial Officer: Murphy, M. Michaela)
Created: 08/10/2021 1:38 PM

08/10/2021
Denied (Judicial Officer: Murphy, M. Michaela)
Created: 08/10/2021 1:39 PM

08/10/2021
Denied (Judicial Officer: Murphy, M. Michaela)
Created: 08/10/2021 1:58 PM

08/10/2021
Court Judgment (Judicial Officer: Murphy, M. Michaela)
Judgment
Ordered: 08/10/2021
Comment: DECISION AND ORDER. (14 M.R.S.A. 5953 & M.R. Civ. P. 80C) . As to the Declaratory Judgment claim in Count I, the Court grants Plaintiffs' Motion for Judgment, and has issued a declaration on the rights and obligations of the parties above, for the reasons stated. The Court denies Director Cutko and BPL's Motion to Dismiss Count I and CMP's Motion for Judgment on Count I. As to Count II's claim for Injunctive Relief, the Court finds that this form of relief was not pursued in the merits briefing or oral argument and is therefore waived. As to Plaintiffs' Appeal of Final Agency Action in Count III, the Court finds no competent evidence to support BPL's claim that it made theconstitutionally-required finding of no "reduction" and/or no "substantial alteration" before itentered into the 2020 lease with CMP. Director Cutko therefore exceeded his authority, and his decision is therefore reversed. This Decision and Order may be noted This Decision and Order may be noted on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure. Parties noticed 8/10/2021
Created: 08/10/2021 1:36 PM

08/13/2021
Appeal - Notice of Appeal to Law Court - Filed $175
Party: Defendant BUREAU OF PARKS AND LANDS STATE OF ME;
Defendant CUTKO DIR PARKS AND LANDS, ANDY
Created: 08/13/2021 3:36 PM

Case Summary

Case No. BCD-CV-2020-00029

08/13/2021
Appeal - Notice of Appeal to Law Court - Filed $175
Party: Defendant CENTRAL MAINE POWER
Created: 08/13/2021 3:38 PM

08/16/2021 Appeal - Notice of Appeal - Sent to Law Court
Created: 08/16/2021 10:36 AM

08/18/2021
Appeal - Record on Appeal - Due in Law Court
Created: 08/20/2021 2:48 PM

08/20/2021
Appeal - Notice of Appeal to Law Court - Filed $175
Party: Plaintiff ACKLEY, KENT;
Plaintiff BENNETT, RICHARD A;
Plaintiff BERRY, SETH;
Plaintiff BLACK, RUSSELL;
Plaintiff BUZZELL, EDWIN;
Plaintiff CARUSO, GREG;
Plaintiff CUMMINGS, CHARLENE;
Plaintiff GRIGNON, CHAD;
Plaintiff HARLOW, DENISE;
Plaintiff HAYNES O/B/O OLD CANADA RD, ROBERT;
Plaintiff JOHNSON, CATHY;
Plaintiff JOSEPH, RON;
Plaintiff NATURAL RESOURCES COUNCIL OF MAINE;
Plaintiff NICHOLAS, JOHN R Jr.;
Plaintiff O'NEIL, MARGARET;
Plaintiff PLUECKER, WILLIAM;
Plaintiff SAVIELLO, THOMAS B;
Plaintiff SMITH, GEORGE;
Plaintiff STEVENS, CLIFFORD;
Plaintiff TOWLE, TODD
Created: 08/20/2021 1:11 PM

09/02/2021
Other Filing - Transcript & Audio Order Form - Filed
Created: 09/02/2021 3:28 PM

09/03/2021 Sent to ER/Reporter
Created: 09/03/2021 7:56 AM

09/17/2021 Appeal - Notice of Appeal - Sent to Law Court
Created: 09/17/2021 2:50 PM

Financial Information

	Defendant CENTRAL MAINE POWER			
	Total Financial Assessment			575.00
	Total Payments and Credits			575.00
	Balance Due as of 10/6/2021			**0.00**
08/28/2020	Transaction Assessment			25.00
08/28/2020	Transaction Assessment			200.00
08/28/2020	Payment	Receipt # BCDWB-20200828-0001	PIERCE ATWOOD	(25.00)
08/28/2020	Payment	Receipt # BCDWB-20200828-0002	PIERCE ATWOOD	(200.00)
05/04/2021	Transaction Assessment			175.00
05/04/2021	Business Court E-File Payment Type	Receipt # 2021-00017583		(175.00)
08/13/2021	Transaction Assessment			175.00
08/13/2021	Business Court E-File Payment Type	Receipt # 2021-00034894		(175.00)

Case Summary

Case No. BCD-CV-2020-00029

	Plaintiff BLACK, RUSSELL		
	Total Financial Assessment		175.00
	Total Payments and Credits		175.00
	Balance Due as of 10/6/2021		**0.00**
08/26/2020	Transaction Assessment		0.00
08/26/2020	Transaction Assessment		0.00
08/20/2021	Transaction Assessment		175.00
08/20/2021	Business Court E-File Payment		(175.00)
	Type	Receipt # 2021-00036021	

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-2020-29

RUSSELL BLACK, *et al.*,)
)
Plaintiffs,)
)
v.) **DECISION AND ORDER**
) **(14 M.R.S.A. § 5953 & M.R. Civ. P. 80C)**
)
ANDY CUTKO, *et al.*,)
Defendants.)

In 1993 the people of Maine decided that their public lands were worthy of constitutional protection. Through their ratification of Article IX, Section 23 of the Maine Constitution, designated public lands cannot be "reduced" or their "uses substantially altered" unless two thirds of both houses of the Maine Legislature agree to any such change. The central question presented in this case is whether certain decisions made in 2014 and 2020 by the Bureau of Public Lands ("BPL"), the Executive Branch agency that holds title to the lands for the benefit of all Maine people, complied with this unique and consequential Amendment.

In analyzing this question, a number of significant issues of first impression have been identified by the Court and the parties. The Court therefore encouraged the parties at various stages of this litigation to agree to a Report of at least some of those questions directly to the Law Court pursuant to Rule 24 of the Maine Rules of Appellate Procedure. However, the parties could not agree on a Stipulated Record which would permit the Court to make such a report under Rule 24(a), and BPL decided not to move for such a Report under Rule 24(c) after the Court ruled against it on a potentially dispositive issue.

Plaintiffs in this action challenge BPL's 2014 and 2020 decisions to lease to Central Maine Power Company ("CMP") [1] portions of two parcels of public reserved land to construct part of the New England Clean Energy Connect transmission corridor. The lands at issue are located in the Upper Kennebec Region, specifically in West Forks Plantation and Johnson Mountain Township.

Pending before the Court are the parties' respective motions for judgment on Plaintiffs' Declaratory Judgment claim and Plaintiffs' Rule 80C appeal. Both have been fully briefed and are now before the Court for decision. Plaintiffs are represented by Attorneys James Kilbreth, David Kallin, Adam Cote, and Jeana McCormick. Defendants Andy Cutko and BPL are represented by Assistant Attorneys General Lauren Parker and Scott Boak. Defendants CMP and NECEC Transmission, LLC are represented by Attorneys Nolan Reichl and Matthew Altieri.

BACKGROUND

Maine's historical practices regarding its management of public land provide context to the issues presented. A more detailed discussion of that history is outlined in the Court's orders dated December 21, 2020 and March 17, 2021 and are incorporated by reference, but is summarized briefly as follows. After acquiring approximately 7 million acres from Massachusetts upon statehood, Maine sold or gave away all but 400,000 acres of this land, mostly prior to 1890. The remaining 400,000 acres of public land were reserved in each of Maine's unorganized townships as approximately 1000 acre lots. Over the years, the State leased

[1] CMP assigned the 2020 lease to NECEC Transmission, LLC in early 2021. NECEC Transmission was joined as a defendant in this case. The Court will refer to them collectively as CMP for the sake of consistency with prior orders in the case.

these public reserved lands at virtually no cost to camp owners, paper companies, and timber companies. In the early 1970s, a reporter published a series of articles in the Portland Press Herald that called attention to Maine's historical management practices and alleged abuses of the public lot leasing program.

In the years that followed, various legal and political efforts were undertaken to preserve the public reserved lands and to ensure their availability for the public's use for generations to come. The culmination of these efforts, legally speaking, was the 1993 Amendment to the Maine Constitution, *see* Me. Const. art. IX, § 23. The Amendment states as follows: "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House." *Id.* The legislation implementing the Amendment designated "public reserve lands" for this constitutional protection, and the West Forks Plantation and Johnson Mountain Township parcels fall within this category. 12 M.R.S.A. §§ 598-B(2-A)(D), 1801(8).

In addition, the Legislature declared when enacting 12 M.R.S.A. Section 1846(1) in 1997 as follows: "[I]t is the policy of the State to keep the public reserved lands as a *public trust* and that full and free public access to the public reserved lands to the extent permitted by law, together with the right to reasonable use of those lands, is the privilege of every citizen of the State." *Id.* (emphasis added).

In the summer of 2014, CMP approached the Governor's Office about its proposed transmission line project and its interest in crossing the West Forks Plantation and Johnson Mountain Township public lots. R. III0001. BPL and CMP proceeded to negotiate a lease agreement. During this process, AAG Lauren Parker, David Rodrigues (BPL's Director of Real

Property Management and former Senior Planner), and several others provided input and comments on the various lease drafts, with Mr. Rodrigues at one point inquiring: "Didn't we get a determination from the [Attorney General's] office that a lease is a contract and the legislature should not be able to break an existing contract?" R. III0053.

The lease was ultimately signed on December 15, 2014 ("the 2014 lease"). Under the agreement, BPL agreed to lease to CMP a "three hundred (300) foot wide by approximately one mile long transmission line corridor" (consisting of roughly 33 acres) located on the West Forks and Johnson Mountain public lots. R. I0035–36. The lease specified an initial term of 25 years and established the annual rent at $1400, to be adjusted by an appraisal. [2] *Id.* BPL did not provide notice to the Legislature or to the public of its intentions to enter into the lease; it did not seek or obtain 2/3 legislative approval of the lease; it did not make any contemporaneous written findings as to why it was not seeking legislative approval; and the lease did not come to light until—depending on the version of subsequent events believed by different parties—months or years after it was executed.[3]

Additionally, CMP did not obtain a Certificate of Public Convenience and Necessity ("CPCN") from the Public Utilities Commission ("PUC") prior to entering into the 2014 lease as required by law. *See* 35-A M.R.S.A. § 3132(13). Rather, the CPCN process commenced after the

[2] On June 22, 2015, the lease was amended to increase the annual lease payment from $1400 to $3680. R. I0061.

[3] The 2014 lease was briefly mentioned in BPL's annual report to the Legislature's Joint Standing Committee on Agriculture, Conservation, and Forestry, dated March 1, 2016. Specifically, BPL noted: "During 2015 the Bureau saw increased requests for new powerline corridor leases across its lands, reflecting continued interest in wind generation for supplying more 'green' energy to the demand centers in southern New England." R. VII0158. "One lease completed in FY 2015 involves a 300-foot corridor 4,700 feet in length crossing two small public lots in the Forks area." *Id.*

lease was executed, with CMP applying for a CPCN in September 2017. Pls.' R. Add. 30. The PUC ultimately issued a CPCN in May 2019. R. I0002.

During the timeframe in which the CPCN process took place, an issue arose regarding a potential CMP utility line lease that would traverse Cold Stream Forest—a different parcel of public reserved lands. The then-sitting director of BPL asked AAG Parker for an opinion on the prospective lease, inquiring "whether [BPL] … must obtain 2/3 legislative approval, pursuant to either 12 M.R.S.A. § 598-A [] or 5 M.R.S.A. § 6209(6) [], to lease to Central Maine Power Company (CMP) for a transmission line public reserved lands that were acquired with proceeds from the Land for Maine's Future (LMF) Fund." Pls.' R. Add. 1.

In a memorandum response dated July 25, 2018, AAG Parker explained that "12 M.R.S.A § 598-A [the Designated Lands Act] applies, not 5 M.R.S.A. § 6209(6)" and that the proposed transmission line is "measured against the Bureau's multiple use mandate for public reserved lands and its management objectives for Cold Stream Forest, and not against the purposes of the LMF program." *Id.* at 1, 4, 7. She further advised that "the Bureau needs 2/3 legislative approval to lease part of Cold Stream Forest for a transmission line if a transmission line will 'substantially alter' Cold Stream Forest." *Id.* at 6. Thus, AAG Parker concluded that "the Bureau may enter into a valid transmission line lease with CMP if such a lease will not 'substantially alter' the public reserved lands at issue" (*id.* at 1, 7), i.e., the "transmission line will not alter the physical characteristics of Cold Stream Forest in a way that frustrates the purposes for which the Bureau holds Cold Stream Forest." *Id.* at 4 (citing 12 M.R.S.A. §§ 598(5), 598-A). On the "substantial alteration issue," AAG Parker explained that there "is no question that a transmission line will alter the physical characteristics of Cold Stream Forest," and identified various factors for BPL to evaluate in deciding whether the proposed lease would

effectuate a "substantial alteration" of that land. *Id.* at 6–7. The record therefore reveals that by late July 2018, BPL seemed to recognize that it was required to conduct a "substantial alteration" analysis pursuant to the Maine Constitution and Maine statute before it entered into a transmission line lease of public reserved lands.

Meanwhile, BPL's management planning process for public reserved lands in the upper Kennebec region (including the Johnson Mountain and West Forks lots) was underway. That process commenced in 2016 and completed on June 25, 2019 with BPL's adoption of the Upper Kennebec Region Management Plan. There is only a brief mention in the plan acknowledging a "new 300-foot wide by mile-long transmission line lease … executed with CMP in December 2014." R. II0093.

In December 2019, Senator Black and several co-sponsors initiated legislation (L.D. 1893) pertaining to the 2014 lease. Pls.' R. Add. at 120–22. As introduced, L.D. 1893 required that any lease of public reserved lands under 12 M.R.S.A. Section 1852 be at reasonable market value and be approved by a supermajority of the Legislature pursuant to Article IX, Section 23. Subsequent committee amendments added new language that directed BPL to terminate the lease and declared that the project would substantially alter the West Forks/Johnson Mountain public reserved lands. Pls.' R. Add. at 123–25. A public hearing on L.D. 1893 took place on January 21, 2020.

As L.D. 1893 worked its way through the legislative process, AAG Parker attended a work session held by the Committee on Agriculture, Conservation, and Forestry ("ACF committee") and answered the committee's questions about her 2018 memorandum regarding the Cold Stream Forest public reserved lands. In an email sent on March 3, 2020, Representative Kinney followed up with AAG Parker, asking her to weigh in on the validity of the 2014 lease

and to address two issues: (1) "whether the planned transmission corridor w[ould] 'substantially alter' designated public reserved lands and whether there should have been a vote of two-thirds of the Legislature per the Constitution of Maine" and (2) whether "the [2014] lease [was] valid since CMP did not receive a [CPCN] from the Public Utilities Commission prior to entering the lease agreement with the State."

The following day (March 4, 2020), AAG Parker responded to Representative Kinney. She informed Representative Kinney that prior to entering into the 2014 lease, BPL did not ask the Office of Attorney General ("OAG")—and the OAG did not opine—whether the lease would substantially alter the West Forks/Johnson Mountain parcels. However, she stated that BPL's current view was that it did not need to have obtained 2/3 legislative approval of the 2014 CMP lease because it did not regard the 2014 lease as substantially altering the public reserved lands at issue. AAG Parker informed Representative Kinney that she had since advised BPL that their position was "legally defensible." As to the second issue, AAG Parker explained that BPL considered the lease valid despite it predating the CPCN—a position that she said also was "legally defensible based, at a minimum, on a harmless error standard." AAG Parker acknowledged, however, that only a court could finally determine whether BPL's positions and interpretations were correct. The Parker-Kinney email exchange was forwarded to Defendant Cutko, and several others on March 4th and 5th, 2020. [4]

[4] The Court discussed this email with counsel in chambers the day of oral argument. The initial concern was that this email exchange had just surfaced as part of a very prolonged Freedom of Access process. As part of this colloquy, AAG Parker clarified that she was unaware a new lease was under negotiation at the time of her conversation with Representative Kinney in early March 2020 as that was being handled by outside counsel. She also clarified that while the OAG had consulted with BPL on the 2014 lease, their advice was limited to technical lease requirements, and not the issue of "substantial alteration."

The ACF committee unanimously voted that L.D. 1893 "ought to pass." The full Legislature, however, did not consider the bill because it adjourned on March 17, 2020 due to the COVID-19 pandemic.[5]

On March 25, 2020, attorneys for CMP circulated an email enclosing a draft of a "new BPL lease related to NECEC." R. IV0122. Ultimately, CMP and BPL entered into a new lease ("the 2020 lease"), with CMP signing the document on June 15, 2020 and BPL signing it on June 23, 2020. The 2020 lease—captioned "Amended and Restated Transmission Line Lease"[6]—states that it supersedes and terminates the 2014 lease; it slightly clarifies the acreage involved; it contemplates a new annual rent of $65,000; and it authorizes a transfer of the lease from CMP to NECEC Transmission. R. I0001–12. Otherwise, the 2020 and 2014 agreements are largely similar and lease to CMP a 300-foot-wide corridor on the West Forks and Johnson Mountain public reserved lands.

[5] Additionally, in 2021, Senator Black introduced L.D. 471, which would require that transmission line projects on public reserved lands be approved by a supermajority of the Legislature and states that the construction of transmission lines constitutes a substantial alteration under Article IX, Section 23. Moreover, it would make these amendments retroactive to September 16, 2014 (it appears that L.D. 471 was carried over to a subsequent session). Similar legislation is the subject of a citizen's ballot initiative, which was certified by the Maine Secretary of State in February 2021. The Governor issued a proclamation requiring that a referendum on the initiated bill be submitted to the voters on November 2, 2021. *Caiazzo v. Secretary of State*, 2021 ME 42, ¶ 5, – A.3d –.

[6] As part of an effort to explain the change in the lease's title, outside counsel for BPL stated in an email:

> With input from Andy Cutko, we've characterized this as an "Amended and Restated Lease," and added a provision … that specifies this Amended and Restated Lease expressly supersedes the 2014 Lease. (As opposed to just signing a new Lease and signing a separate agreement to terminate the 2014 Lease.) Idea is to help show that this 2020 Lease does nothing to "substantially alter" the leased premises now, while still providing a new lease agreement that is being executed after the 2019 CPCN.

R. V0117.

As was the case with the 2014 lease, BPL did not provide notice to the Legislature or the public before signing the lease, and it did not seek or obtain 2/3 legislative approval of the 2020 lease. Nor did it make any contemporaneous written findings as to why it did not seek such approval.

Procedural History

On June 23, 2020—the day the 2020 lease was executed —Plaintiffs filed a Complaint challenging the 2014 lease.[7] At some point after the lawsuit was filed, AAG Parker informed Plaintiffs that CMP and BPL had entered into a new lease. So, on July 17, 2020, Plaintiffs amended their complaint to challenge both the 2014 and 2020 leases. The Amended Complaint alleges, among other things, that the execution of the leases was *ultra vires*, asserting that BPL did not obtain approval of the leases by a supermajority of the Legislature as required by Article IX, Section 23 of the Maine Constitution and that the 2014 lease was signed before the issuance of a CPCN. It alleged three counts: Declaratory Judgment (Count I), Injunctive Relief (Count II), and, in the alternative, Review of Final Agency Action under the Maine Administrative Procedures Act ("MAPA") and Rule 80C of the Maine Rules of Civil Procedure (Count III).

BPL and CMP subsequently moved to dismiss the Declaratory Judgment and Injunctive Relief counts, arguing that the action should proceed only as an administrative appeal under Rule 80C and MAPA.[8] BPL filed the administrative record while these motions were pending and the Court invited supplemental briefing thereafter. On December 21, 2020, the Court denied BPL

[7] The day after Plaintiffs filed their lawsuit, outside counsel for BPL circulated an email indicating that the lawsuit had been filed, but "[f]ortuitously the State had already signed the new lease." Pls.' R. Add. 303.

[8] CMP also raised a standing-based challenge which Director Cutko did not join. The Court issued a decision regarding CMP's standing argument on October 30, 2020 and concluded that at least some of the named Plaintiffs have standing.

and CMP's motions and permitted the case to proceed in Count I as a declaratory judgment action (with some limitations) and as a Rule 80C action in Count III.[9]

Following briefing by the parties, the Court next addressed a legal issue that was potentially dispositive of the case: Whether leases of public reserved lands issued pursuant to 12 M.R.S.A. Section 1852(4) are exempt from Article IX, Section 23. In an order dated March 17, 2021, the Court concluded that leases under Section 1852(4) are not categorically exempt from the application of this constitutional provision or 12 M.R.S.A. §§ 598–598-B. The Court also concluded that the Legislature had entrusted to BPL the obligation of making a determination in the first instance regarding whether a proposed action on public reserved land would reduce or substantially alter the uses for which the State holds that land in trust for the public. The Court first concluded that the language in both the Constitution and enabling statute is clear. Second, the people of Maine through the Amendment retracted authority previously delegated to the Executive Branch by the Legislature. Third, the Legislature's unique constitutional prerogative to have final say over how public lands are used in certain instances cannot be effectuated—and could be undermined or thwarted—unless BPL determines at the outset whether a proposed use of designated public lands results in a "substantial alteration" as defined by the Legislature; and importantly, that these steps must take place publicly, and before any lease is executed.

After deciding these legal questions, various record-related issues remained unresolved, so the Court addressed the scope of the record in an order dated April 21, 2021. The Record was compiled over the course of several months, in part because Plaintiffs have made a broad Freedom of Access request and the materials have been provided by BPL in different batches,

[9] The Court concluded that Plaintiffs' claim for injunctive relief under Count II was remedial and potentially duplicative and thus deferred ruling on it until after the Court decided Plaintiffs' claim under Rule 80C.

and were actually still being provided during final briefing on the merits. In the April 21, 2021 order, the Court struck from the administrative record a September 2020 BPL-prepared memorandum—authored after both leases were signed and while this case was under active litigation—on the grounds that it was an impermissible post-hoc justification of the actions it had taken with respect to the 2014 and 2020 leases. Additionally, the Court ruled on various proposed modifications and corrections to the record and reiterated the proper scope of the Declaratory Judgment count.

Subsequently, CMP and BPL appealed the Court's orders, but the Law Court dismissed the appeals as untimely and/or interlocutory. Briefing on the merits of the Rule 80C claim followed, and all parties moved for judgment on Plaintiffs' Declaratory Judgment claim. The Court held oral argument in this matter on July 16, 2021.

DISCUSSION

A. Count I—Declaratory Judgment

14 M.R.S.A. Section 5953 provides this Court with jurisdiction to "declare rights, status and other legal relations" between the parties. While Defendants have argued that no declaratory judgment can be issued by the Court as to the 2014 lease, and that the Court only has jurisdiction over the 2020 lease pursuant to MAPA, the Court previously rejected these arguments, but limited the scope of what Plaintiffs could argue in this Count. Specifically, the Court ruled that Plaintiffs could assert as part of their Declaratory Judgment action that BPL's decision to enter into the leases was *ultra vires* and could argue, among other things, that BPL failed to provide as to either lease any meaningful, public administrative process prior to executing the leases.[10]

[10] Plaintiffs also argue that BPL lacked authority to enter into the leases because the 2014 lease was executed prior to the issuance of a CPCN and legislative approval of the leases was constitutionally

As noted previously, the Court has concluded that BPL must make a determination as to whether a proposed use of public lands would reduce or substantially alter the uses of those lands and must do so *before* the use is "substantially altered." This is not just a regulatory or statutory requirement. It is required by the plain language of Article IX, Section 23's mandate that a supermajority of the Legislature must approve reductions and substantial alterations to the uses of designated lands. Furthermore, the applicable statutory framework—which entrusts BPL with the care and management of public reserved lands and provides BPL with a statutory definition of "substantial alteration" —confirms the Court's interpretation on this point. As the Court has noted on prior occasions, it is difficult to understand what the definition is otherwise for. Its existence can only legally be understood as comprising part of the post-Amendment delegation of authority to BPL by the Maine Legislature.

Having summarized its prior legal conclusions, the Court turns to the arguments made in the parties' merits briefing regarding both leases in order to address the "rights, status and other legal relations" of the parties. 14 M.R.S.A. § 5953. More specifically, the Court will be focusing on what the Maine Constitution and the enabling statutes required BPL to do and decide before entering into these leases. The Court will first have to address the issue of mootness raised by the Defendants.

1. Plaintiffs' challenge to the 2014 lease is justiciable.

Plaintiffs' Declaratory Judgment claim as it pertains to the 2014 lease is not moot, or alternatively, it is amenable to at least one of the mootness exceptions. Defendants argue that BPL and CMP's execution of the 2020 lease terminated the 2014 lease and thus mooted all of

required as a matter of law. The Court need not address these contentions in light of its disposition of this Count below.

Plaintiffs' claims as to the 2014 lease. They say that the 2020 lease—not the 2014 lease—governs the contractual relationship between BPL and CMP and defines their legal rights with respect to the leased property.

The Court nevertheless concludes that sufficient practical effects flow from the resolution of Plaintiffs' issues surrounding the 2014 lease to justify a decision by the Court. *Campaign for Sensible Transp. v. Me. Tpk. Auth*., 658 A.2d 213, 215 (Me. 1995) (explaining that "[t]he test for mootness is whether 'sufficient practical effects [flow] from the resolution of [the] litigation to justify the application of limited judicial resources.'"). As Plaintiffs point out, the 2014 lease was the predicate for the 2020 lease and the two leases are inextricably linked such that the Court's legal rulings on the 2014 lease affect its rulings on the 2020 lease.

BPL, for instance, relies upon its pre-2014 lease conduct to support its contention that it made the constitutionally required substantial alteration decision before entering into the 2014 lease. It then uses the actions in 2014 as a basis for asserting that it made the requisite constitutional determination prior to entering into the 2020 lease. Similarly, BPL and CMP further argue that the pre-2020 lease management plan process, during which the already-executed 2014 lease was mentioned, constituted a public process sufficient to satisfy the requirements of Maine law. The Court's evaluation of such an argument must take into account the adequacy of the process associated with the 2014 lease. The issues surrounding the 2014 and 2020 leases simply cannot be disentangled.

In any event, Plaintiffs' challenge to the 2014 lease may be considered because the "public interest" and "capable of repetition but evading review" exceptions to the mootness doctrine apply. *A.I. v. State*, 2020 ME 6, ¶ 9, 223 A.3d 910 (setting forth the exceptions to the mootness doctrine). First, with respect to the public interest exception, a court may consider an

issue despite its mootness if it involves "questions of great public concern that, in the interest of providing future guidance to the bar and public [the Court] may address." *Id.* "In deciding whether an issue meets the public interest exception, [courts] consider the following criteria: 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 in the future." *Mainers for Fair Bear Hunting v. Dep't of Inland Fisheries & Wildlife*, 2016 ME 57, ¶ 8, 136 A.3d 714, 717 (internal quotation marks omitted).

The Court is satisfied that the public interest exception is applicable here. The questions surrounding the 2014 lease are plainly public in nature and address BPL's authority to lease land that is held in trust for the public. The two referenda related to the Corridor, along with public proceedings challenging the project in multiple forums, reveal that the public's interest in the lease is strong and ongoing. Moreover, the 2014 lease involves various issues of first impression for which authoritative guidance is needed by the agency and the courts. While BPL asserts that the Court can provide this guidance through its adjudication of the 2020 lease, the issues surrounding the 2014 and 2020 leases do not fully overlap. For instance, unlike the 2020 lease, the 2014 lease did not become public in time for Plaintiffs to seek judicial review under Rule 80C, raising an important question about BPL's leasing process, i.e., whether BPL was obligated to make its determinations public so that Plaintiffs could seek judicial review. As far as the record reveals, BPL has yet to adopt any recognizable administrative process that would enable judicial review of BPL's leasing-related decisions, which suggests that the issue is likely to arise again and authoritative guidance would be useful.

Second, the Court finds that the issues surrounding the 2014 lease fall under the mootness exception for issues that "are capable of repetition but evade review because of their

fleeting or indeterminate nature." *A.I.*, 2020 ME 6, ¶ 9, 223 A.3d 910. BPL, under two different administrations, has taken positions that convince the Court that the issues related to the 2014 lease will recur. BPL has also asserted alternative—and sometimes inconsistent—arguments. BPL has at times asserted that it was not required to make a reduction/substantial alteration determination before either lease was executed. It has also asserted that it actually did make such a determination which could simply be "inferred" by the execution of the leases and/or by the existence of a management plan that was finalized in 2019. It has asserted that the determination did not need to be memorialized in writing or be made public before the leases were signed. Additionally, it has asserted that utility leases are categorically exempt from the requirements of Article IX, Section 23 and that the passage of the Amendment did not affect BPL's ability to convey 25-year leases for transmission lines and a whole host of other projects including pipelines and landing strips. And BPL asserted that it has no obligation to keep the public or Legislature informed of its decisions on a timeline that would make judicial review possible, although AAG Parker did inform Plaintiffs' counsel of the existence of the 2020 lease after the fact, and after they had filed this litigation on June 23, 2020. BPL's position on the latter particularly underscores how the issues associated with the 2014 lease tend to evade review: if BPL's leasing decisions are not transparently made or publicly declared until after the expiration of the period for filing a rule 80C appeal, the opportunities for judicial review diminish. Moreover, as noted, there are issues unique to the 2014 lease that the Court's adjudication of the 2020 lease would not encompass. Accordingly, the Court is not persuaded that the "capable of repetition but evading review" exception is inapplicable under these circumstances.

Thus, the Court concludes that the 2014 lease is justiciable and addresses it as part of Plaintiffs' Declaratory Judgment claim.

2. BPL must apply the definitions set forth in 12 M.R.S.A. Section 598 when deciding whether a proposed lease reduces or substantially alters the uses of the public reserved lands at issue.

Again, the starting point for the Court's discussion must be Article IX, Section 23 of the Maine Constitution:

> State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

Me. Const. art. IX, § 23.

The Legislature in 12 M.R.S.A. Sections 598–598-B enacted implementing legislation to give effect to this constitutional provision. As relevant here, the Legislature defined the term "reduced" to mean "a reduction in the acreage of an individual parcel or lot of designated land under section 598-A." 12 M.R.S.A. § 598(4). Meanwhile, "substantially altered" means "changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State." 12 M.R.S.A. § 598(5).

As the Court explained in its March 17, 2021 order, the statutory definition of "substantial alteration" involves two aspects: whether the use significantly alters the land's physical characteristics, and whether the alterations "frustrate" the essential purposes for which the land is held. As to the later, "the essential purposes for which [] land is held by the State" can be found in both the Maine Constitution and in the definition provided by the Legislature.

It must be underscored that Article IX, Section 23 directly speaks to the matter of "essential purposes." The Amendment applies by its terms to lands "[1] *held by the State for conservation or recreation purposes* and [2] designated by legislation implementing this section." Me. Const. art. IX, § 23 (emphasis added). Without question then, the Maine

Constitution establishes that conservation and/or recreation are as a fundamental matter the "essential purposes" for which the land in question is held by the State.

The Legislature also has defined the essential purposes of public reserved lands: "The essential purposes of public reserved and non-reserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S.A. § 598(5). While "multiple use" is defined in other provisions, the Legislature has specifically defined "essential proposes" with reference to the "multiple use objectives" set forth in 12 M.R.S.A. Section 1847. Specifically, subsection 1847(1) states:

> **1. Purpose**. The Legislature declares that it is in the public interest and for the general benefit of the people of this State . . . that the public reserved lands be managed under the principles of multiple use [1] to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning and that the public reserved lands be managed [2] to demonstrate exemplary land management practices, including silvicultural, wildlife and recreation management practices, as a demonstration of state policies governing management of forested and related types of lands.

12 M.R.S.A. § 1847(1).

Given these legislative definitions of "reduction" and "substantial alteration," it is clear to the Court that BPL must make the reduction/substantial alteration determination contemplated in Article IX, Section 23 by applying those statutory definitions set forth by the Legislature. BPL argues that its "management plans" are a sufficient substitute for these statutory definitions but the Court is not persuaded. BPL's execution of a management plan is not a substitute for application of definitions legislatively mandated. In addition, the Court would note that there was no management plan in effect when the 2014 lease was issued. Thus, the management plan process could not possibly have been the basis for any finding that the 2014 lease did not reduce or substantially alter the public reserved lands at issue.

Moreover, with respect to the 2020 lease, the management plan finalized in June of 2019—which makes no mention of the statutory definitions of reduction or substantial alteration—did not relieve BPL of its obligation to make the reduction and substantial alteration determination in accordance with the statute. The analysis associated with the management plan is fundamentally different from the analysis BPL must undertake when applying the statutory definition. For instance, the dominant and secondary uses that BPL assigns to the land in its management plan are not the same "uses" against which the statute measures "substantial alteration." The agency-assigned dominant and secondary uses are not objectives in themselves, *see* 12 M.R.S.A. §§ 598(5), 1847(1), although arguably they could be said to represent part of BPL's plan to meet its objectives. A lease under 12 M.R.S.A. Section 1852(4), although perhaps consistent with BPL's plan, could nevertheless frustrate the essential purposes for which the land is held by the State. Additionally, the management plans are by definition geared toward "management." The statutory definition, however, requires BPL to look beyond its management objectives and analyze whether the proposed lease frustrates the *protection* and *improvement* of the property for the multiple use objectives established in Section 1847(1). 12 M.R.S.A. § 598(5).

The Court therefore concludes that BPL must make the determination required by Article IX, Section 23 by applying the specific statutory definitions set forth in 12 M.R.S.A. Section 598. BPL has no authority to ignore or re-write a statute of the Legislature, particularly one with such a clear constitutional foundation.

3. The reduction/substantial alteration determination must be made public and be made as part of a public administrative process before BPL decides to enter the lease and before it conveys any property interest in the public lands.

Before it decides to enter and before it executes a lease under 12 M.R.S. Section 1852(4), the Court has found that BPL must make a reduction/substantial alteration determination. The

Court has also concluded that the Maine Constitution requires that any such determination must be made pursuant to a public administrative process.

It is axiomatic in Maine that administrative processes must be public processes, unless the Legislature provides otherwise. Neither Defendant seems to contest this basic premise, nor have they pointed to any legislative exemption made for BPL to do otherwise. And given the subject matter at issue here —constitutionally protected public lands — the need for transparency and public process is heightened. Indeed, the West Forks and Johnson Mountain public reserved lands are not just public lands, they are *public trust* lands. 12 M.R.S.A. § 1846(1).

While the traditional notion of the public trust has generally included sovereign waters and submerged lands, the Legislature has recognized that public reserved lands are natural resources valuable enough to be held in trust for the public's continued access and reasonable use. *See id.* Moreover, the Legislature has assigned BPL the important role of trustee of those lands, providing in Section 1847 that "title, possession and the responsibility for the management of the public reserved lands be vested and established in the bureau acting on behalf of the people of the State." 12 M.R.S.A. § 1847(1).

These provisions make clear that BPL as public trustee is ultimately accountable to the citizens of Maine. Thus, as one court put it in a similar context, a public trustee "as the primary guardian of public rights under the trust, must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process." *In re Wai'ola O Moloka'i, Inc.,* 83 P.3d 664, 693 (Haw. 2004) (quotation marks omitted). "[T]he state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority

these rights command." *Id.*; *see also Kootenai Envtl. All. v. Panhandle Yacht Club*, 671 P.2d 1085, 1091 (Idaho 1983) ("public trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon" (emphasis original)). BPL's reduction/substantial alteration decision—which ultimately may determine whether public trust lands are leased to private entities for uses like setting power lines, building landing strips, or pipelines—is the type of critical decision that BPL must make openly and through an administrative process that reflects the public's important interests under the trust. BPL's duty as trustee to act on the people's behalf requires no less.

Additionally, the process-related requirements set forth above arise by implication from Article IX, Section 23. Defendants challenge the notion that there is a constitutional basis for requiring any additional public process. In doing so, they focus their argument on the federal Due Process Clause, maintaining that Plaintiffs lack any constitutionally cognizable property interest in the public reserved lands at issue. However, it is not a federal right that is at issue here, but one that arises from our State Constitution. Article IX, Section 23 does not require satisfaction of the traditional procedural due process test. Rather, Article IX, Section 23 provides a separate source for mandating additional procedural protections[11] and the Court has concluded

[11] The Massachusetts Constitution contains a relatively similar provision, which provides in part that:

> [T]he protection of the people in their right to the conservation, development and utilization of agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> …
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

Mass. Const. amend. art. 97. Additionally, the notion that the state cannot transfer land from one public use to another in the absence of explicit legislative authority appears to have roots in Massachusetts

that a public administrative process consistent with the requirements of the Maine Administrative Procedures Act is constitutionally required. *And see,* 5 M.R.S.A. § 9051-A(1)–(2).

4. BPL's public reduction/substantial alteration determination must be done in such a way as to permit the Legislature to carry out its duty under Article IX, Section 23 and to permit judicial review.

Any reduction/substantial alteration determination must be made under circumstances that allow the Legislature to exercise its constitutional prerogative to have the final say in cases where a reduction or substantial alteration is found. Not only does this mean that BPL's determination must be public, as described above, but it also means as noted previously that the determination must be announced before BPL executes a lease that would cause a substantial alteration.

Additionally, the public determination must be issued so as to allow any citizen of Maine (including legislators with standing) to obtain judicial review of decisions in which no reduction or substantial alteration is found. Indeed, the availability of judicial review safeguards the Legislature's constitutional role. Only through judicial review can members of the public remedy mistaken reduction/substantial alteration determinations regarding proposed projects that, but for

common law. *Smith v. City of Westfield*, 82 N.E.3d 390, 399–401 (Mass. 2017); *Mahajan v. Dep't of Envtl. Prot.*, 984 N.E.2d 821, 830–31 (Mass. 2013); *Op. of Justices to Senate*, 424 N.E.2d 1092, 1100 (Mass. 1981); *Gould v. Greylock Reservation Com.*, 215 N.E.2d 114, 121 (Mass. 1966).

BPL's mistakes, should have been sent to the Legislature for a vote as required by the Constitution.

Widely available judicial review also fits within the very notions of a public trust:

> Judicial review of public trust dispensions complements the concept of a public trust. . . . The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager. Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

In re Wai'ola O Moloka'i, 83 P.3d at 684-85 (citations and internal quotation marks omitted).

Thus, judicial review in this context safeguards the Legislature's constitutional role as well as the public trust itself.

5. ***If the requirements set forth above are not fulfilled, Article IX, Section 23 would effectively be a nullity and the Legislature's constitutional prerogative—in addition to the public trust—would be thwarted or undermined.***

The Court has concluded that if the above-described public procedures are not required, Article IX, Section 23 would be hollow and the Legislature's ability to discharge its constitutional duty would be undermined or thwarted.

Similarly, the above requirements are necessary to protect the legislatively-created public trust against actions that may undermine it. Not only do these requirements guard against improvident dispositions of public trust lands, they also encourage transparency and accountability to the people of Maine, the ultimate beneficiaries of the trust. Furthermore, they make sure that any reductions or substantial alterations to public trust lands are attributable to the decisions of the Legislature which is what this unique Amendment requires.

Thus, in light of these constitutional and statutory requirements, the Court concludes and declares the rights of the parties as follows as to both the 2014 and 2020 leases. In order to have

authority to execute a lease of these public trust lands, the BPL Director who signed the lease was required prior to deciding to enter into the lease and prior to executing it, to provide a public administrative process, and make a public, pre-execution determination as to whether the lease would result in a reduction or substantial alteration of the uses of the public land. BPL was also required to use the definitions of reduction/substantial alteration established by the Legislature. In addition, the decision had to have been made in such a way that permitted any member of the public or a legislator with standing to be able to exercise their rights to judicial review of the decision.

Remedies for Count I

Based upon the legal arguments made by the parties as to both leases in Count I, the Court has concluded that Plaintiffs are correct as to what BPL is required to decide and steps it must take before its Director had the legal and constitutional authority to enter into these leases. That declaration, however, will be the only remedy provided on Count I for the following reasons.

First, with respect to the 2014 lease, the Defendants have stated at various times in this litigation, that the lease is no longer in effect. This was of course part of their argument as to why they claim Count I is moot, but as noted above, that is not the only factor the Court must consider in a mootness analysis. However, their concession that the 2014 lease is effectively void does affect the remedy that the Court should consider on this Count. Under these circumstances, the only remedy provided will be the declaration above as to what the parties' rights and obligations were as to that lease.

With respect to the 2020 lease, Plaintiffs were able to timely file an appeal under the Maine Administrative Procedure Act in Count III as an alternative to the Declaratory Judgment

claim in Count I. Given the Court's analysis below as to merits of that claim, as well as the remedy provided, the only remedy as to the 2020 lease will be the declaration made above. The Court concludes that any other remedy would be duplicative of the remedy provided on Count III.

B. Count III—Review of Final Agency Action

Plaintiffs have filed a Rule 80C appeal challenging BPL's decision to enter into and execute the 2020 lease. While both Defendants have consistently argued that the Court lacks authority to review the 2014 lease pursuant to a Declaratory Judgment, but did concede the Court has authority to review the 2020 lease pursuant to the Maine Administrative Procedure Act.

As part of their administrative appeal, Plaintiffs allege that (1) there is no competent evidence in the record to show that BPL made the requisite findings and determination regarding whether the lease reduces or substantially alters the uses of the public lands at issue; (2) there is no competent evidence supporting BPL's contention that the lease does not substantially alter the subject lands; and (3) BPL lacked authority to enter into the leases without 2/3 legislative approval as required by 12 M.R.S.A. Section 598-A and Article IX, Section 23. The Court addresses Plaintiffs' Rule 80C challenge below.

As noted above, the Court's consideration of Plaintiffs' Rule 80C appeal is informed by the constitutional and statutory arguments made by the parties with respect to the Declaratory Judgment claim in Count I. The Court now incorporates by reference the legal conclusions made as the starting point for its analysis on Count III. *See supra* discussion of Count I. Accordingly, the legal conclusions made and legal analysis conducted under the Declaratory Judgment claim above apply with equal force with respect to the 2020 lease for purposes of Plaintiffs' Rule 80C appeal.

As noted previously, BPL took the position, at least at some point during this litigation, that leases such as the ones at issue here are categorically exempt from the requirements of Article IX, Section 23, and thus the agency was not obligated to make a "reduction" or "substantial alteration" determination. The Court rejected that contention in its March 17, 2021 Order. Now, in its merits brief, BPL argues that it actually did consider the substantial alteration issue and determined that the 2020 lease would not substantially alter the uses of these public trust lands.

The Court has reviewed the extensive administrative record. Based upon this review, the Court can find no competent evidence supporting BPL's assertion that it made the requisite public, pre-execution findings that the 2020 lease would not reduce or substantially alter the uses of the lands. Both Defendants ask the Court to "infer" that BPL made these determinations, pointing to BPL's actions in 2014 as well as the management plan process, but the record does not support these assertions.

In 2014, BPL conducted what it terms a "resource-based analysis." Specifically, it conducted a site visit of the subject property, considered the impact of the proposed route on a stream and its trout population and negotiated with CMP to reroute the proposed corridor to avoid a stream crossing. However, none of this constitutes competent evidence from which the Court can infer that the requisite determination was made. A "resource-based analysis" is not the standard called for in Article IX, Section 23 and in 12 M.R.S.A. Section 598. Neither the record nor the briefing discloses whether this "resource-based analysis" was parallel to the constitutional and statutory standards such that they could be considered "coextensive" as BPL asserts. Consideration by BPL of some degree of environmental impact does not permit such an inference. The Constitution demands answers to different questions: namely, would the project

result in a reduction or substantial alteration of the uses of these public trust lands? And it further requires, for reasons set out above, that a public process for answering these questions be employed by BPL before the lease is executed. While judicial review of the 2020 lease was made possible given AAG Parker's belated disclosure of the lease, there is no competent evidence in the record to support any assertion that BPL—prior to deciding to enter into the lease and prior to executing the lease—made the requisite finding as to whether the 2020 lease would reduce or substantially alter the uses of the subject lands, and certainly not one using the controlling statutory definitions.

Defendants largely rely upon the management plan finalized in 2019 to support their assertion that the proper determination was made. But as discussed previously, designing and implementing a management plan is not the same as making a public, pre-lease determination that the lease would not frustrate the essential purposes as articulated in the Maine Constitution and as defined by the Maine Legislature.

In the absence of any such competent evidence that these constitutional and statutory requirements were fulfilled, the Court concludes that BPL Director Cutko lacked authority to enter into the 2020 lease.

Because the Court has determined that BPL lacked authority to enter into the 2020 lease, the Court will not consider the other arguments made by Plaintiffs as to this lease.

Remedies for Count III

Plaintiffs have throughout this litigation asked that this Court make the determination of whether the leases in question constitute a "reduction" or "substantial alteration" of these public trust lands, and they still seek this as part of the remedy requested. The Court has consistently declined to act as the fact-finder in this case, as it does not believe that is what the Legislature

intended when it enacted the enabling legislation that not only delegated management authority to BPL, but also gave the agency definitions to apply in making these important determinations.

Plaintiffs have also pointed to certain actions taken within the last two years by the Legislature which without question express a desire on the part of a significant number of its members to deem this project to be a substantial alteration in uses. The Plaintiffs seem to suggest that these actions or expressions by the Legislature support their position that the Court should also find that a "substantial alteration" will occur if the construction on the public lands goes forward. However, the Court agrees with the Defendants on this point generally, and specifically with respect to a recent Proclamation of the Maine Legislature issued on July 19, 2021. The Court has no authority to consider these actions as they did not effectively change the law that is in effect now. The Court's job is to do its best to construe laws after they are finally enacted either by the Legislature and approved by the Governor; or enacted by the people of Maine.

As the multiple and difficult issues of first impression presented in this matter have been litigated and decided, the proper role of the Superior Court and the doctrine of separation of powers have loomed large. However, what has been clear to the Court since the beginning of this case is this: after the people of Maine ratified Article IX Section 23, the Maine Legislature entrusted the management of this public trust to BPL, and it provided BPL with definitions to use when deciding in the first instance whether a "reduction" or "substantial alteration" in use might occur with respect to these lands.

The Court has now concluded that there is no competent evidence in the record to support BPL's assertion that it made these determinations, and that Director Cutko therefore lacked authority to enter into the 2020 lease. The next issue is what remedy the Court has the authority to provide under these circumstances.

For their part, Defendants argue that should the Court find that no competent evidence supports its assertions, the Court should simply remand the case to BPL to make the determinations now, but that it should not vacate the lease. The Defendants argue that vacating the lease will cause disruption to other litigation in which they are involved and to their construction plans on the public lands. Plaintiffs argue that if the Director had no authority to sign the lease it must be vacated. Importantly, the parties cannot agree on what kind of a public process is required if the Court were to simply remand. Again, there is an apparent dearth of cases in Maine addressing what remedies are appropriate under such circumstances, and the parties have once again directed the Court to federal law.

The Court has reviewed the cases proffered by the parties and finds the cases cited by Plaintiffs to be the most applicable, as they provide guidance regarding what courts should do when agencies bypass fundamental procedural steps in reaching an ultimate decision. *See Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers,* 985 F.3d 1032, 1051–54 (D.C. Cir. 2021). This is not a situation where an agency failed to take an important step in a public administrative process. In this case, BPL provided no public administrative process at all prior to deciding to enter into the 2020 lease. Article IX, Section 23 and the Maine Legislature's designation of these lands as public trust lands make these shortcomings very fundamental. The Court therefore declines to order remand without vacatur as requested. BPL exceeded its authority when it entered into the 2020 lease with CMP, and BPL's decision to do so is reversed.

To be clear, the Court has not changed its mind about the need for BPL to be the forum where the determinations of "reduction" or "substantial alteration" are to be made in the first instance. Unless and until a different law is finally enacted which changes this current

delegation to the agency—which could still perhaps occur depending on the final outcome of the November 2021 referendum—those determinations must be made by BPL.

At the same time, the Court is not permitted as a matter of separation of powers to create such a process for the agency; it can only find, as it has, that a public process was required given this unique Constitutional Amendment and the enabling statute enacted by the Legislature. A "simple remand" would be anything but simple. No recognizable process currently exists and the parties could spend many months litigating in multiple forums how much process is required. The Court is convinced a remand under these circumstances would create its own "disruption."

There is one issue upon which the parties agree, and that is that this Decision and Order will be followed by appeals and cross appeals. The legal and constitutional questions presented by this case can therefore be presented to the Law Court for resolution, as it sees fit, before BPL can know what is or is not legally required of it both as to law and to process, should the case be remanded to it once the appeals are concluded.

CONCLUSION

The entry will be: As to the Declaratory Judgment claim in Count I, the Court grants Plaintiffs' Motion for Judgment, and has issued a declaration on the rights and obligations of the parties above, for the reasons stated. The Court denies Director Cutko and BPL's Motion to Dismiss Count I and CMP's Motion for Judgment on Count I. As to Count II's claim for Injunctive Relief, the Court finds that this form of relief was not pursued in the merits briefing or oral argument and is therefore waived. As to Plaintiffs' Appeal of Final Agency Action in Count III, the Court finds no competent evidence to support BPL's claim that it made the constitutionally-required finding of no "reduction" and/or no "substantial alteration" before it

entered into the 2020 lease with CMP. Director Cutko therefore exceeded his authority, and his decision is therefore reversed.

This Decision and Order may be noted on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

8/10/2021

DATE

SUPERIOR COURT JUSTICE

Entered on the docket: 08/10/2021

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-2020-29

RUSSELL BLACK, *et al.*,

Plaintiffs,

v.

ANDY CUTKO, *et al.*

Defendants.

ORDER REGARDING THE DECLARATORY JUDGMENT RECORD AND 80C RECORD

Plaintiffs in this action challenge the Bureau of Parks and Lands' ("BPL") 2014 and 2020 decisions to lease to Central Maine Power Company[1] ("CMP") portions of two parcels of public reserved land in Somerset County to construct part of the New England Clean Energy Connect transmission corridor. The Court has issued a number of procedural and substantive orders in this case. This Order determines the factual record upon which the Court will rely for purposes of the Rule 80C appeal and addresses the Plaintiffs' request for development of a factual record in the Declaratory Judgment count. Before addressing those issues, a brief review of how the case has reached this point is in order.

On December 21, 2020, the Court denied motions to dismiss filed by BPL and CMP and permitted this case to proceed in Count I as a declaratory judgment action (with some limitations) and as a Rule 80C action in Count III. At the direction of the Court, Plaintiffs filed an all-encompassing motion regarding the state of the record on January 7, 2021. In that motion Plaintiffs sought to strike from the record as an impermissible post hoc justification a September 24, 2020 memo to the "Public Lands Lease Files" authored by BPL Director Andy Cutko and Director of

[1] CMP assigned the 2020 lease to NECEC Transmission LLC in early 2021. NECEC Transmission was joined as a defendant in this case. The Court will refer to them collectively as CMP for the sake of consistency with prior orders in the case.

Real Property Management David Rodrigues. Plaintiffs also sought to add additional documents to the record. BPL and CMP each opposed Plaintiffs' motion on January 15, 2021. The Court viewed an issue highlighted by BPL in its opposition as potentially dispositive of the case and ordered the parties to brief that legal issue.[2]

On March 17, 2021, the Court issued an order on that legal question. It concluded that leases pursuant to 12 M.R.S. § 1852(4) were not categorically exempt from application of Article IX, Section 23 of the Maine Constitution and 12 M.R.S. §§ 598-598-B. The Court also concluded that the Legislature had entrusted to BPL the obligation of making a determination in the first instance whether a proposed action on public reserved land would reduce or substantially alter the uses for which the State holds that public reserved land in trust for the public. That decision was grounded in two conclusions. First, the Court concluded that the language in the Constitution and enabling statute is clear. Second, and no less important, the Legislature's unique constitutional prerogative to have final say over how public lands are used in certain instances does not and cannot be effectuated unless a decision is made – one way or the other – by BPL as to whether a proposed use of designated public lands results in "substantial alteration" as defined by the Legislature.

Following that decision the Court held a conference with counsel on March 24, 2021, and ordered the parties to file by April 2, 2021, their positions supplementing arguments regarding the record and to restate proposed remedies. After reviewing those filings, the Court determined it was necessary to issue an order regarding the state of the record before proceeding to the next stage in this case. This prompted the Court to have another conference with the parties on April 9. Plaintiffs requested an opportunity to object to two documents BPL sought to add to the record as

[2] Deadlines regarding the record were stayed while the Court addressed the legal issue.

overlooked. Thus, the Court gave Plaintiffs until April 12 to file a brief objection, BPL and CMP until April 14 to respond to the brief objection, and Plaintiffs until April 14 to seek to add anything else to the record that might come across their radar by way of Freedom of Access Act responses from BPL in the interim. After consideration of all filings regarding the state of the record, the Court issues this order.

ANALYSIS

The Court will first address the issues for the record in the Rule 80C appeal and it will then address the issues for the record in the Declaratory Judgment count.

I. THE RULE 80C APPEAL RECORD

1. The issues in the Rule 80C appeal.

From the beginning of this case, BPL and CMP have argued that this is at most a Rule 80C appeal from a final agency action. They claim that the final agency actions are the two leases to CMP to use portions of public reserved land in Johnson Mountain Township and West Forks Plantation.[3] For purposes of ruling on the Rule 80C record, after considering the pleadings and arguments made to this point, the Court can identify four issues it will be asked to decide:[4]

- Whether there is competent evidence in the record to support BPL's contention that a determination regarding substantial alteration was made prior to entering into the leases;
- Whether there is competent evidence in the record to support BPL's contention that the leases to CMP of Johnson Mountain Township and West Forks Plantation do not

[3] Both BPL and CMP filed motions to dismiss as noted. The Bureau did not move for dismissal of the Rule 80C appeal, but CMP has maintained that Plaintiffs do not have standing.

[4] The Court does not intend to suggest that the parties cannot make arguments on issues other than those listed; the parties are certainly free to argue the issues as they see them. In addition, the Court's characterization of the issues does not discuss, for purposes of this Order, burdens of proof or the Court's standard of review. All of those issues can be fleshed out by the parties in merits briefing.

substantially alter the uses for which the State holds the land;

- Whether BPL entered into the leases without the necessary authority to do so; and
- Whether BPL's decisions to enter into the leases violated Article IX, Section 23 of the Maine Constitution.

The above issues will therefore be the starting point for consideration of the parties' arguments as to what should or should not be included in the record. *Cf. FPL Energy Hydro Maine, LLC v. Bd. of Envtl. Prot.*, No. AP-08-15, 2009 Me. Super. LEXIS 53, at *2 (Feb. 9, 2009) ("Although it is premature to delve into the merits of the 80C petition at this juncture, some discussion is necessary to understand the context of the proffered evidence to determine whether it should be added to the record."). Plaintiffs have sought to add information to the record they claim supports their contention that BPL never made a determination regarding substantial alteration. BPL has also sought to correct the record to add a few more documents relevant to the decisions to lease.

The parties seem to agree on one central fact: there exists no contemporaneous written decision or written findings of fact applying the standard of substantial alteration that predate BPL's decision to enter into a lease either in 2014 or 2020. Therefore, the Court will have to determine whether the record contains competent evidence that such a determination was nevertheless made, as BPL continues to insist. Thus, it is necessary for the record to include any information BPL relied on prior to its decision to enter into the leases in 2014 and/or 2020, any information that rebuts or contradicts BPL's assertions about the determination process, and any information that supports or contradicts BPL's assertions that it acted properly within its authority when it entered into the leases with CMP.

2. <u>The parties' positions regarding the Rule 80C record.</u>

Plaintiffs seek to exclude BPL's September 24, 2020 memo on the basis that it is an

impermissible post hoc justification for BPL's prior actions. They also seek to add twelve specific exhibits to the record and to provide additional testimony from various individuals (such as the testimony of Director Andy Cutko and David Rodrigues). The exhibits Plaintiffs seek to add include the following:

(1) Assistant Attorney General Lauren Parker's July 25, 2018 memorandum to the BPL Director.

(2) The April 24, 2020 Authorization for Outside Counsel regarding the authority of attorneys at Verrill to represent BPL.

(3) The Certificate of Public Convenience and Necessity ("CPCN") issued for the NECEC project.

(4) The May 2020 Department of Environmental Protection permit for the NECEC.

(5) L.D. 1893, titled "An Act To Require a Lease of Public Land To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes," and Amendment A thereto.

(6) A Bangor Hydro Memorandum of Intent dated March 24, 2005.

(7) Correspondence from the fall of 2019 between former Deputy Director Alan Stearns and Director Andy Cutko regarding the Bureau's former approach to legislative approval of leases.

(8) Testimony of BPL Director Andy Cutko and others, including David Rodrigues, both before the Legislature regarding the lease transactions, as well as Director Cutko's testimony as a private citizen before the Department of Environmental Protection regarding the NECEC (before he became the Director of BPL).

(9) The attachments to Plaintiffs' Complaint, including the press clippings and the

summaries of legislative resolves relating to conveyances of public lands.

(10) Legislative Resolves relating to leases and to matters Plaintiffs contend were much less significant in stature than CMP's proposed transmission line.

(11) The Legislature's request for documents and BPL's response thereto in connection with L.D. 1893.

(12) CMP's lease with the Passamaquoddy for lands for the Corridor.

Plaintiffs' April 2 letter seeks to add the following additional information to the record:[5]

(A) L.D. 471 in the current session, which proposes two amendments to 12 M.R.S § 1852(4) in response to BPL's arguments in this case.

(B) The testimony of Director Cutko in opposition to L.D. 471 on March 18, 2021 (available at https://www.youtube.com/watch?v=RbZB3pl-QAU start time 13:08, end time 33:50)

(C) A letter from the Agriculture, Conservation and Forestry ("ACF") Committee dated March 29, 2021, to the Commissioner of the Department of Agriculture, Conservation and Forestry and Director Cutko in response to the Director's testimony.

(D) A BPL-produced video regarding public reserved lands (available at https://www.youtube.com/watch?v=Im-uBEaTtEA).

Further, on April 14, Plaintiffs proposed to add six email chains to the record relating to the 2020 version of the lease. These email chains complete or provide context to email chains that already exist in the record filed by BPL in November 2020 and were just recently obtained – within the past two weeks or so – by Plaintiffs pursuant to a Freedom of Access Act request.

CMP contends the Court should not strike the September 24, 2020 memo from the record

[5] Plaintiffs identified the first set of exhibits with numbers in the January 7 filing and with letters in the April 2 filing. The Court is using the numbers and letters identified by Plaintiffs.

but, to the extent the Court does so, it should remand this matter to BPL to make a new decision concerning the substantial-alteration-of-use question. CMP also objects to Plaintiffs' proposed exhibits 1-3 and 5-11 being added into the record. Further, CMP contends the Court should not admit proposed exhibits 4 and 12 into the record but should remand to BPL for its determination if the Court finds these documents necessary for consideration; the Court should not admit into the record any of the proposed testimony Plaintiffs outline in their Motion but, to the extent the Court believes this testimony should be considered, the Court should remand the matter to BPL for consideration of it and a renewed decision; and the Court should not require Director Cutko or David Rodrigues to testify or be deposed, and should not hold a de novo hearing. Lastly, CMP objects to adding Director Cutko's March 18, 2021 testimony before the Legislature to the record.

BPL also takes the position that the Court should consider the September 24, 2020 memo as a permissible explication of what is already in the record. If the Court determines the memo is an impermissible post hoc justification, BPL contends the Court must remand the matter to BPL to make a new determination regarding substantial alteration after public notice; acceptance of public comments for fourteen days on the issue of substantial alteration; consider all such evidence received; prepare new written findings; and submit to this Court such material, including the 5 additional documents offered by BPL, as a supplement to the administrative record.[6] The 5 documents offered by BPL as corrections to the record pursuant to 5 M.R.S. § 11006(2) are as follows:

(a) The Bureau's 1985 Prescription Review and Multiple Use Coordination Report for the 1986-87 commercial timber harvest of the West Forks Plantation public reserved lands.

[6] While the parties' arguments regarding the record are tethered to the remedies they are seeking, the Court will as part of this Order provide a briefing schedule to enable them to make any arguments they wish which would include any remedy provided for under the Maine Administrative Procedure Act.

(b) The Bureau's March 2006 Prescription Review and Multiple Use Coordination Report with Harvest Map for the 2006-07 commercial timber harvest of the West Forks Plantation and Johnson Mountain Township public reserved lands.

(c) Bureau staff notes, dated August 14, 2014, related to CMP's request for a conveyance of a property interest over public reserved lands for an electric power transmission line.

(d) An internal marked-up copy of the 2014 lease dated September 22, 2014.

(e) A Department of Administrative and Financial Services, Bureau of General Services, Professional Service Pre-Qualification List identifying Dwyer Associates, which appraised the leased premises, as pre-qualified to provide property appraisal services for state agencies.

In response to BPL's attempted correction of the record, Plaintiffs objected to the two Prescription Review and Multiple Use Coordination Reports noted above on the basis that they "were not considered by the Bureau at the time it allegedly made a substantial alteration determination . . . ." (Pl.s' Obj. p. 2 (Apr. 12, 2021).)

As it pertains to Plaintiffs' proposed exhibits, BPL does not object to 1-3, 5-7, 8 (pages 201-243 only), and 9-11 from the January 7 filing. BPL does object to Plaintiffs' proposed exhibits 4, 8 (pages 1-200), 12, and the six proposed affidavits. In its April 2 filing, BPL stated that,

> [s]hould the Plaintiffs, through their contemporaneous letter to this Court, ask the Court to supplement the administrative record with materials in addition to those identified in Plaintiffs' motion, the Court should deny that request absent confirmation from the Bureau that the Bureau considered same. If, however, the Court determines that any such additional proposed documents are material to the issues on review, this Court should remand the matter to the Bureau pursuant to 5 M.R.S. § 11006(1)(B). Any proffered legislative materials would not trigger a remand because, regardless of whether the Bureau considered such, the parties are free to cite legislative materials for permissible purposes. *See Wawenock v. Dep't of Transp.*, 2018 ME 83, ¶¶ 13, 15, 187 A.3d 609.

3. The Court's rulings on the contents of the Rule 80C record.

Generally, "[j]udicial review shall be confined to the record upon which the agency decision was based . . . ." 5 M.R.S. § 11006(1). Only in certain limited circumstances can the reviewing court permit additions to the record. As relevant here those circumstances are "[i]n the case of the failure or refusal of an agency to act or of alleged irregularities in procedure before the agency which are not adequately revealed in the record, evidence thereon may be taken and determination made by the reviewing court"; "[i]n cases where an adjudicatory proceeding prior to final agency action was not required, and where effective judicial review is precluded by the absence of a reviewable administrative record, the court may either remand for such proceedings as are needed to prepare such a record or conduct a hearing de novo"; and when "[t]he reviewing court . . . require[s] or permit[s] subsequent corrections to the record." *Id.* § 11006(1)(A), (D), (2).

Plaintiffs have argued for the application of the first two for their proposed documentation and BPL has argued for application of the third for its proposed documentation. In addition to their contention that the Court can conduct a full evidentiary hearing because this is truly a declaratory judgment action, Plaintiffs have been insistent throughout that this Court may hold a de novo hearing under section 11006(1)(D) because there was no adjudicatory proceeding prior to BPL entering into the leases and effective judicial review is precluded by the absence of a reviewable administrative record. Both parties have referenced the adequacy of the administrative record at different junctures and for different reasons. However, there is a difference between having a reviewable record that can be meaningfully reviewed, and having a record that maximizes the chances of one party or the other prevailing on what might be in the record.[7] The Court

[7] In support of their arguments for the different remedies the parties seek, they have all – to varying degrees and at different junctures – asserted that there is no reviewable record before the Court. However, because BPL has insisted throughout this litigation that it did make a determination prior to both leases that neither

concludes there is a reviewable record here. The question presented then for purposes of the Rule 80C appeal is whether that record supports the final agency actions taken by BPL.

Plaintiffs' April 2 letter to the Court also contends, "Plaintiffs have made a prima facie showing of the Bureau's failure to act (i.e. make a substantial alteration determination) and of procedural irregularities." (Pl.s' Apr. 2 Ltr. p. 5.) The Law Court has only applied the "procedural irregularities" prong of section 11006(1)(A) in instances when "a showing of bad faith or improper behavior is strong enough to justify intrusion into the administrator's province." *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984). Plaintiffs have not really attempted to make a showing of bad faith or improper behavior, and the Court does not find that the Plaintiffs have made a sufficient showing of bad faith or improper behavior given the Law Court's language in *Cutler*. However, the Court does find that Plaintiffs have made a prima facie showing that BPL failed to act by not making a determination regarding substantial alteration prior to entering into the leases.

The Court emphasizes two points about this finding. First, the Court understands that this is not a prima facie showing of a *typical* failure of an administrative agency to act at all because there does seem to be final agency action here (the leases). However, as the Court held in its March 17, 2021 order, the unique constitutional and statutory structure applicable to public reserved lands requires a preliminary action prior to the final agency action. It is this preliminary action for which Plaintiffs have made a prima facie showing that BPL failed to take by way of their January 7, 2021 motion. And second, this is only a prima facie showing and is not a decision on the merits of the issue.

would result in substantial alteration of the public reserved lands at issue, and because BPL filed a voluminous record, the Court intends to review the record and adjudge the Rule 80C issues based upon it.

a. The September 24, 2020 memo.

The Court first addresses what has become a contentious issue in the case: the September 24, 2020 memo. This memo – authored more than 6 years after entering into the 2014 lease, 3 months after entering into the 2020 lease, and while this case was being actively litigated – contends as follows:

> [i]n reviewing the project in 2014, the Bureau made the following findings and determinations, although not reduced to writing, with respect to the 2014 Lease based on field observations and its consideration and interpretation of applicable statutes. In 2020, the Bureau confirmed and made again these same findings and determinations, although not reduced to writing, with respect to the 2020 Amended and Restated Lease . . . ."

(A.R. I0069.) The memo asserts, on one hand, that BPL believed it was not constitutionally and statutorily obligated to make a determination regarding whether entering into the leases of the public reserved land with CMP would result in a substantial alteration to the uses of the land. On the other hand, notwithstanding the fact that BPL believed it did not have to make any determination regarding substantial alteration, the memo contends that BPL actually *did* make such determinations in both 2014 and 2020, even though BPL has to concede that it did not contemporaneously document any aspects of such determinations either in late 2014 or early summer 2020.

This memo is highly peculiar in the realm of administrative action. It reads like a legal brief; it purports to document findings, determinations, and conclusions made but not contemporaneously reduced to writing not only once, but twice; and it even goes out of its way to identify two legislators who happen to be named plaintiffs in this case and who would have received annual reports from BPL in which the already-executed 2014 lease to CMP was noted in order to explain that BPL "understood and interpreted this to mean that no legislative approval . .

. was required." (A.R. I0069.) As the Court noted in the December 21, 2020 order on the motions to dismiss, the September 24, 2020 memo appears to be a post hoc justification of BPL's actions in 2014 and 2020.

BPL contends that post hoc rationalizations are permissible additions to administrative records, citing three D.C. Circuit Court cases. These D.C. Circuit Court cases stand for the following propositions:

> Courts "review an agency action based solely on the record compiled by the agency when issuing its decision, not on some new record made initially in the reviewing court. . . . [R]eviewing courts [are permitted] to rely on post hoc declarations in certain situations when the declarations have come from the relevant agency decisionmaker. . . . [Courts are] barred consideration of post hoc materials when they present an entirely new theory, or when the contemporaneous record discloses no basis for the agency determination whatsoever. [Courts] can permit consideration of post hoc materials when they illuminate the reasons that are already implicit in the internal materials.

Rhea Lana, Inc. v. Dep't of Labor, 925 F.3d 521, 524 (D.C. Cir. 2019) (alterations from original, citations, and quotation marks omitted); *cf. Maine v. Shalala*, 81 F. Supp. 2d 91, 94 (D. Me. 1999) ("[I]t is . . . a well-settled rule of law that the agency must have provided a valid basis for its action at the time the action was taken."). BPL cites *Rhea Lana* and contends the "memo is a fuller explanation of the Bureau's reasoning at the time it acted, and is rooted in the Bureau's record and legislative interactions . . . ." (BPL Opp. to Mot. re: Record p. 17 (Jan. 15, 2021).) However, in *Rhea Lana*, "the Declaration largely echoe[d] the rationale contained in the contemporaneous record." *Rhea Lana*, 925 F.3d at 524.

BPL has not pointed to – nor has the Court been able to find – anything in the record that expresses a contemporaneous rationale of the kind referred to in *Rhea Lana*, either in 2014 or 2020. More fundamentally, the Court is not aware of any Maine court that has permitted post hoc

justifications such as the September 24, 2020 memo; BPL has not cited one. BPL is essentially asking this Court to create new substantive law about the nature of permissible review by the Superior Court in reviewing agency actions, and the Court declines BPL's request to do so. The Court therefore strikes it from the administrative record. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___US___, 140 S. Ct. 1891, 1909 (2020) (alterations, citations, and quotation marks omitted) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target.").

b. The remainder of proposed modifications and corrections to the record.

As all parties seem to agree, legislative materials can be cited for permissible purposes as part of the merits briefing. CMP objects to Plaintiffs' use of Director Cutko's recent testimony before the Legislature, particularly Plaintiffs' unofficial transcript. However, Plaintiffs also linked to the video of that testimony, which would be the best evidence of it in any event. Therefore, because the parties can cite to the relevant legislative information as part of the merits briefing as it is and because it is clearly relevant to what is looming in the merits briefing, the Court permits the record to be supplemented with the legislative material proposed by Plaintiffs in the April 2 letter (Exhibits A-C). In addition, because the six email chains offered by Plaintiffs on April 14 simply complete email chains that already exist in the record filed by BPL or provide context for others, the Court accepts those as corrections to the record pursuant to section 11006(2).[8]

[8] BPL objected (and CMP joined the objection) to Exhibit 6 (an email string running from June 24-25, 2020) from the April 14 filing because

> [t]he Bureau's 2020 lease to CMP took effect on June 23, 2020, which is the date the Bureau executed the lease. (A.R. I0012.) No part of Plaintiffs' proposed Exhibit 6 existed at the time the Bureau executed the lease.

Further, although CMP objects to most of the proposed documents offered by Plaintiffs to be added to the record in the January 7 motion, BPL – the pertinent agency actor here – does not. The Court accepts BPL's position regarding the numbered exhibits. Therefore, Plaintiffs' proposed exhibits 1-3, 5-7, 8 (pages 201-243 only), and 9-11 from the January 7 filing are part of the record. The Court agrees with BPL that Exhibits 4 (the DEP permit that is not specifically limited to Johnson Mountain Township and West Forks Plantation and encompasses a different issue than that before BPL), pages 1-200 of Exhibit 8 (Andy Cutko's testimony before the DEP as a private citizen before he became Director of BPL as well as other transcribed testimony before the DEP), and Exhibit 12 (CMP's lease with the Passamaquoddy Tribe for a different portion of the corridor) are not proper for inclusion in the record. Additionally, the Court does not find Plaintiffs' proposed Exhibit D from Plaintiffs' April 2 letter to be appropriate for inclusion in the record. Because the Court is not modifying the record on the basis of section 11006(1)(D), and because Plaintiffs have not made a prima facie showing of "procedural irregularities" as the Law Court has defined that concept in the *Carl L. Cutler* case, the proposed affidavits and deposition testimony are not proper additions to the record.

Finally, though BPL offered them in the event the Court were to deny Plaintiffs' request to strike the September 24, 2020 memo, the Court nonetheless permits the correction of the record offered by BPL with the five documents listed in its April 2 filing, including the two Prescription

> Consequently, the Bureau could not have considered that email string with respect to the 2020 lease and did not consider that email string with respect to the 2020 lease.

(BPL Obj. pp. 1-2 (Apr. 16, 2021).) However, BPL itself included in its filing of the certified record a July 30-August 3, 2020 email chain – among a few other post-June 23 items – in which David Rodrigues emailed BPL's Western Region Lands Manager to ask if there were "any constructed recreational facilities on" West Forks Plantation and Johnson Mountain Township. (A.R. VIII0109.) BPL very clearly could not have considered such information with respect to the 2020 lease, yet it has asked the Court to include that information, nonetheless. The Court finds BPL's position on this issue to be without merit.

Review and Multiple Use Coordination Reports objected to by Plaintiffs. The harvests referenced by the two Prescription Review and Multiple Use Coordination Reports are discussed in the Upper Kennebec Region Management Plan that is already part of the record. (*E.g.*, A.R. II0093.)

4. Advancing to merits briefing on the Rule 80C appeal.

BPL and CMP contend that the Court must remand the matter to BPL should the Court admit any additional documents into the record or strike the September 24, 2020 memo. *See* 5 M.R.S. § 11006(1)(B). However, as the Court advised the parties in the last conference, no party should be expected to make meaningful arguments about the multiple issues presented in this appeal, including arguments about proposed remedies which could include remand, until that party knows what the administrative record contains. It is the intent of this Order to provide such notice to the parties.

II. THE DECLARATORY JUDGMENT RECORD

From the beginning of this litigation the Plaintiffs have insisted that the Court should develop the factual record not only in their Rule 80C appeal, but also because it has brought a Declaratory Judgment count which survived BPL and CMP's motions to dismiss it. As stated above, now that the parties have before them the administrative record, they are free to make any arguments they wish regarding what the Court should order in the Rule 80C appeal, including what if any remedies are appropriate under Maine law.

However, with respect to the Declaratory Judgment count, the Court limited the scope of that claim in its December 21, 2020 Order on Defendants' Motions to Dismiss Count 1 and 2. In that Order the Court concluded that, with respect to the 2014 lease, Plaintiffs should be permitted to argue that it is void for lack of a CPCN and, as to the constitutional claims it was making, whether a constitutional violation occurred before any administrative process was available to

them. In addition, with respect to both leases, the Court permitted the Plaintiffs to argue that, given the unique constitutional provision at issue, BPL was required to provide a meaningful administrative process to them but failed to do so. Further, the Court permitted the Plaintiffs to argue in the declaratory judgment portion that, as a matter of law, Legislative approval of both leases was constitutionally required.[9]

These arguments by the Plaintiffs, as understood by the Court, are legal arguments. The Court has concluded that these arguments can be decided based upon appropriate motions made by any party, and the briefing schedule below shall provide for such legal arguments.

The entry is:

1. The administrative record is modified and corrected as detailed in this order.
2. The Court establishes the following briefing schedule for merits briefing on the Rule 80C claim as well as on motion for judgment on the Declaratory Judgment claim:
    a. Plaintiffs shall file their merits brief on the Rule 80C claim and, if they wish, for judgment on the Declaratory Judgment claim by May 5, 2021. If BPL and/or CMP wish to file a motion for judgment on that claim they shall do so by May 5, 2021, as well.
    b. BPL and CMP shall file their respective opposing Rule 80C merits briefs and opposition to any motion brought by Plaintiffs regarding the Declaratory Judgment by May 19, 2021. Plaintiffs shall file their opposition to any motion for judgment on the Declaratory Judgment claim by that date as well.
    c. Plaintiffs shall file any reply merits brief on the Rule 80C claim by May 26, 2021. Any reply by any party to any motion brought for judgment on the Declaratory Judgment shall be filed on that date as well.
    d. Oral argument shall be held on June 4, 2021, by Zoom at 10:00 am. Clerk shall send notice to counsel of record.
3. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

[9] With respect to this last issue as framed by the Court, it is understood and expected that the parties will disagree as to whether such a constitutional claim is duplicative of any relief provided under the Maine Administrative Procedure Act (MAPA). However, should the Court conclude that BPL was required in 2014 to provide an administrative process as a matter of law but failed to do so, Plaintiffs would be unable to seek a remedy under MAPA but could be entitled to a remedy under the Maine Constitution given the unique constitutional relationships between BPL and the Maine Legislature at work in this case.

Dated: 4/21/2021

Hon. M. Michaela Murphy
Justice, Maine Superior Court

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-20-29

RUSSELL BLACK, *et al.*,

Plaintiffs,

v.

ANDY CUTKO, *et al.*

Defendants.

ORDER ON THE APPLICATION OF ART. IX, § 23 OF THE MAINE CONSTITUTION TO THE BUREAU OF PARKS AND LANDS' AUTHORITY TO LEASE PUBLIC RESERVED LOTS

Plaintiffs in this action challenge the Bureau of Parks and Lands' ("BPL") decision to enter into two leases[1] with Central Maine Power Company ("CMP") for two parcels of public reserved land in Somerset County in order to construct part of the New England Clean Energy Connect transmission corridor. After reviewing the parties' filings on Plaintiffs' Motion Regarding Record and Creation of a Factual Record, the Court discerned that the following legal issue raised by BPL[2] could be dispositive of this case: whether utility leases, pursuant to 12 M.R.S. § 1852(4), are exempt from Article IX, Section 23 of the Maine Constitution. The Court ordered the parties to brief this legal issue and held oral argument via Zoom on February 12, 2021.

After consideration of the parties' arguments on briefs and at hearing, the constitutional provision at issue, the legislation implementing that constitutional provision, and BPL's statutory leasing authority both prior to the constitutional amendment and after, the Court concludes that utility leases (including those for electric power transmission), pursuant to 12 M.R.S. § 1852(4), are not categorically exempt from application of Article IX, Section 23 of the Maine Constitution.

[1] The first lease was executed on December 15, 2014, while the "amended and restated" lease was executed on June 23, 2020.

[2] At the hearing the Court recalled CMP as the party highlighting the issue, but a review of the paperwork showed that it was BPL who first made this assertion.

BPL has been delegated the authority to manage public lands and it is also required to make a determination whether the leases result in a substantial alteration to the uses of the public land. If they do, the leases must be approved by the Maine Legislature by 2/3 vote of both chambers.

ANALYSIS

The starting point for this analysis must be the constitutional provision itself. Article IX, Section 23 of the Maine Constitution provides:

> State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

The key question presented here is how and to what extent this amendment affected the executive branch's authority over "State park land, public lots or other real estate held by the State for conservation or recreation purposes." To determine this, the Court must review what authority had been delegated to BPL by statute before the amendment, and how that authority may have changed after the Legislature and the people of Maine enacted and then ratified this amendment. The Court agrees with the parties that this case implicates the doctrine of separation of powers as provided in the Maine Constitution. The Court also agrees with the parties that it must be mindful about the limits of the authority of the three branches as they play out in this case.

Under Maine's doctrine of separation of powers, the source and extent of authority of the executive branch has been held to be similar to the source and extent of authority of the judicial branch; by comparison, the Legislative authority to legislate is often described as "absolute."

> The authority of the executive and judicial departments is a grant. These departments can exercise only the powers enumerated in and conferred upon them by the Constitution and such as are necessarily implied therefrom. The powers of the Legislature in matters of

> legislation, broadly speaking are absolute, except as restricted and limited by the Constitution. As to the executive, and judiciary, the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority.

Me. Equal Justice Partners v. Comm'r, 2018 ME 127, ¶ 40, 193 A.3d 796 (Alexander, J., dissenting) (quoting *Sawyer v. Gilmore*, 109 Me. 169, 180, 83 A. 673, 678 (1912)). The Legislature makes the laws of the State; the executive branch enforces those laws. Me. Const. art. IV, pt. 3, § 1; Me. Const. art. V, pt. 1, § 12. The Supreme Judicial Court and other courts established by the Legislature are vested with the judicial power. Me. Const. art. VI, § 1.

The parties seem to agree that, prior to the amendment, the Legislature broadly delegated authority to the executive branch to manage, sell, and lease public lands. Though the agent in charge may have been different or merged into another agency, and the location in the Maine Revised Statutes may have been different, the authority was created by statute as to what actions State agents could take with public reserved lands. Leasing for purposes of setting utility lines was one of those actions. *E.g.*, P.L. 1973, ch. 628, § 14 ("The Forest Commissioner may take the following action on the public reserved lands: . . . Lease the right, for a term of years not exceeding 25, to set poles and maintain utility lines . . . .").

While the pertinent State agent historically had robust authority over public reserved lands, it is important to note that the Legislature did make changes, some more substantive than others, over time. In 1987, the statutes setting out this delegation were relocated from title 30 to title 12. *See* P.L. 1987, ch. 737. At that time the Legislature also determined that it was in the best interest of the people of the State of Maine "that title, possession and the responsibility for the management of the public reserved lands . . . be vested and established in an agent of the State acting on behalf of all of the people of the State"; that the public reserved lands be "managed under the principles of multiple use to produce a sustained yield of products and services"; and that the public reserved

"lands be managed to demonstrate exemplary land management practices, including silvicultural wildlife and recreational management practices . . . ." *Id.* § 2, *codified at* 12 M.R.S. § 585(1).[3]

Remaining portions of section 585 figure prominently in the parties' statutory construction arguments.[4] Section 585(1), as quoted in the preceding sentence, explained the general purpose of the management of public reserved lands, which were to be managed under multiple-use principles. Then section 585(2) defined various terms for use in section 585, including "multiple use" (which the Court quotes in full in footnote 7, *infra*), "public reserved lands," and "sustained yield." Section 585(3) placed the "care, custody, control and responsibility for the management of the public reserved lands" in the hands of the commissioner of Conservation. It also made the commissioner responsible for "prepar[ing], revis[ing] from time to time and maintain[ing] a comprehensive management plan for the management of the public reserved lands . . . ." These plans were to "provide for a flexible and practical approach" to the management of the lands, and the commissioner was required to "compile and maintain an adequate inventory of the public reserved lands, including . . . the other multiple use values for which the public reserved lands are managed." Importantly, the management plans had to "provide for the demonstration of appropriate management practices [to] enhance the timber, wildlife, recreation, economic and other values of the lands."

Then, "[w]ithin the context of the comprehensive management plan, the commissioner, after adequate opportunity for public review and comment, [had to] adopt specific action plans for

[3] The statutes governing public reserved lands were located in title 12, part 2, chapter 202-B.

[4] The Court's quotations in following paragraphs are from the main volume of the 1994 publication of the Maine Revised Statutes Annotated, which did not yet include non-emergency laws from the second regular session of the 116th Legislature. The Designated Lands Act, P.L. 1993, ch. 639, which implemented the constitutional amendment at issue, was a non-emergency law from the second regular session of the 116th Legislature and became effective on July 14, 1994. Accordingly, these quotations detail the delegated authority as it existed immediately before implementation of the constitutional amendment.

each of the units of the public reserved lands system." These "action plan[s] [had to] include consideration of the related systems of silviculture and regeneration of forest resources and . . . provide for outdoor recreation, including remote, undeveloped areas, timber, watershed protection, wildlife and fish." Section 585 then proceeded in subsection 4 to describe the *actions* that the director of the (then) Bureau of Public Lands could take on the public reserved lands in the event the actions were "consistent with the management plans . . . ." Section 585(4) was where the provision permitting leasing of public reserved lands for electric power transmission was located (along with many other activities that were permitted before the amendment: setting and maintaining bridges and landing strips; laying and maintaining pipelines and railroad tracks; and, with the consent of the Governor, leasing mill privileges and other rights in land for industrial and commercial purposes, dam sites, dump sites, the rights to pen, construct, put in, maintain and use ditches, tunnels, conduits, flumes and other works for the drainage and passage of water, and flowage rights).

Not too long after the 1987 move to title 12, in 1993, the 116th Legislature proposed a momentous constitutional amendment. The genesis of this amendment is worth highlighting briefly, and the Bureau seems to recognize the constitutional amendment bore at least some legal significance. The following information was taken from the briefs of the Plaintiffs and the Bureau.

Work by an investigative journalist in the 1970s called into question how Maine had administered public reserved lands dating back to the 1800s – which included giving away over time all but 400,000 acres of the approximately 7 million acres that had originally existed. Of these remaining 400,000 acres, the State was leasing these public reserved lands at minimal cost to camp owners, paper companies, and timber companies. The 1993 constitutional amendment was proposed to place a limit on this historical practice of selling state parks and historic sites, but

during the legislative process its scope was expanded to include public reserved lands. As Plaintiffs highlight, the Law Court in *Cushing v. State* explained that "[t]he State holds title to the public reserved lots as trustee and is constrained to hold and preserve these lots for the 'public uses' contemplated by the Articles of Separation." 434 A.2d 486, 500 (Me. 1981) (citing *Opinion of the Justices*, 308 A.2d 253, 271 (Me. 1973)). The Law Court further noted that there were constitutional limits on the State's authority to convey interests in public reserved lands to private parties. *Id.* It follows then that the 1993 constitutional amendment can only be properly understood within the context of such limitations; which means the Court must decide what impact if any the amendment had on the State's authority to convey interests in public reserved lands to private parties.

The initial proposal read: "**Sec. 23. Alienation of state park land prohibited.** Land owned and designated by the State as a state park or memorial must continue in that use forever and may not be sold or transferred." L.D. 228 (116th Legis. 1993). And as the Bureau points out, the Legislature then expanded the scope of the proposed constitutional amendment. *See* Comm. Amend. A to L.D. 228, No. H-92 (116th Legis. 1993); Comm. Conf. Amend. A to Comm. Amend. A to L.D. 228, No. H-679 (116th Legis. 1993). The final constitutional resolve passed by the Legislature highlighted this expansion by asking the citizens of Maine if they "favor[ed] amending the Constitution of Maine to protect state park or other designated conservation or recreation land by requiring a 2/3 vote of the Legislature to reduce it *or change its purpose*." Const. Res. 1993, ch. 1, *passed in* 1993 (emphasis added). The people answered "yes" to the question, and what was approved is as follows:

> **Sec. 23.** State park land. State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of

> all the members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

Const. Res. 1993, ch. 1, *approved in* 1993.

The Court interprets this amendment as taking back from the executive branch authority previously delegated to it by the Legislature. And beginning with the 116th Legislature, and then through ratification by the people of Maine, what was taken back was the final say as to whether public reserved lands could be sold, and – pertinent here – whether the uses of the public lands could be "substantially altered." By design, the people of Maine also made any sale or substantial alteration of these lands challenging to achieve, as a supermajority vote is required in both Houses of the Maine Legislature.

Next, the Legislature enacted implementing legislation, which defined a term that is at the heart of this case: "substantially altered."

> "Substantially altered" means changes in the use of designated lands that significantly alter its physical characteristics in a way that frustrates the essential purposes for which that land is held by the State. . . . The essential purposes of public lots and public reserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 585 . . . .

P.L. 1993, ch. 639, § 1 (effective July 14, 1994), *codified at* 12 M.R.S. § 598(5). As the Plaintiffs point out, there is no explicit exemption made for any particular type of property conveyance, such as for an easement or lease. What matters are two aspects: whether the use significantly alters the land's physical characteristics, and whether the alterations "frustrate" the essential purposes for which the land is held.

In addition, the Legislature made its express intent undeniably clear in implementing legislation that it was retracting authority previously delegated to BPL, and returning that authority

to the Legislature in particular circumstances:

> The following lands are designated lands under the Constitution of Maine, Article IX, Section 23. Designated lands under this section may not be reduced or substantially altered, except by a 2/3 vote of the Legislature. It is the intent of the Legislature that individual holdings of land or classes of land may be added to the list of designated lands under this section in the manner normally reserved for amending the public laws of the State. *Once so designated, however, it is the intent of the Legislature that designated lands remain subject to the provisions of this section and the Constitution of Maine, Article IX, Section 23 until such time as the designation is repealed or limited by a 2/3 vote of the Legislature.*

P.L. 1993, ch. 639, § 1 (emphasis added), *codified at* 12 M.R.S. § 598-A.[5] The question then becomes: what does it mean to be subject to the provisions of the Designated Lands Act (the implementing legislation) and Article IX, Section 23 of the Maine Constitution? This brings the Court to the parties' arguments on what changed (or purportedly did not change) with BPL's delegated authority over public reserved lands after the constitutional amendment was approved by the citizens of Maine and subsequently implemented by the Legislature.[6]

BPL's argument starts from the assumption that Plaintiffs are arguing the Designated Lands Act impliedly repealed BPL's leasing authority for electric power transmission. The Court does not interpret Plaintiffs' argument as being based on implied repeal. Moreover, counsel for Plaintiffs clarified at oral argument that they are not arguing implied repeal but are instead arguing that the constitution as of 1994 placed an additional condition on that leasing authority. The condition is that reductions or substantial alterations to the uses of public reserved lands must be approved by 2/3 of each House of the Legislature. This would logically mean that BPL – the agent

[5] Public reserved lots (or lands) were thereafter designated. *See* P.L. 1993, ch. 639, § 1; 12 M.R.S. § 585(2)(B), *repealed by* P.L. 1997, ch. 678, § 5; *see also* 12 M.R.S. § 598-A(2-A)(D).

[6] For the sake of completeness, it is worth noting that in 1995 the Legislature combined the Bureau of Public Lands and the Bureau of Parks and Recreation within the Department of Conservation into the Bureau of Parks and Lands. *See* P.L. 1995, ch. 502.

entrusted with the care and management of the public reserved lands – must make a determination whether an action would reduce or substantially alter the uses of public reserved lands before the use is "substantially altered." Unless such a determination is made by BPL, the Legislature's constitutional prerogative can be frustrated or even thwarted.

BPL's view of its authority as of 1993 is that, as to a myriad of uses of public lands, its authority has not changed at all, and that certain categories of uses are "exempt" from application of the constitutional standard and always have been. BPL asserts that the multiple-use mandate discussed in what was then 12 M.R.S. § 585 included the authority to lease public reserved lands for electric power transmission for up to 25 years. However, it is important to note that the definition of "multiple use" did not discuss electric power transmission at all. Instead, "multiple use" is defined in the context of the renewable surface *resources*.[7] Nevertheless, BPL's argument

[7] The full definition in section 585 (which was substantially the same as the current definition in section 1845(1)) was as follows:

> (1) The management of all of the various renewable surface resources of the public reserved lots, including outdoor recreation, timber, watershed, fish and wildlife and other public purposes;
>
> (2) Making the most judicious use of the land for some or all of these resources over areas large and diverse enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions;
>
> (3) That some land will be used for less than all of the resources; and
>
> (4) Harmonious and coordinated management of the various resources, each with the other, without impairing the productivity of the land, with consideration being given to the relative values of the various resources and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

12 M.R.S. § 585(2)(A), *repealed by* P.L. 1997, ch. 678. Leases for electric power transmission arise in the provision permitting the director take *actions* consistent with the management plans (which are based on the multiple uses). Notably, each of (1) through (4) quoted above contain specific references to "resources." Additionally, CMP simply calls these "broad standards," (CMP Rebuttal Brief 5), but does not explain what is particularly broad about "the various renewable surface resources of the public reserved lots, including

is premised on the assumption that electric power transmission was an aspect of the multiple-use objectives for public reserved lands. Thus, according to BPL, when the Legislature enacted the Designated Lands Act in 1994 and defined "substantially altered" in reference to the essential purposes multiple-use mandate in section 585, it meant that public reserved lands could only be "substantially altered" by frustrating the essential purposes for which the State held the land – and one of those essential purposes was leasing the land for electric power transmission. Because of this the Designated Lands Act, according to BPL, confirms that its leasing authority was unaffected by the constitutional amendment.

However, it is important to note that if the constitutional amendment did nothing to limit or constrain BPL's leasing authority for electric power transmission projects, then the constitutional amendment also did nothing at all to limit or constrain BPL's authority to conduct a myriad of other activities, or even a combination of these activities. Taking this argument to its logical extreme would mean that *anything* that was listed in any portion of section 585 was part of the multiple-use mandate and exempt from application of the constitutional standard. Therefore, as "leas[ing] [for] mill privileges and other rights in land for industrial and commercial purposes, dam sites, dump sites, the rights to pen, construct, put in, maintain and use ditches, tunnels, conduits, flumes and other works for the drainage and passage of water, flowage rights and other rights of value in the public reserved lands" were part of the multiple-use mandate, as was leasing to "[l]ay and maintain or use pipelines and railroad tracks," and none of those could ever substantially alter the uses of the land. 12 M.R.S. § 585(4)(C)(2), (G), *repealed by* P.L. 1997, ch. 678. Plaintiffs highlight in their reply the extreme results of this reasoning:

> [t]he Bureau Director could execute leases that allowed for development equivalent to the Portland Jetport ("landing strip"), a

outdoor *recreation*, *timber*, *watershed*, *fish* and *wildlife* and *other public purposes* . . . ." 12 M.R.S. § 585(2)(A)(1) (emphases added), *repealed by* P.L. 1997, ch. 678.

> residential subdivision ("residential leaseholds"), a massive factory ("industrial purposes"), the Maine mall ("commercial purposes"), or the Juniper Ridge Landfill (a "dump"), all without ever seeking or obtaining legislative approval, even though no one could maintain with a straight-face that these activities would not "reduce" or "substantially alter" the silviculture, wildlife, and recreation uses of the lands involved. Given that these multiple non-forest uses described in 12 M.R.S. § 1852 were also authorized actions in 1993—by then-12 M.R.S. § 585(4)—when the constitutional amendment passed, it is inconceivable that the people of Maine approved the constitutional amendment requiring super-majority legislative approval for a public lot to be reduced or its uses changed but simultaneously included a silent exception for reductions or changes resulting from all of the non-forest uses outlined in then-12 M.R.S. § 585(4).

(Pl.s' Reply Brief 14.)[8]

It would also follow from BPL's interpretation of its authority that no member of the public, no abutter to the public lands, and no "aggrieved party" could ever go to Court to argue that such leases for such activities by BPL were conveyed in excess of the agency authority as BPL seems to assert that all such activities are "exempt."

CMP's argument as to what happened regarding the leasing provisions, the Designated Lands Act, and the constitutional amendment closely mirrors BPL's. It agrees with BPL that when the Legislature enacted the Designated Lands Act in 1994, it defined "substantially altered" with reference to the multiple-use objectives detailed in section 585. That is, CMP asserts that since section 585 as a whole included the leasing authority at that time (located at 12 M.R.S. §

[8] BPL makes the final point that the Legislature "renewed" BPL's authority to lease public reserved lands for electric power transmission when it enacted section 1852(4) in 1997. According to BPL, because other provisions contained specific cross-references to the Designated Lands Act (e.g., 12 M.R.S. § 1851(1)), the lack of a cross-reference to the Designated Lands Act is proof that the Legislature made a conscious decision not to subject section 1852(4) to the 2/3 legislative approval requirement. The Court reviewed the legislative history to these changes but could not find any intent that could be inferred from this, particularly in contrast to the express intent contained in the Designated Lands Act's requirement that uses of public reserved land remain subject to the constitutional amendment unless the land is "undesignated" by a 2/3 vote of the Legislature. In other words, if there is a conflict between negative inferred intent and express intent, the Court must rely upon the statement of express intent.

585(4)(C)), leasing for electric transmission facilities was an essential purpose for which the State held the lands. CMP also points to the Legislature's claim of "no substantive changes" to the law[9] (when it moved BPL's statutory authority to the 1800s in title 12 in 1997) to mean that the law already authorized BPL to lease electric transmission facilities as an essential purpose (i.e., based on the multiple-use objectives) for which the land was held.[10] As the Court has already noted regarding BPL's assertion of this same point, however, the definition of "multiple use" spoke only in the context of renewable surface resources and said nothing of leasing for electric power transmission.

Plaintiffs, of course, in addition to their reliance on the plain language of the constitutional amendment and the "once so designated" language in the Designated Lands Act, do not agree with BPL and CMP's statutory interpretation. They argue that the leasing activities permitted by statute (both the former section, 12 M.R.S. § 585(4)(C), and the section enacted in 1997 and still in effect, 12 M.R.S. § 1852(4)) are permissible *activities* that must be consistent with the *uses* described in the management plan based upon the multiple-use objectives. In other words, counter to CMP and BPL, Plaintiffs argue that leasing for the various purposes provided in the statutory authority were not and are not "multiple-use objectives." Plaintiffs point to the requirement that "the public reserved lands be managed under the principles of multiple use," which multiple uses are defined

[9] As the L.D. said, "[t]here are no substantive changes from current law in this subchapter." L.D. 1852, Summary, § 4, at 76 (118th Legis. 1997).

[10] CMP does not grapple with the fact that the definition of "substantially altered" was also amended in 1997 to change the reference from section 585 to section 1847. When it was enacted in 1997, section 1847(1) became what was the purpose portion of section 585 (i.e., 12 M.R.S. § 585(1)(A)-(C)), section 1847(2) became what was the responsibility portion of section 585 (i.e., 12 M.R.S. § 585(3)), and section 1847(3) became what was a sliver of the action portion of section 585 (i.e., 12 M.R.S. § 585(4), without the additional subparts, many of which ended up in section 1852). The definitions of "multiple use" and "sustained yield" (i.e., 12 M.R.S. § 585(2)(A), (C)) became section 1845. In this sense, the 1997 enactment undercuts CMP's argument because the definition of "substantially altered" pointed to a section (section 1847) that said nothing about leasing for electric transmission lines.

as being, in part, "[t]he management of all of the various renewable surface resources of the public reserved lands including outdoor recreation, timber, watershed, fish and wildlife and other public purposes," as well as "exemplary land management practices, including silvicultural, wildlife and recreation management practices . . . ." 12 M.R.S. §§ 1845(1)(A), 1847(1). These are thus the "essential purposes" for which the State holds the land: "The essential purposes of public reserved and nonreserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." *Id.* § 598(5). BPL and CMP's reliance on the original reference to section 585 in the definition of "substantially altered" does not change this because the multiple-use objectives were clearly defined in section 585 and were differentiated from the *actions* that could be taken consistent with those *uses*.

As noted in footnote 10, section 585(1), (3), and the first part of (4) became what is now section 1847. Subsection (1) made clear that "[i]t is in the public interest that the public reserved lands be managed under the principles of multiple use to produce a sustained yield of products and services," and subsection (2) then specifically tied the definitions of "multiple use" and "sustained yield" to renewable natural resources. 12 M.R.S. § 585(1)(B), (2)(A), (C), *repealed by* P.L. 1997, ch. 678. After listing these uses and the management plans necessary to effectuate these purposes, *id.* § 585(3), *repealed by* P.L. 1997, ch. 678, section 585 then proceeded to explain that the commissioner had to adopt action plans within the context of the comprehensive management plan. *Id.* § 585(3), *repealed by* P.L. 1997, ch. 678.

Following that, in a subsection titled "Actions," section 585 stated that the director could take "the following actions on the public reserved lands *consistent with the management plans for those lands* and upon such terms and conditions and for such consideration as the director considers reasonable," *id.* § 585(4) (emphasis added), *repealed by* P.L. 1997, ch. 678. Those following

actions included such items as leasing for electric power transmission, landing strips, pipelines, industrial and commercial purposes, etc. Therefore, leasing for electric power transmission was not a multiple-use objective but was instead an action that could be taken as long as it was consistent with the management plan.

Plaintiffs then point to the 1997 recodification of the authority statutes and additional revision to the definition of "substantially altered" as confirmation of the above interpretation for mainly the same reasons discussed in footnote 10. The 1997 amendment to the definition of "substantially altered" changed the reference from section 585 to section 1847, not sections 1847 *and* 1852. Section 1847 contained the requirement for management under the principles of multiple use as well as enactment of management plans and action plans. It did not contain any reference to leasing for electric power transmission. In this sense, the 1997 recodification and revision confirmed that leasing for electric power transmission was not a multiple-use objective.

In summary, the Court first agrees with Plaintiffs' interpretation of how Article IX, Section 23 and the Designated Lands Act affected BPL's authority over State lands, including public reserved lands. Before the constitutional amendment, BPL was vested with broad authority over public reserved lands. As has been detailed, prior to the constitutional amendment BPL could lease public reserved lands for electric power transmission for up to 25 years. That same authority exists today but it has been limited by the Maine Constitution and the Designated Lands Act. The Legislature and the people of Maine – through the constitutional amendment – retracted some of the authority previously delegated to BPL.[11] The Maine Constitution, "the supreme law of the state," *La Fleur ex rel. Anderson v. Frost*, 146 Me. 270, 280, 80 A.2d 407, 412 (1951), was

[11] Unlike the Public Utilities Commission, where the Legislature has delegated essentially all of its authority, *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 32, 237 A.3d 882, the Legislature here retained authority for itself in instances of reductions or substantial alterations to the uses of public reserved lands.

amended to place a condition on executive action with public reserved lands.

Second, BPL and CMP seem to want the Court to turn its attention away from what occurred in 1993 and 1994 when the amendment and Designated Lands Act were enacted and to engage instead in statutory construction. However, harmonizing language within a statute, or harmonizing statutes, is not the same as comparing a constitutional amendment (and its enabling statute) with the statutes that have been referenced in BPL and CMP's arguments. Instead of comparing only the pre-amendment and post-amendment statutes regarding utility leases, the Court must take as its starting point the constitutional amendment, and it must accord appropriate weight to what the people of Maine enacted when they ratified this amendment. In addition, to the extent any comparison between the broad language of the enabling statute and statutes that address utility leases (and many other kinds of leases and uses) that were still in effect after the amendment create any ambiguity, the Court concludes that any ambiguity must be resolved in favor of the constitutional amendment and the clear expression of intent in its enabling statute.

In sum, for this unique constitutional amendment to have any effect, the amendment itself, the Designated Lands Act, and statutes that remain on the books after the amendment must be read harmoniously. *Cf. Phelps v. United States*, 274 U.S. 341, 344 (1927) ("Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."); *Alliance for Retired Americans v. Sec'y of State*, 2020 ME 123, ¶ 9, 240 A.3d 45 (in the event of a conflict between the constitution and a statute, the Court must interpret in a manner that renders the statute constitutional). This constitutional amendment limited the scope of BPL's authority over public reserved lands by placing a condition on it: that public reserved lands cannot "be reduced or [their] uses substantially altered except on the vote of 2/3 of all the members elected to each House." Me. Const. art. IX, § 23. Thus, BPL is obligated to determine whether a particular

action (including a lease for electric power transmission pursuant to section 1852(4)) reduces or substantially alters the uses of public reserved lands before it takes that particular action.

Finally, contrary to what BPL intimated in its Rebuttal Brief, the effect of such a holding is not that the constitutional amendment says *every* action (including any section 1852(4) lease) is a substantial alteration that must be taken to the Legislature. Instead, BPL must exercise its delegated authority to make a determination on a case-by-case basis. And contrary to the statements made by CMP and BPL that any finding by the Court that the constitutional standard of "substantial alteration" applies to these leases would violate the separation of powers doctrine by abrogating the authority of the Legislature, the Court disagrees. On the contrary, the Court has attempted here to give appropriate weight to the amendment, and in doing so to respect the authority that was restored to the Legislature by the amendment. Therefore, if BPL determines that a proposed use of public lands results in "substantial alteration," the Legislative branch must be given the final say on the issue, and be able to exercise the authority that the people of Maine returned to it – their elected representatives – when they ratified Article IX, Section 23.

The entry will be: Utility leases, pursuant to 12 M.R.S. § 1852(4), are not categorically exempt from application of Article IX, Section 23 of the Maine Constitution. The Clerk shall note this Order on the docket by reference pursuant to M.R. Civ. P. 79(a). Counsel for the parties shall make themselves available to participate in a conference with the Court to establish the course of future proceedings. Clerk of the Business and Consumer Court will send notice of this conference to counsel of record for Wednesday, March 24, 2021 at 10:00 am. The conference will be conducted by Zoom and recorded by the Clerk.

Dated: 3/17/2021

Hon. M. Michaela Murphy
Justice, Maine Superior Court

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-20-29

RUSSELL BLACK, *et al.*,

Plaintiffs,

v.

ANDY CUTKO, *et al.*

Defendants.

ORDER ON DEFENDANTS' MOTIONS TO DISMISS COUNTS 1 AND 2

Defendants Bureau of Parks and Lands, Director Andy Cutko (collectively, BPL), and Central Maine Power Company (CMP) filed motions to dismiss Counts I (declaratory judgment) and II (injunctive relief) of the Plaintiffs' First Amended Complaint, contending that the action can only proceed under the alternative Count III, which seeks review of a final agency action under the Maine Administrative Procedure Act (MAPA), 5 M.R.S. §§ 11001-11008, and M.R. Civ. P. 80C.[1]

The Court held a hearing on October 21, 2020. Because the initial briefing on the motions to dismiss did not make clear whether BPL made any determination (either in 2014 or 2020, though the First Amended Complaint alleges no determinations were ever made) whether leasing the public reserved land at issue to CMP would effect a substantial alteration to the uses of that public reserved land (and therefore require 2/3 legislative approval),[2] the Court directed BPL to file the

[1] CMP raised a separate argument regarding the standing of the Plaintiffs. BPL and Director Cutko did not join this argument. The Court issued a decision regarding CMP's standing argument on October 30, 2020, and concluded at least some of the named Plaintiffs have standing. In supplemental filings both BPL and CMP concede that Count III is a viable claim as it pertains to the 2020 lease. (BPL Supp'l Brief 8 (Dec. 9, 2020); CMP Supp'l Brief 5 (Dec. 9, 2020).)

[2] *See* Me. Const. art. IX, § 23 ("State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House."); *see also* 12 M.R.S. §§ 598-598-B.

administrative record by November 23, 2020.[3] BPL did so on November 18, 2020. Following that, the Court invited the parties to supplement their motion to dismiss filings by December 9, 2020, which all parties did. Having considered the parties' respective arguments at all stages of briefing, the arguments at the hearing, the contents of the administrative record filed to date, and the relevant law, the Court issues the following decision.

LEGAL STANDARD

"A motion to dismiss tests the legal sufficiency of the complaint, the material allegations of which must be taken as admitted . . . ." *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, ¶ 16, 209 A.3d 116 (citations omitted). "A dismissal is only proper when it appears beyond doubt that [the] plaintiff is entitled to no relief under any set of facts that [it] might prove in support of [its] claim." *Id.* (alterations in original). A complaint need only consist of a short and plain statement of the claim to provide fair notice of the cause of action. *Johnston v. Me. Energy Recovery Co., Ltd. P'ship*, 2010 ME 52, ¶ 16, 997 A.2d 741. The Court "examine[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* ¶ 10 (quotation marks omitted).

[3] BPL's original motion argues MAPA exclusively governs this case because entering into a lease is "final agency action" as defined in MAPA, meaning that it is "dispositive of *all issues*, legal and factual . . . ." 5 M.R.S. § 8002(4) (emphasis added). Neither the 2014 nor 2020 lease attached to the pleadings reflect consideration of whether the conveyances to CMP would result in a substantial alteration to the uses for which the State holds the lands in trust for the public. (*See* Pl.s' First Amnd. Compl. *passim* & Ex. A-B.) This put the Court in the position of being asked to rule on the scope of this action without knowing whether BPL made any finding regarding "substantial alteration" before or contemporaneously with the conveyances at issue. The Court concluded during the oral argument that any such finding, or lack of finding, would be essential to the Court's determination of whether BPL's decision to lease the public reserved lands at issue to CMP could fairly be characterized as being dispositive of all legal and factual issues. It therefore ordered BPL to file the administrative record and permitted supplemental argument.

SUMMARY OF THE ALLEGATIONS

This case stems from the convergence of many factors, including: Maine's historical practices in the management of its public lands; a popularly enacted 1993 amendment to the Constitution that sought to remedy shortcomings in this management by requiring 2/3 legislative approval for conveyances of public land that reduce or substantially alter the uses of those lands; the implementing statute entrusting BPL to manage these lands; additional statutory provisions governing BPL's authority over these lands held in trust for the public's benefit; CMP's efforts to construct a transmission line from Quebec to an interconnection in Lewiston to supply power to the greater New England power grid; a 2014 lease from BPL to CMP of two parcels of public reserved land (West Forks Plantation and Johnson Mountain Township) as part of the path of this transmission line; CMP's receipt from the Public Utilities Commission of a certificate of public convenience and necessity in 2019; a 2020 "amended and restated" lease from BPL to CMP of these same two parcels of public reserved land; a number of Plaintiffs who contend the proposed transmission line will interfere with their uses of these public reserved lands; allegations that BPL failed in its duty to make a public determination whether the leases resulted in a substantial alteration to the uses of West Forks Plantation and Johnson Mountain Township; the alleged lack of any available administrative process in place permitting such a determination to be made, either in 2014 or 2020; and BPL's alleged failure to seek the necessary 2/3 legislative approval, either in 2014 or 2020, for what Plaintiffs assert to be substantial alteration of the uses of the public lands in West Forks Plantation and Johnson Mountain Township.[4]

[4] BPL and CMP resolutely assert that only the 2020 lease is at issue in this case. (BPL Supp'l Brief 3 n.2 (Dec. 9, 2020); CMP Supp'l Brief 1 (Dec. 9, 2020).) Plaintiffs contend they challenge both the 2014 lease and the 2020 lease. (Pl.s' Supp'l Brief 4-5, 7-8, 10 (Dec. 9, 2020); Pl.s' Joint Opp. to Mot. Dismiss 12-13 (explaining that "they challenge a governmental action—the 2014 and 2020 Leases, the latter of which is still in effect—as *ultra vires* because the BPL acted beyond its authority and jurisdiction and in violation of the Maine Constitution") (Sep. 17, 2020).) At this juncture, considering that Maine is a notice pleading

ANALYSIS

The starting point must be the constitutional provision specifically addressing how BPL is permitted to make conveyances of interests in public reserved land: "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House." Me. Const. art. IX, § 23. This unique constitutional provision gives the Legislature final say over the disposition of State land when that land is reduced or the uses substantially altered. The genesis of this constitutional provision is described in Plaintiffs' Amended Complaint as follows.

Ownership of approximately seven million acres of land was transferred to Maine when it separated from Massachusetts in 1820. (Pl.s' First Amnd. Compl. ¶ 33.) Prior to 1890, Maine sold or gave away all but 400,000 acres of this land. (Pl.s' First Amnd. Compl. ¶ 33.) The remaining 400,000 acres of public reserved lands were reserved in each of the State's unorganized

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state while "view[ing] the complaint in the light most favorable to the plaintiff[s] to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff[s] to relief pursuant to some legal theory," *McCormick v. Crane*, 2012 ME 20, ¶ 5, 37 A.3d 295 (quotation marks omitted), the Court interprets the First Amended Complaint as challenging the validity of both the 2014 lease and the 2020 lease. (Pl.s' First Amnd. Compl. ¶¶ 72-76.) Plaintiffs allege that the leasing of the public reserved lands at issue in order to build a transmission line would obviously effect a substantial alteration to the public reserved lands, and further that BPL entered into the 2014 lease with CMP without (1) considering or determining whether the leasing for this purpose would effect a substantial alteration and (2) obtaining the constitutionally required 2/3 legislative approval.

Plaintiffs further contend (Pl.s' First Amnd. Compl. ¶ 55) that the 2014 lease was *ultra vires* because it was entered into before CMP received a certificate of public convenience and necessity from the Public Utilities Commission. *See* 35-A M.R.S. § 3132(13) ("The State, any agency or authority of the State or any political subdivision of the State may not sell, lease or otherwise convey any interest in public land, other than a future interest or option to purchase an interest in land that is conditioned on satisfaction of the terms of this subsection, to any person for the purpose of constructing a transmission line subject to this section, unless the person has received a certificate of public convenience and necessity from the commission pursuant to this section."). The parties seem to agree that CMP did not receive the certificate of public convenience and necessity until 2019. (Pl.s' First Amnd. Compl. ¶ 57.) Plaintiffs contend the alleged impropriety of the 2014 lease bears on the legality of the 2020 lease. (Pl.s' First Amnd. Compl. ¶ 58.)

townships as approximately 1,000-acre lots and were intended to be used to encourage development, provide funds for the ministry, and for education. (Pl.s' First Amnd. Compl. ¶ 34.) Because Maine did not develop as initially contemplated, over the years the State leased these public reserved lands at virtually no cost to camp owners, paper companies, and timber companies. (Pl.s' First Amnd. Compl. ¶ 34.) The paper companies claimed that their leases, which dated back to the 1800s, allowed them to cut all the timber on the leased land in perpetuity at nominal rent. (Pl.s' First Amnd. Compl. ¶ 34.)

This prompted a National Resources Council of Maine board member to catalogue the abuses of the public lot leasing program, and in a series of articles in the Portland Press Herald in the early 1970s, reporter Bob Cummings documented the importance of these lands, the purposes for which they were originally intended when Maine separated from Massachusetts, and their highest and best use going forward. (Pl.s' First Amnd. Compl. ¶ 35.) Eventually, after a decade of investigation, legislative consideration, and litigation, the public lots were returned to the State. (Pl.s' First Amnd. Compl. ¶ 35.) After extensive negotiation and land swaps, the public lots were configured into the shape they now have. (Pl.s' First Amnd. Compl. ¶ 36.) The purpose of this effort was to preserve areas (such as the Debsconeag Lake Wilderness Area, the Bigelow mountain range, Mahoosuc and Deboullie, hundreds of miles of remote lake shores and streams, and thousands of acres of forests) to be available for public use and enjoyment, not for the benefit of private and corporate interests. (Pl.s' First Amnd. Compl. ¶ 36.)

To ensure this purpose, the people of Maine enacted Article IX, Section 23 of the Maine Constitution in 1993. (Pl.s' First Amnd. Compl. ¶ 37.) As quoted above, this constitutional provision requires 2/3 legislative approval for any reduction of or substantial alteration to the uses of these designated lands. Me. Const. art. IX, § 23. The Legislature then designated the lands

covered by this constitutional provision in title 12, sections 598-598-B. Included in this designation are public reserved lands, such as the two parcels at issue in this case. 12 M.R.S. § 598-A(2-A)(D). Responsibility for—and management of—the public reserved lands was delegated to BPL "for the general benefit of the people of this State" "to keep the public reserved lands as a public trust and . . . full and free public access to the public reserved lands to the extent permitted by law, together with the right to reasonable use of those lands, is the privilege of every citizen of the State." *Id.* §§ 1846(1), 1847(1).

However, unlike many delegations of authority by the Legislative to the Executive branch, the constitutional relationships at issue here are unique. In amending the Maine Constitution in 1993, the people of Maine retained for their elected representatives—the Maine Legislature—the final say over disposition of those lands when the lands would be reduced or their uses substantially altered. *Id.* § 598-A; *see also* Me. Const. art. IX, § 23.

BPL is statutorily authorized to take various actions with respect to the public reserved lands, including acquiring public reserved lands, selling public reserved lands, transferring management responsibility over public reserved lands to other state agencies, or leasing public reserved lands in various situations.[5] 12 M.R.S. §§ 1850-1852. Notably, the Legislature expressly provided a definition to apply when determining whether designated lands would be reduced or

[5] BPL and CMP point out that these statutes appear to make distinctions on when legislative approval is necessary. *See, e.g.*, 12 M.R.S. § 1851(1). Plaintiffs point out that the constitutional provision does not distinguish between the types of conveyances that require 2/3 legislative approval, the touchstone simply being reduction or substantial alteration of the uses. Resolution of that dispute is beyond the scope of this motion. However, contrary to Plaintiffs' assertion, the Court does not believe 12 M.R.S. § 1814 controls leasing of public reserved lands. That section applies to the "Parks and Historic Sites" subchapter of the laws governing BPL, and the general definitions distinguish between public reserved lands, parks, and historic sites. *See id.* § 1801(5), (7), (8).

substantially altered.[6] *Id.* § 598.

Plaintiffs claim that the confluence of these constitutional and statutory provisions requires BPL to make a determination regarding whether any action it takes vis-à-vis public reserved lands results in a reduction of or substantial alteration to the uses of those public reserved lands, and to do so before the conveyance is made or the use is authorized. BPL has made somewhat conflicting statements about how it views its constitutional and statutory obligations in this regard. First, it claims that *if* it determines that a lease will result in a substantial alteration to the uses of public reserved lands, it would seek the 2/3 legislative approval. But it also asserts that it has taken the position historically that leases, categorically, do not require legislative approval. CMP agrees with BPL's referenced policy that utility leases never require legislative approval. Resolution of that issue is beyond the scope of this Order, as the Court must first decide whether this matter should proceed under MAPA, as a declaratory judgment action, or both.

Under MAPA, a party is entitled to review in the Superior Court when that party "is aggrieved by final agency action" or when that party is "aggrieved by the failure or refusal of an agency to act . . . ." 5 M.R.S. § 11001(1), (2). Here, Defendants contend the lease between BPL and CMP was a "final agency action" as it is defined in MAPA and, therefore, must be reviewed under MAPA and Rule 80C. *See Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 14, 60 A.3d 1248 (quotation marks omitted) ("[W]hen, as here, a[n] . . . agency's decision is reviewable pursuant to . . . M.R. Civ. P. 80C, that process provides the exclusive process for

[6] The constitutional provision states that 2/3 legislative approval is required if the "uses [of the designated lands are] substantially altered," Me. Const. art. IX, § 23, whereas the implementing statute mentions the 2/3 legislative approval requirement when "[d]esignated lands . . . [are] substantially altered," 12 M.R.S. § 598-A. The definition of "substantially altered" in the statute speaks to "the use of designated lands," but to the extent "so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State." *Id.* § 598(5).

judicial review unless it is inadequate.").[7] A "final agency action" is defined as "a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency." 5 M.R.S. § 8002(4).

It is difficult to discern from the record filed to date what, if any, administrative process or contemporaneous consideration was undertaken by BPL as to whether either lease to CMP of these public reserved lands would result in a substantial alteration to the uses of the lands. Included in the record is what appears to be a post hoc determination in the form of a September 24, 2020 memorandum—compiled almost six years after the 2014 lease was signed, and several months after the 2020 lease was signed and while the motions to dismiss were pending—from Director Cutko and David Rodrigues (Director of Real Property Management) to the "Public Lands Lease File." The memo states that its purpose is to "provide[] background detail and context and memorialize[] actions, considerations, and legal interpretations by [BPL] related to the New England Clean Energy Connect (NECEC) utility corridor lease" to CMP of public reserved land in Johnson Mountain Township and West Forks Plantation. (A.R. I0062.) BPL contends post hoc rationalizations are permissible additions to administrative records, citing three D.C. Circuit Court cases. The Court assumes that one of the next steps of this litigation will be to determine the scope of the administrative record. Therefore, whether this memo is properly a part of the record will be argued and decided later, but the Court notes that the cases cited by BPL contain important limitations that would have to be considered.

For example, the D.C. Circuit Court explained that it has "barred consideration of post hoc

[7] Direct judicial review would be inadequate if "irreparable damage" would result. *Fisher v. Dame*, 433 A.2d 366, 372 (Me. 1981) (quotation marks omitted). It would also be inadequate "when an alleged deprivation of civil rights occurs before, and not as a part of, the action or inaction for which a [party] seeks review." *Cayer v. Town of Madawaska*, 2016 ME 143, ¶ 16, 148 A.3d 707.

materials when they present an entirely new theory, or when the contemporaneous record discloses no basis for the agency determination whatsoever . . . ." *Rhea Lana, Inc. v. United States Dep't of Labor*, 925 F.3d 521, 524 (D.C. Cir. 2019) (alterations, citations, and quotation marks omitted); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___US___, 140 S. Ct. 1891, 1909 (2020) (alterations, citations, and quotation marks omitted) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target."). Instead, the D.C. Circuit "permit[s] consideration of post hoc materials when they illuminate[] the reasons that are [already] implicit in the internal materials." *Rhea Lana*, 925 F.3d at 524 (first alteration added, and citation and quotation marks omitted). Again, what weight, if any, the Court should attach to the memo will be resolved another day.

As it pertains to Count I, the Court acknowledges the Law Court's pronouncements that "[a] declaratory judgment action cannot be used to create a cause of action that does not otherwise exist . . . [and] may only be brought to resolve a justiciable controversy." *Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172. Defendants argue the Plaintiffs' declaratory judgment claim is not supported by an underlying cause of action. However, the First Amended Complaint does allege that the 2014 lease is void due to the lack of a certificate of public convenience and necessity (CPCN).

The Court concludes at this early juncture that Plaintiffs should be permitted to proceed on the declaratory judgment claim with respect to the 2014 lease both as to whether it was void for lack of a CPCN, and as to the constitutional claims that are being made, particularly where it is alleged that a remedy can be provided apart from MAPA when the alleged constitutional violation

occurred before any administrative process was available to any potentially aggrieved parties. With respect to both leases, the Plaintiffs will be permitted to pursue their allegations in a declaratory judgment that BPL was obligated under the unique constitutional provision at issue to provide an administrative process under MAPA.[8] *Cf. Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 12 n.4, 237 A.3d 882; *Gorham v. Androscoggin Cnty.*, 2011 ME 63, ¶ 25, 21 A.3d 115 ("Because this alleged deprivation of property occurred before the Commissioners' administrative hearing, we cannot, on this record, conclude that direct review pursuant to Rule 80B would provide an adequate remedy for Gorham's § 1983 claim."). They will also be able to argue in the declaratory judgment that the Legislature's approval of these leases was constitutionally required.

From the record provided to date, it is difficult to identify what if any administrative process was at work for either lease. Nothing in the record to date indicates whether any sort of notice was provided to the public regarding either lease of public reserved lands held in public trust for the public's benefit. *Cf.* 12 M.R.S. §§ 1846(1), 1847(1). Nothing in the record to date indicates that any party who could be aggrieved by the decision to lease these public lands was aware that the MAPA clock ostensibly began running in December 2014. These factors will, of course, be subject to argument by the parties. Given all of these unique circumstances, the

[8] Moreover, the Court notes that the jurisprudence on the scope of the Declaratory Judgments Act lacks clarity. *Compare Zelman v. Zelman*, 2020 ME 138, ¶ 13, __ A.3d __ ("Here, Andrew requested a declaratory judgment from the court. The Maine Uniform Declaratory Judgments Act states that '[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.' 14 M.R.S. § 5953 (2020). Here, pursuant to this Act, the BCD had subject matter jurisdiction to determine the 'rights, status, and other legal relations' among the parties.") *with Desmond v. Persina*, 381 A.2d 633, 638 (Me. 1978) ("This Court has held that, although the Declaratory Judgments Act expands the range of available relief, the statute 'does not establish a *subject-matter jurisdiction* by which the Superior Court achieves power to act.' *Walsh v. City of Brewer*, Me., 315 A.2d 200, 210 (1974). (Emphasis in original).").

declaratory judgment action will be permitted to move forward as the Court has concluded that it "ha[s] the authority 'to declare rights, status and other legal relations [regarding the leases] whether or not further relief is or could be claimed,' and there is no constitutional or statutory limitation on that authority that constrains [its] action in this matter." *Avangrid*, 2020 ME 109, ¶ 12 n.4, 237 A.3d 882 (quoting 14 M.R.S. § 5953).

Finally, as BPL and CMP have conceded, *see* footnote 1, *supra*, the 2020 lease is subject to judicial review under MAPA and Rule 80C. Regardless of whether BPL's actions pertaining to the 2020 lease are considered a "final agency action" or a "failure or refusal to act," *see* 5 M.R.S. §§ 8002(4), 11001(1)-(2), 11002(3), the parties agree that the 2020 lease is properly subject to the Court's subject matter jurisdiction. The Court thus denies the motions to the extent they seek dismissal of Count III if Count I were not dismissed.[9] (*See, e.g.*, BPL Mot. Dismiss 2.)

CONCLUSION

As the Court has discussed above, dismissal is not warranted, and the motions are denied. The entry is:

1. BPL's and CMP's respective motions to dismiss Count I are denied and a ruling on Count II is deferred.
2. Any deadline governing motions that may be brought regarding the Record are stayed until the Court establishes a Scheduling Order addressing those and other deadlines. The Clerk shall set up a teleconference in the next 14 days with counsel of record to discuss such deadlines, implementation of a Scheduling Order, and pending motions.
3. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: December 21, 2020

/s/M. Michaela Murphy
M. Michaela Murphy
Justice, Maine Superior Court

[9] As Count II ("injunctive relief") is remedial—and potentially duplicative of any relief Plaintiffs could receive after MAPA and Rule 80C proceedings on the merits of the 2020 lease, *see* 5 M.R.S. § 11007(4)(C)—the Court defers ruling on this until a decision is issued on Count III.

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
DOCKET NO. BCD-CV-20-29

RUSSELL BLACK, et al.,

PLAINTIFFS,

v.

ANDY CUTKO as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation, and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION, AND FORESTRY,

and

CENTRAL MAINE POWER COMPANY,

DEFENDANTS.

ORDER ON CENTRAL MAINE POWER COMPANY'S MOTION TO DISMISS FOR LACK OF STANDING

Before the Court is Central Maine Power Company's ("CMP") motion to dismiss Plaintiffs' complaint pursuant to Maine Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs' complaint seeks to invalidate a lease or leases the Bureau of Parks and Lands ("BPL") entered into with CMP for the use of 32 acres of public reserve land within Johnson Mountain Township and West Forks Plantation (the "Lease"). As such, Plaintiffs seek declaratory and injunctive relief in Counts I and II of their complaint, or, in the alternative, seek Rule 80C review of any final agency action that approved of the lease described in Count III. In response, CMP filed the motion currently before the Court, which contends that, assuming this matter falls under Rule 80C and the Maine Administrative Procedures Act ("MAPA"), Plaintiffs do not have standing to sue.[1] BPL

[1] CMP and BPL have also filed motions to dismiss the declaratory judgment counts as they allege that the Maine Administrative Procedure Act is the only avenue of potential relief for Plaintiffs.

and the Department informed the Court they take no position on the issue of standing.

Plaintiffs are represented by Attorneys James Kilbreth, David Kallin, Adam Cote, and Jeana McCormick. Defendants Andy Cutko and BPL are represented by Assistant Attorneys General Lauren Parker and Scott Boak. Defendant CMP is represented by Attorneys Nolan Reichl and Matthew Altieri.

LEGAL STANDARD

When reviewing a motion to dismiss under Rule 12(b)(6), the Court "consider[s] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem'l Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that [it] might prove in support of [its] claim." *Id.*

The standard applicable to a Rule 12(b)(1) motion to dismiss for lack of standing is different than that applicable to a Rule 12(b)(6) motion for failure to state a claim. *Mun. Review Comm. v. USA Energy Grp., LLC,* No. BCD-CV-15-22, 2015 WL 4876449, at *2 (Me. B.C.D. June 3, 2015). Because this Court's subject matter jurisdiction depends on each Plaintiff's standing, the Court "make[s] no favorable inferences in favor of the plaintiff such as [it does] when reviewing a motion to dismiss for failure to state a claim . . . ." *Tomer v. Me. Human Rights Comm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335.

DISCUSSION

MAPA provides a right to judicial review for parties "aggrieved" by final agency action pursuant to 5 M.R.S. § 11001. A person is considered aggrieved for the purposes of MAPA "if

that person has suffered particularized injury—that is, if the agency action operated prejudicially and directly upon the party's property, pecuniary, or personal rights." *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378 (citing *Storer v. Dep't of Envtl. Prot.*, 656 A.2d 1191, 1192 (Me. 1995). Generally, "the injury suffered must be distinct from any suffered by the public at large and must be more than an abstract injury." *Id.* Courts examine the issue of standing in context to determine whether the asserted effect on the party's rights genuinely flows from the challenged agency action. *Id.* In this matter, the Plaintiffs can be divided into three distinct groups, each asserting their own injuries stemming from the Leases granted by BPL: 1) Private Citizen Plaintiffs; 2) the National Resources Council of Maine ("NRCM"); and 3) Current and Former State Legislators ("Legislator Plaintiffs"). Whether or not each group has suffered particularized injury such that it qualifies as aggrieved under MAPA will be addressed in turn.

I. Private Citizen Plaintiffs

The first category of plaintiffs is a group of private citizens who claim a variety of personal and professional uses of the public reserve land subject to the Lease, as well as the surrounding area. In total, the group amounts to ten individuals: Edwin Buzzell, Greg Caruso, Charlene Cummings, Robert Haynes, Cathy Johnson, Ron Joseph, John R. Nicholas Jr., George Smith, Clifford Stevens, and Todd Towle.

Plaintiffs assert that, as a matter of course, members of the public who use public lands have standing to challenge a lease on those reserved lands. Despite this, the Law Court has never established a definitive right for members of the public to challenge the State's management of public lands, based on being members of the public alone. However, in *Fitzgerald v. Baxter State Park*, the Law Court addressed the meaning of "particularized injury" as it relates to private citizens' standing to challenge aspects of public land management. *Fitzgerald v. Baxter State Park*,

385 A.2d 189, 196 (Me. 1978).[2]

In *Fitzgerald*, five individual plaintiffs sought injunctive relief restraining the Baxter State Park Authority (the "Authority") from the use of heavy equipment when cleaning up areas of timber blow-down in the park. *Id.* at 194. On appeal to the Law Court, the central issue was whether the "five individual plaintiffs, as Maine citizens, domiciliaries, voters and property owners, and actual *users* of Baxter State Park" had standing to challenge the Authority's management decisions. *Id.* at 196. To make such a determination, the Law Court considered the plaintiffs' allegations to determine whether the plaintiffs suffered particularized injury.

Crucial to the Law Court's determination were the allegations made by each of the plaintiffs that they had substantially used Baxter State Park in the past and planned to use it substantially in the future. *Id.* at 197. Because the plaintiffs had established their actual use of the park, the Law Court stated that the plaintiffs' allegations established "a direct and personal injury . . . to their interest in Baxter State Park, which, although not an economic interest in the sense of involving their livelihood or financial liability, is nonetheless worthy of protection of the law." Thus, the Law Court decided the plaintiffs had suffered a particularized injury and had standing.[3]

In the matter currently before the Court, the public reserved lands subject to the Lease are kept as a public trust, and full and free public access to the public reserve lands is the privilege of every citizen of the State. 12 M.R.S. § 1846(1). To this end, the State, for the public benefit, has

[2] CMP takes issue with Plaintiffs' argument that standing is "prudential" and not statutory, and that this Court must consider the issue standing within the confines of Rule 80C jurisprudence. *Fitzgerald* was not a Rule 80C action, but the Law Court nevertheless held the Plaintiffs to the standard of whether they were "aggrieved" in the sense of having suffered "particularized injury." The Court therefore disagrees with CMP that *Fitzgerald* has little or nothing to offer the Court in conducting the standing analysis in this case.

[3] The Law Court also stated, "[a]ny citizen of Maine who shows himself to have suffered 'particularized injury' as a result of the action of the Baxter State Park Authority has standing to obtain judicial review and to seek injunctive relief against that proposed action." *Id.* at 197.

vested title, possession, and the responsibility for the management of the public reserved lands in the BPL. 12 M.R.S. § 1847(1). This arrangement is not unlike the relationship between Baxter State Park and the Authority in *Fitzgerald,* where the Law Court noted that the Legislature created the Authority by statute to manage and regulate use of the park in accordance with "the grand design of Governor Baxter's gift to the people of Maine." *Fitzgerald,* 385 A.2d at 195. Importantly, the Court in *Baxter* held that by force of *statute*, any action by the Authority in operating Baxter State Park was both an action by the trustee of a charitable trust of which the Authority is the agent, and was also a governmental action in carrying out the mission and mandate imposed by statute. *Id.*

Here, the Private Citizen Plaintiffs make allegations almost identical to those made by Plaintiffs in *Fitzgerald.* For instance, Mr. Buzzell has alleged that in his work as a commercial whitewater rafting outfitter and registered Maine Guide, he has engaged in business and recreation in and around the public reserved land subject to the Lease. (First Amnd. Compl. ¶ 17.) Many of the other plaintiffs have alleged that they use lands in and around the public reserve lands subject to the Lease for recreation, while others (Mr. Smith, Mr. Joseph, and Ms. Cummings) have asserted that they use, and will continue to use, the lands for both scientific and journalistic purposes. (First Amnd. Compl. ¶¶ 19, 22, 24.) All of the Private Citizen Plaintiffs assert that the Leases and subsequent construction of the NECEC transmission line would disrupt the environment in and around the public reserve land, resulting in harm to their continued use. Applying the Law Court's analysis in F*itzgerald* to the Private Citizen Plaintiffs' allegations, the Court finds a particularized injury, such that the Private Citizen Plaintiffs are aggrieved under 5 M.R.S. § 11001. Accordingly, the Private Citizen Plaintiffs have standing in this matter.[4]

[4] In addition to the plaintiffs described as "Private Citizen Plaintiffs," Former State Senate President Richard Bennett has asserted a history of engaging in recreational activities on Maine's public lands and plans to

II. The Natural Resources Council of Maine

The second category of plaintiffs is a single organization, the NRCM. It alleges that its members have "used and plan to continue to use, the public reserved land in and around Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides." (First Amnd. Compl. ¶ 16.) "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, and the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Conservation Law Found. v. Town of Lincolnville,* No. AP-003, 2001 WL 1736584, at *6 (Me. Super. Ct. Feb. 28, 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.,* 528 U.S. 167, 180 (2000)).

The Natural Resources Council of Maine is a non-profit organization that has a stated mission of "protecting, restoring, and conserving Maine's environment, now and for future generations." A number of the Private Citizen Plaintiffs, already determined to have standing, are also members of the Natural Resources Council of Maine. Likewise, the claims at issue, seeking the invalidation of leases of public reserved lands, are undoubtedly germane to the organization's purpose of conserving Maine's environment. Accordingly, the NRCM has standing to proceed in this matter.

III. Current and Former Maine Legislators

The third and final category of plaintiffs in this matter is the Legislator Plaintiffs. CMP relies upon federal case law pertaining to the Article 3 standing of members of Congress to challenge institutional injuries. *See Raines v. Byrd,* 521 U.S. 811, 821 (1997); *Coleman v. Miller,*

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continue doing so. As such, Mr. Bennett has standing in this matter regardless of the Court's determination regarding current and former Maine legislators.

307 U.S. 433, 436 (1939). Maine Courts have not previously decided when, or if, individual legislators have standing to sue for institutional injuries. The closest the Law Court has come to the issue was to assume without deciding that the Maine Senate had standing to bring State statutory and constitutional challenges to Maine's system of Rank Choice Voting (RCV). *See Senate v. Sec'y of State*, 2018 ME 52, ¶ 25, 183 A.3d 749.[5]

The Court, however, need not resolve the question at this stage because it finds that both the Private Citizen Plaintiffs and the NRCM have standing to challenge the BPL's alleged unconstitutional lease of public reserved land and this case will be moving forward. The Court also recognizes that some of current or former state legislators are on the ballot in the November 3rd election. The Court could revisit the question of whether Legislator Plaintiffs have standing after the election, after it rules on the other pending motions to dismiss, and should either or both of the parties wish to press the issue.

CONCLUSION

For the reasons stated above, this Court finds that the Private Citizen Plaintiffs' substantial prior use and plans for continued use of the public reserved land subject to the Leases amount to a particularized injury such that they have standing to sue and enforce their rights. Likewise, because members of the NRCM have standing to sue as individuals for reasons germane to the organization's mission, the NRCM also has standing in this matter. Finally, the Court defers judgment on the standing of the Legislative Plaintiffs until after the upcoming November 3rd election and after it rules on the other pending motions to dismiss.

[5] CMP noted in oral argument that (and as the Court also recalls) in the RCV case the Senate as a whole voted to permit the named Senators to bring that Declaratory Judgment action. It does not appear that any such vote occurred in this matter.

The entry will be: Defendant CMP's Motion to Dismiss for lack of standing is denied. The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

10/30/2020
DATE

SUPERIOR COURT JUSTICE

Entered on the Docket: 10/30/2020
Copies sent via Mail__Electronically ✓

BUSINESS AND CONSUMER COURT DOCKET NO. CV-20-29

HEARING/CONFERENCE RECORD

Case Title: Russell Black et al., v. Andy Cutko et al
Date: October 21, 2020 Time: 1:00 p.m. Location: Video
Justice: M. Michaela Murphy

Type of Motion or Request	Nature or Subject
○ Discovery Dispute	
◉ Motion Hearing	
○ Status Conference	
○ Other	

Parties Participating:	Counsel:
Plaintiffs	Attys. Kilbreth, McCormick, Kallin
Defendants Cutko and BPL	Asst. Attys. General Parker, Boak
Defendant CMP	Attys. Reichl, desRrosier, Altieri

Court Findings or Rulings: The Entry Will Be:

The Court will take under advisement CMP's Motion to Dismiss for Lack of Standing after oral argument. If that motion is granted in full, the case will be dismissed. If any of the Plaintiffs are found to have standing the Court will reserve ruling on the Bureau of Public Land's and CMP's motions to dismiss Counts I and II of Plaintiffs Complaint, until the Attorney General files the certified record in this matter which shall be done no later than November 23, 2020.

Date 10/22/2020

Justice, Business and Consumer Court

Entered on the Docket: 10/22/2020
Copies sent via Mail ___ Electronically ✓

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No.

Russell Black, Richard A. Bennett, Kent Ackley, Seth Berry, Chad Grignon, Denise Harlow, Margaret O'Neil, William Pluecker, Natural Resources Council of Maine, Edwin Buzzell, Greg Caruso, Charlene Cummings, Robert Haynes o/b/o Old Canada Road National Scenic Byway, Cathy Johnson, Ron Joseph, John R. Nicholas Jr, George Smith, Clifford Stevens, and Todd Towle,

Plaintiffs,

v.

Andy Cutko as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

and

Central Maine Power Company,

Defendants.

COMPLAINT

(Title to Real Estate Involved)

(Declaratory and Injunctive Relief Requested)

Plaintiffs, State Senator Russell Black, former State Senator Richard A. Bennett, State Representative Kent Ackley, State Representative Seth Berry, State Representative Chad Grignon, former State Representative Denise Harlow, State Representative Margaret O'Neil, State Representative William Pluecker, Natural Resources Council of Maine, Mr. Edwin Buzzell, Mr. Greg Caruso, Ms. Charlene Cummings, Mr. Robert Haynes o/b/o Old Canada Road National Scenic Byway, Ms. Cathy Johnson, Mr. Ron Joseph, Mr. John R. Nicholas Jr, Mr. George Smith, Mr. Clifford Stevens, and Mr. Todd Towle, for their Complaint against

Defendants Andy Cutko as Director Bureau of Parks and Lands, State of Maine Department of Agriculture, Conservation and Forestry, the Bureau of Parks and Lands, State of MaineDepartment of Agriculture, Conservation and Forestry, and Central Maine Power Company, allege as follows:

INTRODUCTION

1. In an action harkening back to Maine's disastrous administration of its public reserved lands from the 1800's up until the 1970's, in 2014 the Bureau of Parks and Lands ("BPL") entered into a lease with Central Maine Power Company ("CMP") of public reserved land in Johnson Mountain Township and West Forks Plantation for the construction of a transmission line (the "Lease") (Exhibit A attached hereto). That lease totally undermines the wilderness values and uses that Mainers fought for decades to restore to the public reserved lands.

2. The fight to restore and protect Maine's public reserved lands culminated in 1993, when Maine residents voted to amend the Constitution to prohibit any reduction or substantial alteration of public lands designated by the Legislature without a two-thirds vote of the Legislature. Me. Const. Art. IX, Sec. 23. Similarly, the Legislature has required that before any lease for a transmission line can be entered into, the lessee must have obtained a Certificate of Public Convenience and Necessity ("CPCN") from the Public Utilities Commission ("PUC") to ensure that there is a public benefit to the possible loss of public land. Against this backdrop, BPL's Lease with CMP, entered into before the issuance of a CPCN and without the requisite legislative approval, was *ultra vires.* The Lease does not and cannot give any rights to CMP to use the land it purports to lease, nor can the BPL Director lawfully transfer the Lease from CMP to a separate entity that is the only one authorized by the PUC to construct the transmission line.

PARTIES

3. State Senator Russell Black (R-Franklin) is an individual residing in Wilton, Maine. Senator Black served four terms in the Maine House of Representatives from 2010-2018 before serving his current term in the Maine Senate. Senator Black was a lead sponsor of L.D. 1893 "An Act to Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes," which relates to the statutes and constitutional provisions governing BPL's Lease with CMP. Senator Black has been deprived of his constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

4. Former State Senate President Richard A. Bennett (R-Oxford) is an individual residing in Oxford, Maine. He served two terms in the Maine House of Representative from 1990-1994 and four terms in the Maine Senate from 1996-2004. From 2001-2002, Senator Bennett served as President of the Maine Senate. Senator Bennett served in the Maine House in the 116th Legislature when it approved the L.D. 228, codified as Article IX, section 23 of the Maine Constitution. The son of well-known naturalist and author Dean Bennett, Senator Bennett from a very young age has enjoyed recreational activities such as canoeing, backpacking, fishing, hunting, cross-country skiing and trail-running on Maine's public lands and plans to continue to do so.

5. State Representative Kent Ackley (C-Monmouth) is serving his second term in the Maine House of Representatives. He currently serves on the Veteran & Legal Affairs Committee, previously serving on the Agriculture, Conservation & Forestry committee and the Joint Select Committee on Marijuana Legalization Implementation. Representative Ackley is deeply involved in environmental conservation, appointed as Vice President of the

Annabessacook Lake Improvement Association and is a board member of the Friends of the Cobbossee Watershed District. Representative Ackley is a Registered Maine Guide and a small business owner in Monmouth. Representative Ackley has been deprived of his constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

6. State Representative Seth Berry (D-Bowdoinham) is an individual residing in Bowdoinham, Maine. He is currently serving his sixth non-consecutive term in the Maine House of Representatives. Representative Berry is the former House Majority Leader and is currently the House Chair of the Joint Standing Committee on Energy, Utilities, and Technology. Representative Berry has been deprived of his constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

7. State Representative Chad Grignon (R-Athens) is an individual residing in Athens, Maine. He is currently serving his first term in the Maine House of Representatives representing District 118, which includes the Somerset County communities of Athens, Bingham, Caratunk, Cornville, Embden, Harmony, Jackman, Moose River, Moscow, Wellington and Plantations of Brighton, Dennistown, Highland, Kingsbury, Pleasant Ridge, The Forks and West Forks, plus the unorganized territories of Concord, Lexington and Wyman Townships, Northeast Somerset (including Rockwood Strip), Northwest Somerset and Seboomook Lake. The lands purportedly leased to CMP are in his District. Representative Grignon has been deprived of his constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

8. Former State Representative Denise Harlow (I-Portland) is an individual residing in Portland, Maine. She served four terms in the Maine House of Representative from 2010-2018. From 2010-2018, Representative Harlow served on the Environment and Natural

Resources Committee and from 2017-2018 the Inland Fisheries and Wildlife Committee. Representative Harlow was deprived of her constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

9. State Representative Margaret O'Neil (D-Saco) is an individual residing in Saco, Maine, and is serving her second term in the Maine House of Representatives. Representative O'Neil served on an AmeriCorps term with the Maine Conservation Corps, during which time she developed a deep appreciation for the value of Maine's natural resources. Representative O'Neil worked as an Assistant Park Ranger at Ferry Beach State Park in Saco for five years. In her spare time, she enjoys hiking, running and being out on the water. Representative O'Neil has been deprived of her constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

10. State Representative William Pluecker (I-Warren) is an individual residing in Warren, Maine, and is serving his first term in the Maine House of Representatives. He serves on the Agriculture, Conservation, & Forestry Committee and the House Committee on Engrossed Bills. Representative Pluecker is a vegetable farmer, small businessman and educator, who teaches farm apprentices everything from growing crops to online marketing. Representative Pluecker has been deprived of his constitutional right to vote on the Lease pursuant to Article IX, Section 23 of the Maine Constitution.

11. Natural Resources Council of Maine ("NRCM") is Maine's largest environmental advocacy group with over 25,000 members and supporters. NRCM's mission is "protecting, conserving, and restoring Maine's environment, now and for future generations." Many of NRCM's members have used, and plan to continue to use, the public reserved land in and around

Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides.

12. Mr. Edwin Buzzell is an individual residing in Moxie Gore, Maine, and the owner of Kennebec Kayak, Inc. Mr. Buzzell is a member of NRCM and has served on the board of the Old Canada Road National Scenic Byway since 2016; he is currently President of the Board. Mr. Buzzell has worked as a commercial whitewater rafting outfitter, as a Registered Maine Guide for whitewater, recreation, fishing and hunting, in and around the public reserved land that is the subject of BPL's Lease with CMP, since approximately 1974 and plans to continue to do so. He is also an avid hunter who has harvested more than a dozen bucks in the areas spanning the proposed transmission line corridor and plans to continue to hunt in this area. In 1995, Mr. Buzzell purchased 80 acres near the public reserved lands now purportedly leased to CMP and built a home on the land for the pristine views, which will be destroyed if the transmission line is built.

13. Mr. Greg Caruso is an individual residing in Caratunk, Maine, and is a Master Maine Guide for fishing, hunting, whitewater rafting, and snowmobiling. For over twenty seven years Mr. Caruso has worked as a guide to thousands of guests in and around the public reserved lands that are the subject of the Lease and plans to continue to do so.

14. Ms. Charlene Cummings is an individual residing in Phippsburg, Maine. She is the daughter of Mr. Bob Cummings who received two Pulitzer Prize nominations for his extensive reports as a journalist on what are today recognized as Maine's public reserved lands. Ms. Cummings has used public reserved lands in Maine's Western Mountains for recreational uses since approximately 1970 and plans to continue to do so.

15. Mr. Robert Haynes is the Coordinator of the Old Canada Road Scenic Byway, Inc. This organization manages Old Canada Road National Scenic Byway. This National Byway is one of 150 nationally designated special American roads, dedicated to preserving the natural beauty of the Kennebec and Moose River Valley. The management of this National Byway is important for residents and visitors to enjoy while traveling by automobile or while stopping to participate in recreation such as whitewater rafting, fishing, hiking and camping. Maine Public land is an important asset for scenic vistas and recreation of this area.

16. Ms. Cathy Johnson is an individual residing in Alna, Maine, and is a member of NRCM. She who worked at NRCM for 30 years and retired as its Senior Staff Attorney and Forests and Wildlife Director in February 2020. Ms. Johnson has spent her leisure time hiking and canoeing in Maine's North Woods since1971, and plans to continue to do so.

17. Mr. Ron Joseph is an individual residing in Sidney, Maine. He is a member of NRCM and a retired wildlife biologist for the Maine Department of Inland Fisheries and Wildlife and the U.S. Fish and Wildlife Service. As a Maine resident who has used and enjoyed the Upper Kennebec Region for research and recreation since approximately 1960, and who plans to continue to do so, Mr. Joseph is particularly concerned about the threat of the transmission line corridor to the Upper Kennebec Deer Wintering Area, which is already suffering from low deer densities and is critically important to deer populations, recreational hunters and hunting businesses.

18. Mr. John R. Nicholas, Jr. is an individual residing in Winthrop, Maine. He is the former Deputy Commissioner of the Department of Conservation, now known as the Department of Agriculture, Conservation and Forestry. Mr. Nicholas owns property in Upper Enchanted Township approximately two miles from the proposed transmission line corridor. He has fly

fished the remote native brook trout ponds around the approximately 54 miles of transmission line corridor in Segment 1 for approximately 20 years and plans to continue to do so. He is familiar with the public reserved lands that are the subject of the lease agreement.

19. Mr. George A. Smith is a resident of Mount Vernon, Maine. He is a full time writer covering hunting, fishing, and other outdoor activities, current events and issues, book reviews, and travel, and has been honored with awards from the Maine Press Association. He was the executive director of the Sportsman's Alliance of Maine for 18 years. He writes monthly columns for The Maine Sportsman magazine (for more than 30 years), a weekly editorial-page column for central Maine's two daily newspapers (for 25 years), and a travel column that he and his wife author for central Maine's two daily newspapers (for five years). In 2014 Islandport Press published his book of columns about Maine titled "A Life Lived Outdoors." In addition to his family, his interests include hunting, fishing, and birding throughout the Maine Woods, including its public reserved lands.

20. Mr. Clifford Stevens is an individual residing in The Forks, Maine, and owns and operates Moxie Outdoor Adventures. Mr. Stevens's businesses offer whitewater rafting, kayaking, canoeing and hiking, and operates in and around the public reserved lands subject to BPL's Lease with CMP. The proposed transmission line corridor abuts the lands that Mr. Stevens uses to operate his business and would be visible to his customers.

21. Mr. Todd Towle is an individual residing in Kingfield, Maine, and is a member of the NRCM and owner and operator of Kingfisher River Guides. As part of his fishing and guiding business, Mr. Towle conducts trips on the Kennebec River from The Forks to the Shawmut Tailwater with a focus on fly fishing for trout and salmon. The proposed transmission line corridor will affect the temperatures of Cold Stream Pond—home to native trout—located in

Johnson Mountain Township and will be visible to his clients while participating in recreational activities. Mr. Towle has used the public reserved lands that are the subject of the Lease for recreational purposes since approximately 1988, and plans to continue to do so.

22. Defendant Andy Cutko is the Director of the Bureau of Parks and Lands in the Department of Agriculture, Conservation and Forestry, which is located in Augusta, Kennebec County, Maine. He is sued in his official capacity.

23. Defendant Bureau of Parks and Lands in the Department of Agriculture, Conservation and Forestry, is an agency of the State of Maine with its principal office in Augusta, Kennebec County, Maine.

24. Defendant Central Maine Power Company is a Maine business corporation that is headquartered in Augusta, Maine.

REAL ESTATE INVOLVED

25. A three hundred foot wide by approximately one mile long area of public reserved land in Johnson Mountain Township and West Forks Plantation, in Somerset County owned by the State of Maine in trust for the public as more particularly described in the Lease attached as Exhibit A hereto.

JURISDICTION AND VENUE

26. This Court has jurisdiction over this Complaint for Declaratory and Injunctive Relief pursuant to 14 M.R.S. §§ 5951-5963, §6051 (13), §§6651 *et seq*., §§6701 *et seq*., and Rules 57, 65 and 80A of the Maine Rules of Civil Procedure.

27. Venue is properly laid in this Court pursuant to 14 M.R.S. § 505 because both BPL and CMP conduct business from their principal offices in Augusta, Kennebec County, Maine.

FACTUAL BACKGROUND

28. Ownership of approximately seven million acres was transferred to Maine when it separated from Massachusetts in 1820. Prior to 1890, Maine sold or gave away all but 400,000 acres of this land.

29. The remaining 400,000 acres of public reserved lands were reserved in each of the State's unorganized townships as approximately 1,000 acre lots, and in some cases 1,280 acre lots, and were intended to be used to encourage development, provide funds for the ministry, and for education. Because Maine didn't develop as initially contemplated, over the years the State leased these public reserved lands to camp owners, paper companies, and timber companies, at virtually no cost. The paper companies claimed that their leases, which dated back to the 1800's, allowed them to cut all the timber on the leased land in perpetuity at nominal rent.

30. An NRCM board member began to catalogue the abuses of the public lot leasing program, and in a series of articles in the Portland Press Herald in the early 1970's, reporter Bob Cummings documented the importance of these lands, the purposes for which they were originally intended when Maine separated from Massachusetts, and their highest and best use going forward. *See* articles attached hereto as Exhibit B. Eventually, after a decade of investigation, legislative consideration, and litigation, the public lots were returned to the State. *See Cushing v. State*, 434 A.2d 486, 501 (Me. 1981).

31. After extensive negotiation and land swaps, the public lots were configured into the shape they now have. The purpose of this effort could not have been clearer—to preserve these jewels, like the Debsconeag Lake Wilderness Area, mountain ranges such as the Bigelow,

Mahoosuc and Deboullie, hundreds of miles of remote lake shores and streams, and thousands of acres of forests—and make them available for public use and enjoyment, not for the benefit of private and corporate interests. *See* Bob Cummings, *Our public lots: State's scenic jewels had a long journey home*, Maine Sunday Telegram (1981) attached hereto as Exhibit C.

32. To ensure that purpose was realized, the people enacted Article IX, Section 23 of the Maine Constitution in 1993. It states: "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House."

33. 12 M.R.S. §§ 598 to 598-B implements Section 23 by designating various public lands, including public reserve lots and public reserved lands, for this constitutional protection.

34. Because West Forks Plantation and Johnson Mountain Township parcels are Public Reserved Land, they constitute designated lands under 12 M.R.S. § 598-A(2) and cannot be reduced or substantially altered absent approval of 2/3 of the Legislature.

The Proposed Transmission Line and Lease

35. CMP has proposed construction of a new 145 mile, high voltage direct current transmission line from Quebec to an interconnection with the New England grid in Lewiston, Maine, commonly known as the New England Clean Energy Connect ("NECEC").

36. Approximately 54 miles of the transmission line route would consist of an entirely new 150 foot wide transmission line corridor. The transmission line would bisect West Forks Plantation and Johnson Mountain Township by cutting a 150 foot wide by one mile long corridor across these two parcels of Public Reserved Land and erecting towers and transmission lines approximately 100 feet tall.

37. On or about December 8, 2014, BPL entered into the Lease, a twenty-five year lease for the non-exclusive use of a portion of West Forks Plantation and Johnson Mountain Township—a three hundred foot wide by approximately one mile long area—as part of this transmission line corridor. The Lease initially provided for an initial year one lease payment from CMP of $1,400.
38. On or about June 22, 2015, BPL and CMP entered into an amendment to the Lease, which increased the initial year one lease payment from $1,400 to $3,680. All other terms and conditions of the Lease remained in full force and effect.
39. On information and belief, at no time did BPL obtain an appraisal of the value of the land to be leased or consider the enhanced value associated with parcels required as part of the right-of-way for a linear project.
40. On information and belief, CMP is not paying market price for its lease of public reserved land, which is evidenced by the significantly greater price per square foot it paid for its lease of land from the Passamaquoddy Tribe.
41. The Passamaquoddy Tribe entered into a twenty-five year transmission line lease agreement with CMP (the "Passamaquoddy Lease") for the non-exclusive use of a portion of Lowelltown Township—a three hundred foot wide by approximately three hundred foot long area—as a part of the transmission line corridor, which provides for an initial payment from CMP of $1,000,000.
42. The Lease between BPL and CMP was for approximately 1,584,000 square feet (300 feet wide by 5,280 feet long). The initial year one payment of $1,400 from CMP to BPL under the Lease was at a rate of $0.0009 per square foot ($1,400 / 1,584,000 square feet). The

initial year one payment of $3,680 under the amendment to the Lease was at a rate of $0.002 per square foot ($3,680 / 1,584,000 square feet).

43. The Lease between the Passamaquoddy Tribe and CMP was for approximately 90,000 square feet (300 feet wide by 300 feet long). The initial year one payment of $1,000,000 from CMP under the Passamaquoddy Lease was at a rate of $11.11 per square foot ($1,000,000 / 90,000 square feet).
44. If CMP had paid BPL the same amount per square foot that it paid the Passamaquoddy Tribe, then it would have paid BPL an initial one year payment of $17,598,240 ($11.11 x 1,584,000 square feet)—not $3,680.
45. Moreover, the minimum subsequent annual payments from CMP to the Passamaquoddy Tribe are at least approximately $6,000 more per year than CMP's subsequent annual payments to BPL.
46. Notwithstanding the fact that the BPL leased this Public Reserve Land to CMP for next to nothing, the Lease grants CMP the right to, among other things, construct and maintain "poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity . . . ."
47. According to the Lease, BPL had authority to enter into the Lease pursuant to 12 M.R.S. § 1852(4).
48. On information and belief, BPL was unaware of the size and scope of the proposed use of the leased land, nor did it consider whether that use constituted a "substantial alteration" requiring legislative approval. Legislative approval was neither sought nor obtained.
49. In contrast, BPL did seek and obtain legislative approval for the lease of public reserved land necessary for other transmission lines.

50. At the time BPL and CMP entered into the Lease, CMP had not obtained a CPCN from the PUC. Although the PUC eventually issued a CPCN for NECEC on or about May 3, 2019, the PUC simultaneously approved a stipulation specifying that "CMP will transfer and convey the NECEC to NECEC Transmission LLC ("NECEC LLC"), a Delaware limited liability company that is a wholly owned subsidiary within the Avangrid Networks family of companies and is not a subsidiary of CMP." *Cent. Me. Power Co.*, Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, Docket No. 2017-00232, Stipulation at 16 (Me. P.U.C. Feb. 21, 2019). Thus, even now, CMP itself technically does not have a CPCN.
51. The Lease contains a provision prohibiting assignment or sublease without the written approval of BPL.

COUNT I
DECLARATORY JUDGMENT
(Violation of 35-A M.R.S. § 3132)

52. Plaintiffs repeat and reallege the assertions made in Paragraphs 1 through 51 as though fully set forth herein.
53. A present dispute between the Plaintiffs and the Defendants as to the validity of the Lease exists because BPL entered into the Lease with CMP even though CMP had not obtained a CPCN from the PUC as required by 35-A M.R.S. § 3132(13).
54. An agency of the State of Maine, including BPL, cannot lease an interest in land to any person for the purpose of constructing a transmission line unless the person has first received a CPCN from the PUC. 35-A M.R.S. § 3132(13) ("The State, any agency or authority of the State or any political subdivision of the State may not sell, lease or otherwise convey any

interest in public land, other than a future interest or option to purchase an interest in land that is conditioned on satisfaction of the terms of this subsection, to any person for the purpose of constructing a transmission line subject to this section, unless the person has received a certificate of public convenience and necessity from the [public utilities] commission pursuant to this section.").

55. At the time BPL and CMP entered into the Lease, CMP had not obtained a CPCN from the PUC as required by 35-A M.R.S. § 3132(13).

56. Because CMP had not obtained a CPCN from the PUC before entering into the lease, BPL's execution of the lease was *ultra vires*. Approval of the PUC-required transfer of the lease from CMP to NECEC LLC also would be *ultra vires* for the same reasons.

57. Plaintiffs have standing to raise this issue because BPL's violation of 35-A M.R.S. § 3132 has resulted in a Lease between BPL and CMP for a proposed transmission line that would interfere with their rights as trust beneficiaries and owners of the public reserved lands and their respective abilities to continue engaging in recreational and commercial activities and, in some cases, the use and enjoyment of their properties, in West Forks Plantation and Johnson Mountain Township.

58. Additionally, several of the plaintiffs are actively contesting issuance of Site Law and Natural Resources Protection permits for the proposed transmission line at the Maine Department of Environmental Protection ("DEP") on the ground, among others, that the Lease is invalid. The DEP has responded by saying that such a challenge must be brought in court.

59. It appears reasonably certain that litigation to resolve the instant dispute is unavoidable; the state of facts underlying the parties' disagreement is reasonably certain; and a judicial declaration, if rendered and entered, would terminate the uncertainty regarding the parties'

interests in the validity of the Lease and fix the legal rights of the parties to this action.

COUNT II
DECLARATORY JUDGMENT
(Violation of Me. Const. Art. IX, sec. 23)

60. Plaintiffs repeat and reallege the assertions made in Paragraphs 1 through 51 as though fully set forth herein.

61. A present dispute between the Plaintiffs and the Defendant as to the validity of the Lease exists because BPL entered into the Lease with CMP without first obtaining a 2/3 vote of each House as required by Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A.

62. Article IX, section 23 of the Maine Constitution requires that public reserved land designated by the Legislature may not be reduced or altered without a 2/3 vote of "all the members elected to each House."

63. The implementing statute, 12 M.R.S. § 598-A, identified public reserved lands as among the lands being "designated...under …Section 23," and similarly provides that such lands "may not be reduced or substantially altered, except by a 2/3 vote of the Legislature."

64. The Legislature defined the term "substantially altered" as changing the land "so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which the land is held by the State" and stated that "[t]he essential purpose of public reserved and nonreserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S. § 598(5).

65. As set forth in 12 M.R.S. § 1847, Public Reserved Land is to "be managed under the principles of multiple use to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning and that the public reserved

lands be managed to demonstrate exemplary land management practices, including silvicultural, wildlife and recreation management practices, as a demonstration of state policies governing management of forested and related types of lands."

66. BPL manages West Forks Plantation and Johnson Mountain Township pursuant to the Upper Kennebec Region Management Plan ("Management Plan"), which provides for these two parcels to be used for timber management, wildlife management, and recreational uses.

67. In accordance with the Management Plan, West Forks Plantation and Johnson Mountain Township are presently forested and largely without any significant permanent structures.

68. CMP's proposed transmission line would bisect West Forks Plantation and Johnson Mountain Township by cutting a 150 foot wide by one mile long corridor. It would fragment West Forks Plantation and Johnson Mountain Township and would be the largest fragmenting feature in the Western Maine Mountains region.

69. By cutting a 150 foot wide by one mile long corridor that bisects West Forks Plantation and Johnson Mountain Township, CMP's proposed transmission line would require, among other things, vegetation removal, surface alteration, and placement of poles and wires that are approximately 100 feet tall.

70. The proposed transmission line corridor would directly impact approximately 973 acres of the region, including West Forks Plantation and Johnson Mountain Township, through forest and wetland species mortality and habitat alteration and destruction associated with the corridor footprint.

71. In West Forks Plantation and Johnson Mountain Township, the proposed transmission line would impact wildlife habitats (*e.g.*, for birds, marten, lynx, loon, moose and other iconic

Maine animals), fisheries (*e.g.* wild brook trout), recreational uses (*e.g.* bird watching, hiking and hunting), and timber harvesting**.**

72. Thus, the proposed transmission line would alter the physical characteristics of West Forks Plantation and Johnson Mountain Township in a way that frustrates the essential purposes for which the parcels are held and substantially alter the uses of these public reserved lands.

73. On other occasions, BPL has recognized that even smaller transmission lines substantially alter the public land being leased and accordingly require legislative approval. *See, e.g.*, Resolve Ch. 91, LD 1913, 123rd Maine Legislature, finally passed June 19,2007:

> This resolve allows the Director of the Bureau of Parks and Lands within the Department of Conservation to convey:
>
> 1. An easement for electric transmission lines across 2 state-owned parcels to TransCanada Maine Wind Development, Inc. The parcels are in Wyman Township abutting existing utility corridors and proximate to or abutting State Route 27 and the Appalachian Trail Corridor;
>
> 2. An easement for electric transmission lines across a state-owned parcel to Bangor Hydro-Electric Company. The parcel is in Bradley;
>
> 3. An easement for electric transmission lines across a state-owned parcel to Bangor Hydro-Electric Company. The parcel is in Township 21 in Washington County

See Exhibit D at 7-8, a copy of the resolve attached hereto.

74. Despite the fact that the proposed transmission line would significantly alter these public reserved lands, upon information and belief, BPL did not consider whether the Lease triggered the 2/3 legislative vote requirement under Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A. The Lease is silent with respect to whether CMP's intended use requires 2/3 legislative approval under Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A.

75. BPL leased the land to CMP without first obtaining a 2/3 vote of each House as required by Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A. Execution of the Lease without 2/3 legislative approval was *ultra vires*. Any purported future assignment or transfer of the Lease would similarly be *ultra vires*.

76. Plaintiffs have standing to raise this issue because (i) leasing these public reserved lands for the transmission line would interfere with their rights as trust beneficiaries and owners of the public reserved lands and their respective abilities to continue engaging in recreational and commercial activities and, in some cases, the use and enjoyment of their properties, in West Forks Plantation and Johnson Mountain Township; and (ii) BPL's failure to seek legislative approval has deprived plaintiffs Black, Ackley, Berry, Grignon, O'Neil, Pluecker, and Harlow of their constitutional right to vote on the Lease under Article IX, Section 23 of the Maine Constitution.

77. It appears reasonably certain that litigation to resolve the instant dispute is unavoidable; the state of facts underlying the parties' disagreement is reasonably certain; and a judicial declaration, if rendered and entered, would terminate the uncertainty regarding the parties' interests in the validity of BPL's Lease with CMP and fix the legal rights of the parties to this action.

COUNT III
(Injunctive Relief)

78. Plaintiffs repeat and reallege the allegations set out in Paragraphs 1 through 77 as if fully set forth herein.

79. Because the Lease is *ultra vires*, no rights it purports to grant may be exercised by defendant CMP and it should be enjoined from attempting to exercise any such purported rights.

80. Similarly, because the Lease is *ultra vires*, the Director may not lawfully transfer it from CMP to NECEC, LLC as required by the PUC stipulation, and he should be enjoined from any such attempt.

WHEREFORE, Plaintiffs respectfully requests that the Court enter judgment in their favor and against Defendant and:

(A) Find and declare that the execution of the Lease was *ultra vires* and that, accordingly, the Lease is void and/or invalid because BPL issued the Lease prior to CMP obtaining a CPCN from the PUC in violation of 35-A M.R.S. § 3132;

(B) Find and declare that the proposed transmission line would effect a substantial alteration in the use of designated lands, thus requiring 2/3 legislative approval;

(C) Find and declare that execution of the Lease was *ultra vires* and that, accordingly, the Lease is void and/or invalid because BPL issued the Lease without first obtaining a 2/3 vote of each House in violation of Article IX, Section 23 of the Maine Constitution;

(D) Find and declare that the execution of the Lease was *ultra vires* and that, accordingly, no future transfer or assignment of the Lease can be made;

(E) Enter an order prohibiting defendant CMP from undertaking any activities on the lands purportedly leased pursuant to the unlawful Lease;

(F) Enter an order prohibiting defendant Cutko or any agent of BPL from executing a transfer of the unlawful lease to NECEC, LLC;

(G) Award Plaintiffs their costs of suit, as permitted under 14 M.R.S.A. § 5962; and

(H) Award Plaintiffs such other and further relief as this Court deems just and proper.

Dated at Portland, Maine this 23rd day of June, 2020.

/s/ James T. Kilbreth

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Public Land Sold And Given Away

TELEGRAM
SUN MAR 12 1972

By BOB CUMMINGS

Maine is pondering the disappearance of its coastline to out of state developers and speculators.

And it is struggling to buy enough land to preserve some minimum of public access to its lake and mountain country.

But at the same time the recreational potential of 400,000 acres the public already owns continues to be neglected, sold and given away.

This is the amazing story of the state's little known, and little understood public lots—a vast legacy of public domain dating from colonial time.

This public land lies scattered throughout the 10 million acres of wildlands. All of it is in the unorganized townships of northern and eastern Maine.

Public lots straddle mountain tops and slopes, encompass miles of lake, pond and riverfront and include within their environs hundreds of free flowing wilderness streams.

They are 1,000-acre and in some cases 1,280-acre plots set aside when Maine and Massachusetts sold millions of acres of public lands. Massachusetts' role stemmed from the fact that until 1820 Maine was part of Massachusetts.

The plots orginally were set up so income from them could be used to support the ministry and the public schools.

Later, in 1833, by joint action of the legislatures of the two states, the public lots were dedicated solely to the support of public schools and Maine was given trusteeship.

As a source of funds for schools the lots have proved a complete bust. After 151 years of state trusteeship, the lots generated just $55,000 in interest last year, money which was paid to the state department of education.

The principal now stands at the grand total of $2.8 million, approximately what a typical Maine community of 15,000 spends for schools in a year.

One reason for the poor showing is the state's poor trusteeship. Between 1850 and 1878 the Maine legislature sold off all rights to harvest the trees on the public lots for as little as a nickel an acre — and didn't even put the money into the trust fund. It spent it instead.

As a result the state owns both land and timber rights to only 70,000 acres of its 400,000 acres. On the rest the state owns only the land itself and the minerals under it.

But the value today is not in the timber harvesting potential which the state sold. Maine already grows twice as much wood each year as its mills can use.

The shortage is in public recreation lands.

And in public lots Maine owns twice as much land as the area of Baxter State Park, Maine's largest, and 10 times the total acreage of all the other state parks including the Allagash Wilderness Waterway.

Aside from the occasional leasing of camp lots, Maine has largely ignored the recreational value of its vast domain. This may at last be changing. But the change is coming slowly.

Last June Gov. Kenneth M. Curtis issued an executive order setting up a joint committee of state department heads to ponder "the need for coordinating future plans of each state agency for acquiring and using lands for recreation, conservation or open space preservation."

Named to the panel was the Commissioner of Forestry, Austin Wilkins—the man currently responsible for the management of the public lots.

Others are the commissioners of inland fisheries and game, and highways, the executive director of the Maine Land Use Regulation Commission and the director of state planning.

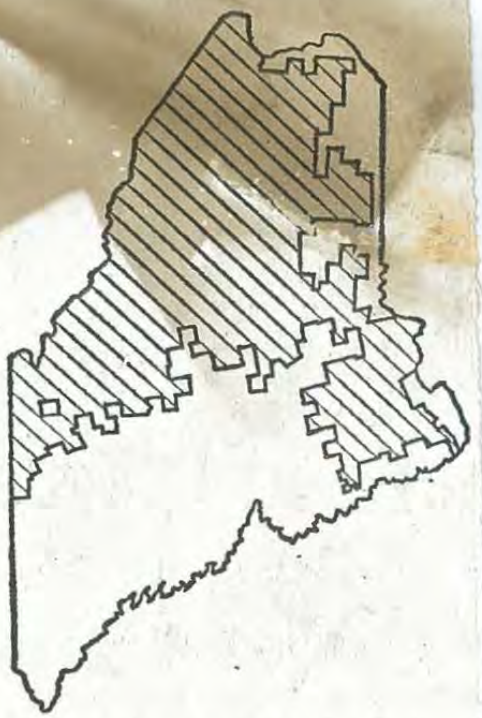
Lawrence Stuart, director of parks and recreation, is chairman.

Among the specific charges to the committee is to recommend a policy for the public lots including "the exchange of forest lots in the unorganized townships."

But the committee has yet to meet. The governor's office and Stuart blame the time required to plan for the proposed department of Natural Resources of which Stuart is commissioner.

The special session of the legislature, however, has now finally rejected the new department and members of the land committee say they expect a meeting now to be called soon.

The directive calling for a study of the "exchange" of public lots may be the most important consideration of the new committee.



UNORGANIZED — Cross hatched area indicates extent of Maine's unorganized territory. There are about 425 unorganized townships within the area and most contain more than 1,000 acres of woodland dedicated to public use.

The scattered location of the lots makes the management for sustained yield of forest products expensive and difficult Wilkins says — and makes any systematic recreational use impossible.

Consolidation of the lots into several compact blocks would make public access and public recreation more likely and probably increase the value of the lots in providing money for the operation of schools in the wildlands.

Wilkins moved a lot near Greenville a couple of years ago because it was in the way of Squaw Mountain ski development.

If the location of public land can be moved to facilitate private recreation, the locations can be changed to provide for public recreation.

At least this is the suggestion of John McKee, a director of the Land Use Regulation Commission and an officer of the Natural Resources Council of Maine.

McKee, whose photographic essay "As Maine Goes . . ." focused national attention on the Maine coast a few years ago, has written, "little thought has been given to the role the public lots might play

in a coordinated program of conservation and wilderness recreation at minimum cost to the public.

"Indeed, many people looking at the state house from the outside and jarred at the prices being demanded for potential state park and other lands, have come away wondering whether the left hand was aware of the right hand."

His concern has some foundation. While the state is buying coastal land for up to $25,000 and more an acre, it has recently embarked on a new policy of selling away its public lots for as little as $400 an acre.

Sales have been completed for big chunks of the public lots in the Carrabasset Valley near Sugarloaf for an average price of 11 cents an acre and other sales are pending. (5 square feet)

Forest Commissioner Wilkins says the prices were established by an independent appraisal and the sale was authorized by the legislature on his recommendation.

The initial sale was voted a couple of years ago and two more sales last spring.

The first was an attempt to clarify the legal status of camp owners who had leased land from the Dead River Co. and built camps—only to find later that the state actually owned the land.

But the sales authorized last year had no such legal complications. The owners of camp lots on land the state itself had leased wanted the protection of ownership and the state went along.

Wilkins calls the sales "a special situation" and says he will oppose future sales of the public lands.

But the precedent has been set and future legislatures are certain to be faced with continuing pressure to sell camp lots wherever the forest commissioner has the leased land.

Wilkins defends the leasing program. "I am not adverse to continuing the policy of leasing camp lots. This is part of a national trend of outdoor recreation," he says.

Three hundred and sixty such leases are outstanding now—most for an annual fee of $50.

mittee must ponder is whether it can afford to give exclusive use to 150 feet or more of lakefront to one person, while at the same time buying other lakefront for use by the general public.

The public lots were created on the assumption that eventually all parts of the state will become settled and grow into communities with their own stores, churches, homes and schools.

But the facts of Maine life, of course, have changed in the years since the lots were created by the Massachusetts legislature in the 1870's. The assumption is no longer valid.

Maine wildlands are no longer serious candidates for being settled—except by recreational home buyers who need no schools.

More important the wildlands are the croplands for the state's most important industries — pulp, paper and wood products.

These combine to provide jobs for a majority of Maine workers. Few seriously contend that it is in the state's interest to try to replace this industry with anything else.

The woods industry pays the highest wages of any in the state and by its use of the woods for timber harvesting provides most of the tiny bits of wildness left for outdoor recreation available in the entire northeast.

The legislature recognized the uniqueness of the Maine woods when it created the Land Use Regulation Commission to assure that any development in these areas doesn't destroy the woods environment.

If the premise of the wildlands commission is realistically to be carried out, the 1780's goal of an organized community in each township has to be changed and a better use be made of the land, McKee argues.

The key vote establishing the state's right to the land was made by the Massachusetts Legislature on March 26, 1788, when it made a condition of the sale of any township of six square miles the reservation of "four lots of 320 acres each, one for the first settled minister, one for the future appropriation of the general court, one for the use of the ministry and one for the use of the schools."

When Maine became a separate state the one of the articles of separation that became part of the Maine constitution provides ". . . and in all grants hereafter to be made by either state of unlocated land within the said district, the same reservation shall be made for the benefit of schools and the ministry as heretofore been usual.."

The only subsequent change in the basic law setting up the reserve lots came in 1832, when both legislatures agreed to change 1,280 acres to 1,000 acres and to eliminate the reference to the ministry.

About half the 400,000 acres of public land lies scattered in the 390 unorganized townships—towns laid out in six square mile blocks but containing no organized government.

The land is located in plots as small as 50 acres and as large as 2,000 — bigger than all but two of our 37 state parks.

The rest the state owns but has never gotten around to laying out on the ground. But the public's right to its land remains undisputed and the procedures for establishing the boundaries are established by law.

The public lots are what remain from the seven million acres of public domain that Maine inherited or bought after it separated from Massachusetts in 1820.

But Maine didn't get to be a half century old before it had peddled or given away all of its seven million acres of public lands—except the public lots.

It may be one of the ironies of history that these lots set up to insure eventual civilization may become a major tool in preserving one of the scarcest commodities of the final decades of the 20th century—natural areas and wilderness.

SUN APR 9 1972 TELEGRAM

Public Lots Saga Gets Stranger

By BOB CUMMINGS

The saga of Maine's public lots gets stranger and stranger.

Records on file in the office of Forestry Commissioner Austin H. Wilkins reveal that 16 acres of public land was sold in Wyman township near Sugarloaf Mountain last summer. Wilkins last week had said only seven acres had been sold.

The forestry department records also reveal that the price paid the state was $2,000 an acre rather than the $5,000 previously quoted by Wilkins.

The land sale, to an association of people who had been leasing the lots, had been authorized in a special legilstive resolve passed last spring.

The 16 acres sold for $31,950, which figures out to four and three-fifths cents per square foot. Wilkins earlier had announced the price as 11 cents a square foot.

AS OWNER of the land, the state got to keep $21,300.33 of the total. The J. M. Huber Corp. received $10,650.17 for its timber cutting rights on the 16 acres.

During the debate over the productivity tax, also passed by the Maine Legislature last spring, industry spokesmen said timberland in Maine produces $1.50 per acre per year on an average.

Wilkins says the timber owners normally get half the income from leased lots on public lands. He said Huber was given only a third of the sale price, rather than half, because he thought the value of the land itself was greater than its timber cutting value.

Originally only seven acres were to be sold. Another nine acres was added to bring the average lot size up to 20,000 square feet. That size is required by Maine law for new construction in areas not served by public sewers and water.

As laid out for camps by the forestry department, the lots ranged in size from 6,650 to 18,750 square feet.

The land sold was part of a 500-acre public preserve along Route 27 and a gravel access raod to the pincipal trails on Bigelow Mountain.

ALSO AUTHORIZED to be sold by the 105th Maine legislature were formerly leased lots in another Carrabasset Valley township.

The town of Bridgton also was given 40 acres of public land in that community, and the Brown Paper Company got 320 acres near Mount Tumbledown a short distance from Mount Blue State Park. Both of these gifts were designed to clear up disputed titles.

The lands were part of the 400,000 acres the public still owns out of seven million acres Maine got from Massachusetts after it became a separate state in 1820. The rest was sold or given away, mostly prior to 1890.

The 400,000 acres was retained on the theory that eventually all of Maine would become settled and the lots would be useful in providing income to schools.

A special committee had been named by Gov. Kenneth M. Curtis to recommend public land acquisition policies for the state and to explore their recreational potential.

The committee meets for the first time Tuesday.

Public Land:

A Double

SUN APR 16 1972

Standard TELEGRAM

By BOB CUMMINGS

Public Land

How much are the timber cutting rights to Maine's public lots worth?

The State Bureau of Taxation places a valuation of $14 an acre on the public land in Wyman Township, near Sugarloaf Mountain.

But when the state sold 16 of these publicly-owned acres to a group of camp owners who had been leasing it, Forestry Commissioner Austin H. Wilkins handed over $665 an acre to the J. M. Huber Corp., which had the timber rights.

This surprising aspect in the continuing bizarre saga of Maine's public lands prompts several questions which could be explored by the committee set up by Gov. Kenneth M. Curtis last week.

Wilkins thinks the state got a bargain when it gave Huber $10,695 of the $31,950 he negotiated for sale of the lots.

He explains that traditionally the timber owner has gotten half the sale price. In this case, Huber got only a third.

"I think I did very well for the state on this, as a matter of fact. I feel rather pleased," Wilkins comments.

But since Huber owns only the timber and grass cutting rights to the public lands, why should he get more than the value of these rights when the land is sold?

Wilkins says he doesn't really know. "I have just followed the precedent established back in 1914 as other forest commissioners have."

But he agrees this is an area the governor's committee should look into.

The committee of state department heads was named last spring to look into all state land acquisition and land sale policies.

The governor named the committee last June, but the first meeting wasn't held until last week—three weeks after a Maine Sunday Telegram story charged the state with neglecting the recreational potential of 400,000 acres of public lands.

Wilkins says the state should also look into the terms on which it leases the public lots. At present the timberland owners and the state split lease fees down the middle.

Wilkins thinks that the $25 a year payment for quarter-acre camp lots represents many times the timber harvesting value of the land.

He also agreed, in response to questions, that one possibility might be for the state to buy back its timber-harvesting rights before leasing lots in the future.

The cost in most cases would be negligible. Most of the leased lots are on lake shores or mountain hillsides with limited timber harvesting potential.

The lots sold in Wyman township last summer are in what, until 20 years ago, was a hay field. Wilkins describes the land now as "pasture spruce" with trees up to 30 feet high.

Two main themes have arisen from the public debates, news stories and deluge of letters to the editor since the initial Sunday Telegram article on public lots a month ago.

The first and major question is to decide the best use Maine can make of its almost 400,000 acres of public lots, land which was left over from the orgy of selling that followed Maine's statehood in 1820.

The second question is whether the state is getting full value for the uses to which the land is now put. The $10,695 payment to Huber and a pending similar payment to Scott Paper Co. suggests perhaps it isn't.

During the first 65 years of statehood, our legislatures sold or gave away most of the 7 million acres Maine acquired from Massachusetts.

But reserved in each of the state's unorganized townships were blocks of public lots. The theory was that eventually all of Maine would be settled and these lands could then be used for the support of the schools.

In some townships 1,280 acres were aside; in the rest, 1,000.

Under the 1820 plan, as each 36-square mile township was organized, it would receive its 1,000 acres to use to support the education of its children.

Although grass and timber cutting rights were sold on most of the reserve lots, the deeds stipulate that these rights revert back when the township gets an organized local government.

The whole scheme was based on the assumption that quite quickly all of Maine would be settled. But things didn't work out that way. Half of Maine is still unorganized wildlands, and all prospects suggest that most of it will remain in this category.

The cutting rights on a thousand or more acres in some instances sold for as little as $50.

The 1280-acre public lot in Wyman township—out of which the 16 acres were sold last summer—cost only $200, or 1 cents an acre, when it was sold in 1854.

For all practical purposes the owner of the cutting rights treats the land as if it were his own—except that he doesn't have to pay taxes on the basic land, just on the timber it grows.

For some of the land the timber harvesting value and the total value is nearly identical.

But in places like Wyman township the big value is for public recreation or for the sale or lease of camp, cottage and vacation home sites.

The state bureau of taxation, which assesses the taxes, thinks the state owns the recreational value. Yet the forestry department is, in effect turning a half or a third of this recreational value over to the owner of the cutting rights as well.

The other probelm for the governor's committee is even more basic.

It's the question of whether the forestry department should continue to ignore and lease or sell away the recreational potential of lands the state already owns while the State Parks Department is busy simultaneously buying new recreational lands, and paying heavily for them.

Although Wilkins says he doesn't oppose new use of the public lands, he plans to continue leasing lots and putting through sales even while the committee is deliberating the system and is almost certain to come up with recommendations for change.

Public Lots

Maine's chance to right a history of wrongs

By BOB CUMMINGS

THE CITIZENS of Maine once owned nearly 8 million acres of land. In just over 150 years, the trustees of this great public heritage have managed to give away or sell off 95 per cent of it.

Between 1820, when Maine became a state, and 1878, its officials gave away two million acres. And they sold more than 3½ million acres at an average price of 56 cents an acre.

Now, in 1972, we watch in frustrated dismay as our coastline is chewed away by out-of-state developers and land speculators. And we struggle, through our state Parks and Recreation Department, to preserve at least minimal public access to our remaining lake and mountain country.

But the neglect and waste continue, at least as far as the recreational potential of 400,000 acres of wildlands the state already owns is concerned.

These lands, worth at least $30 million and perhaps many times this amount, are treated as the private domain of the big timberland owners of the state.

THE USE and disposition of these public lands was the central issue raised in a series of Maine Sunday Telegram reports last spring.

Nine months later it continues to be probably the most pressing environmental decision facing Maine's elected and appointed officials, executors of this rich natural heritage.

An executive order issued by Gov. Kenneth M. Curtis has put at least a temporary stop to the sales and giveaways of these lands.

But barely begun is the monumental task of devising long range plans for the best use of this legacy from the birth of the state of Maine.

The tale of the public lands is one of giveaways and neglect dating back to the earliest days of statehood.

The lands were sold at auction to keep the state from raising taxes and given away as prizes in lotteries for the same purposes. Hundreds of thousands of acres went, after the Civil War, to veterans but wound up in the hands of speculators. And a whopping 700,000 acres was given to the North American Railway Company in return for a promise to build a railroad from Bangor to Vanceboro in extreme northern Washington County.

All that remains are the public reserved lots — in most instances 1,000 acres in each of the six mile square townships scattered through Maine's wildlands.

ORIGINALLY the reserved lands were to support the ministry and the public schools. They were required to be set aside under the terms of the articles of separation that became part of Maine's first constitution.

Later, when separation of church and state became an issue, the legislature decreed that the lands should be used exclusively for schools.

Under that plan the reserved lots were to be held in trust until such time as Maine became settled like all the other states in the eastern United States.

But the settlers never came. And Maine proved a poor trustee.

Maine as trustee in effect gave the lots to the state's big landholders until such time as the lands became settled. Since fewer rather than more people live in the wildlands each year, those temporary gifts in effect have come to be regarded as permanent. Only now are serious questions being raised.

The "gifts" were in the form of cutting rights to the grass and timber — sold in some instances for 10 cents an acre, in others for 17 cents and occasionally for as much as 30 cents.

The problem really boils down to two questions:

How best to get back the cutting rights so that the public can use its land without paying tribute to the timber owners? And thereafter, how to devise a plan so these 400,000 acres can be used again for public rather than private purposes.

Maine taxpayers have paid for the answer to the first question. But in what has to be one of the most bizarre aspects of a bizarre story, the answer is being kept secret by Atty. Gen. James S. Erwin.

Following the Sunday Telegram series came three meetings of a special interdepartmental committee on public lands appointed earlier by Gov. Curtis.

And out of the committee came a decision by State Attorney General Erwin to assign Asst. Atty. Gen. Lee M. Schepps to a three-month study of the history and legal ramifications of the reserved lots.

The report was completed early in September, but for reasons that are still unclear, Erwin won't let anyone read it. He won't give a copy to the governor, the legislature, the press or even the committee is presumably was written for in the first place.

The document is "incomplete and a working tool of my office," Erwin insists. "It never was intended to be made public."

So Maine citizens and taxpayers may end up paying for a second public lot study.

State Parks and Recreation Director Lawrence Stuart, who was named to head Gov. Curtis' special committee on public lands, says he is looking for a foundation grant to pay for his own public lot probe. But if he can't find one, he'll seek money in his budget to pay for a new study.

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SO FAR THE only official statement concerning the public lands study that has been made public is a three-page summary of the Schepps report sent to Gov. Curtis, members of

Got An Opinion?

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Stuart's committee and State Sen. Joseph Sewall, chairman of the legislative research committee.

This summary concludes that:

— Maine in fact still owns the nearly 400,000 acres of public reserved lands despite its long neglect of the property.

— The grass and timber rights which were sold by the Maine legislature between 1850 and 1890 have either already reverted to the public or through proper legislative and legal steps can be made to do so.

— The lands and any income they may generate can be used for any public purpose, not exclusively for schools, as was presumed in the past.

The summary also insists that the public lots now scattered through each of the state's 395 wildland townships can be assembled into compact parcels, suitable for use as park lands, public forests or any other use the legislature may devise.

These are the key conclusions in what the attorney general has publicly described as an "excellent resume of the history, fact and legal consequences" of the public lands.

What remains is to test the validity of these findings in a court of law and in the halls of the legislature.

Yet once before when Maine had a chance to recover at least some of the rights to its public lands, the legislature promptly gave them away again.

This happened in 1905 when the rights of the holders of the cutting permits to harvest hardwoods and fir from the public lots was challenged. The argument was that when Maine was selling its cutting rights, timber meant only spruce, pine and oak. Before the courts even could rule, the legislature decreed that as far as the public lots went, timber meant anything that would grow.

ALL CUTTING rights automatically revert to the public when a township becomes organized either as a town or a plantation. An 1876 law restricts plantations to one township. But the Schepps study suggests that by repealing this limitation, the legislature could, for instance,

Please turn to next page

Continued from previous page

recreate as one plantation all the unorganized townships in a county.

Schepps thinks this would be legal since at the time cutting rights were sold, there either were no statutory provisions limiting the area or population of plantations, or else cutting rights were to expire upon the organization of the township merely for the purpose of casting ballots in county, state and federal elections.

This isn't necessarily easy, one reason being that Maine's entire tax system is divided between organized and unorganized townships.

Unless the state wants to take a chance of imposing a tax break or a tax windfall on one group of taxpayers or another such conflicts have to be carefully checked out.

But time is running out. The legislative session is only five weeks away and legislators and the public can't seriously begin thinking about such ramifications until the attorney general's study is somehow made available.

And it is essential that the coming Maine legislature act, if for no other reason than to protect the status quo of the lots.

Too much delay could mean that when Maine finally gets around to reclaiming its public lands, it won't find a forest, but a barren wasteland of clearcut stumps.

Why? In the wake of the publicity, everyone who owns cutting rights on the public lands will want to harvest his crop of trees while he still can.

FOR SOME of the lands, public concern has come too late. This fall and winter Diamond International Corp. is cutting a thousand acre public lot deep in the heart of Piscataquis County — a lot that extends right to the edge of Gulf Hagas, the remote wilderness canyon.

Diamond's decision — made before the lots issue became public — illustrates the fate that may be in store for several hundred thousand acres of public lands in the coming weeks and months.

A Maine forest industry that is about to cut the equivalent of 16,000 acres in Baxter State Park isn't likely to show restraint when threatened with the loss of public lands it has treated as its own for more than a century.

The new concern with public lands also comes too late to save a 1,000 acre public lot traversed by the ancient foot path that carried Benedict Arnold's men to Quebec in one of the Revolutionary War's most famous battles.

The Arnold Expedition Historical Society two years ago laborously traced the course of Arnold's march between the Kennebec River and Flagstaff Lake near the Carry Ponds and was getting ready to negotiate with adjacent landowners for a corridor preserve, when the lot was suddenly cut.

What had been a deeply worn foot path still visible a century after the last fur traders, trappers and hunters had used it became overnight a tangle of slash and bulldozer tracks. The trail is now extinguished, probably forever.

But these are exceptions rather than the rule. Most of the public lots are typical of most Maine forest lands. Some are overgrown, mature timber, some straggly second growth and some are recovering from recent timber harvests.

Some lots have never been cut. These are in out of the way places where cutting hasn't been economical — on mountain tops, steep slopes, marshes, bogs and lakeshores.

State law required the lots to be on land that represented the average value of a township. But human nature being what it is, sometimes land agents a century ago were less than diligent in carrying out their responsibilities.

ONE OF THE ironies of history is that much of what was worthless then has become the most valuable land around.

Hundreds of the lots were laid out on lake shores so that as much as possible of the public's 1,000 acres would be under water. Those strips of waterfront today are incredibly valuable.

Similarly, some of the fastest selling land in Maine often is on the steep slopes that become ski resorts and four-season condominium developments.

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Sometimes this "worthless" land has become so valuable that developers have swapped it for "good" land.

On Squaw Mountain, the Scott Paper Company ski resort near Greenville, where a public lot interfered with the ski development, the forest department conveniently accepted in exchange a fine piece of timberland in a more accessibly cut area.

The state lost on both ends of this transaction. It gave up a piece of valuable recreation property. And the timber on the piece given in exchange, Scott promptly cut. Because it owned the cutting rights to the lot that was swapped.

THE FIRST priority now is to somehow keep the chainsaws off the public lots while the state ponders which lots should remain as essentially timber — and to whom it belongs — and which have a higher potential for public recreation.

One way to achieve this might be a court test of Schepp's claim that what was sold in the grass and timber deeds of the 19th century may have been the right to cut and carry away the timber then standing.

Since this has long since been harvested, the present standing timber would be owned by the public.

Such litigation might take years, but by bringing action the state could seek an injunction halting further cutting until ownership of the trees is decided.

An equally important task for the next legislature is to provide funds for the parks department to inventory the public lands to see which have recreational potential and which do not.

In the long run, probably many of the lots should be traded off with the big timber growers in return for land better suited to public use.

But some of the public lands are extremely valuable just as they sit.

For instance, the public lands include such attractions as the scenic summit of Coburn Mountain near Jackman, a wild waterfall and gorge deep in the Carrabasset Valley and a spectacular waterfall on the Cupsuptic River in northern Oxford County near the Canadian border.

Another public lot encompasses 1,280 acres on East Kennebago Mountain near Rangeley Lake. Two lots provide potential public access to the fascinating Tumbledown Mountain near Mount Blue State Park in Weld.

ANOTHER 1,000-ACRE public lot wraps around the shoreline of Long Lake at the north end of the spectacular Barren-Chairback Mountain range in Piscataquis County.

And included in the roster of public lands is probably the most magnificent stand of big pines remaining in northern Maine — the pines of Gero Island at the northern end of Chesuncook Lake, near the traditional entrance to the Allagash wilderness canoe trip.

But perhaps the most important public lands are those lying at the base and on the slopes of the Bigelow Mountain range across Carrabasset Valley from Sugarloaf.

Bigelow, one of the finest mountain regions in the northeast, has been proposed by the committee of the Natural Resources Council, the Sierra Club and the Appalachian Mountain Club as a new mountain park and back country recreation area for hikers and wilderness campers.

If the courts uphold Schepps' opinions on the lots, the 3,000 acres the public already owns will provide a nucleus for the new park. Even more important is the huge trust fund created when Central Maine Power Company dammed the Dead River to create Flagstaff Lake nearly 25 years ago.

The power company has been paying the state $25,000 a year for the privilege of being allowed to flood a public lot and this kitty now stands at nearly three quarters of a million dollars — awaiting the time when civilization and schools come to the slopes of Bigelow.

Schepps has said that the legislature could use this fund to create a park if it wants to.

In any case it's worth the cost of a court test to find out.

THIS IS NOT the first time Maine has tried to use its public lands for recreation. When the state was buying the Allagash Wilderness Waterway, Stuart wanted to establish public lots along the river and lake shores to cut down the acreage the state had to buy.

The Allagash country includes some of the 150,000 acres of public lots which are recorded on the deeds but never physically laid out.

But Erwin ruled that the law requires the lots to be located on lands "average in quality, situation and value" with the other lands in the township.

"Anyone familiar with water courses such as the Allagash knows that the shoreline for long distances may be nothing but flowage, grass, swamp or other land of such character to be economically valueless," he wrote.

"In my opinion the Forest Commissioner not only ought not, but must not, ignore the quality, situation and value of the land when laying out public lots."

This was interpreted by Stuart and Forest Commissioner Austin Wilkins as meaning that the public lots couldn't be used as part of the waterway.

So instead of using land it always owned, the state bought its wilderness with cash. And it paid an average of $120 an acre, or twice the then going Maine forest land price, for it. Economically valueless?

The public therefore continues to own a thousand acres in each of the Allagash region's dozen townships. But unless the legislature acts, these lands will remain the province of the big timber companies until such time, if ever, when the wilderness waterway becomes populated with year round residents requiring schools.

What this means is that the public can use its thousands of acres of public domain in the Allagash region only if the wilderness that taxpayers paid $6 million for is destroyed by the arrival of civilization.

THERE ARE SIGNS that the public may at last be demanding some public use of its land legacy.

Although the state has yet to make any recreational use of these lands, at least one town has done so. The 980 residents of Mattawamkeag, northeast of Bangor, voted in 1971 to give their 1,000-acre lot to the state for a wilderness park. Mattawamkeag had gained title to the lands when it became an incorporate town as present law specifies. When the deal fell through, Mattawamkeag applied for and received a federal grant to create a wilderness preserve and canoe camping area of its own on the shores of the Mattawamkeag River.

The Mattawamkeag experience points the way to how these lands — originally preserved to assure eventual civilization for Maine's wild country — can become a major tool in preserving one of the scarcest commodities of the final decades of the 20th century — natural areas and wilderness.

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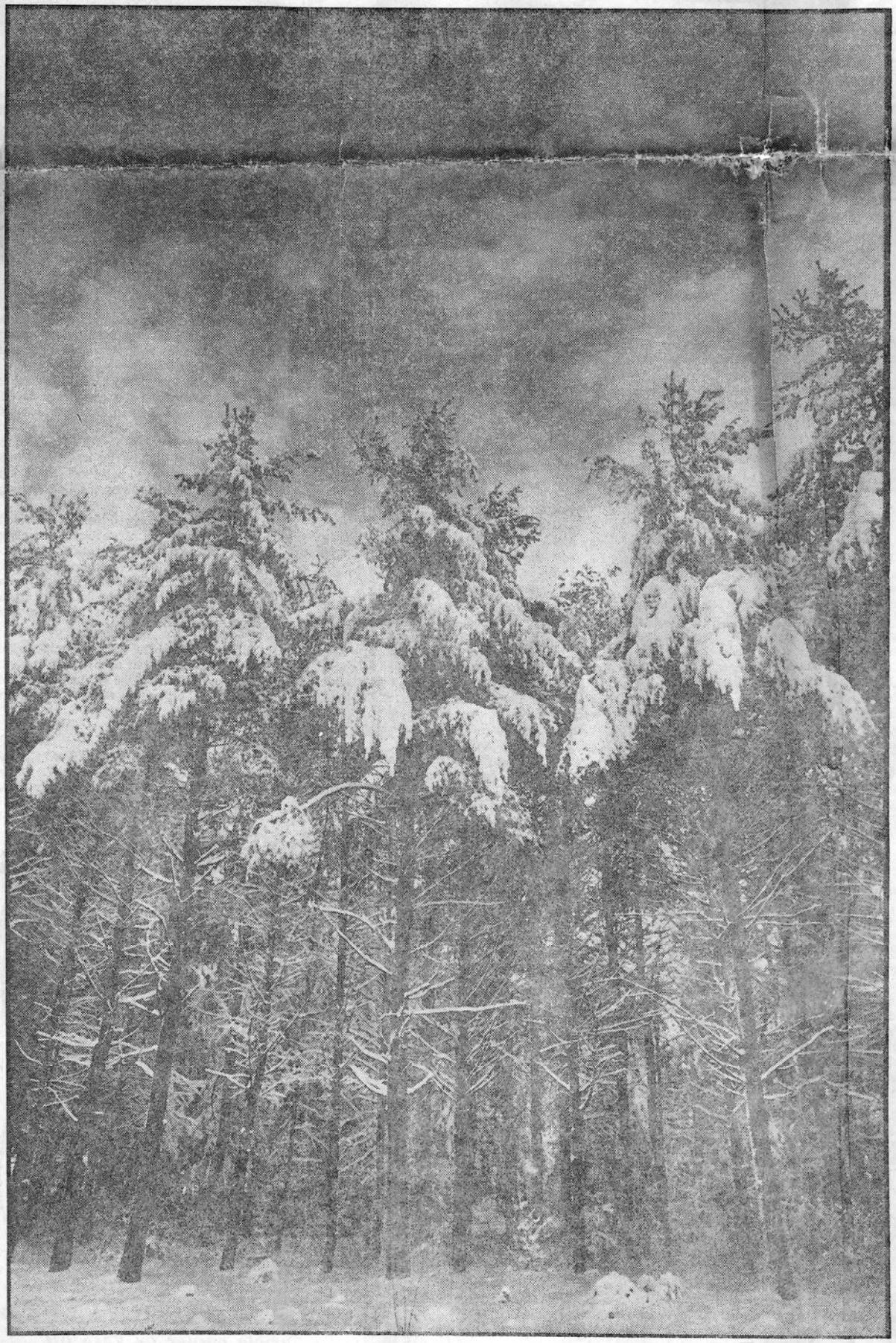

PHOTO: STEPHEN O. MUSKIE

'The first priority is to keep the chainsaws off the lots'

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Public Lots: Maine's Chance To Get Them Back

PHOTO BY BOB CUMMINGS

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Early supporters crucial to success

By BOB CUMMINGS
Staff Writer

Several people played key roles early in the recovery of the public lots, but a former assistant attorney general who now runs a family liquor business in Texas deserves top honors.

It was Lee Schepps who first suggested that the cutting rights the state had sold a century before had expired.

Schepps, a Texas native, based his contention on numerous court decisions in the far west, where similar timber deeds had been interpreted as meaning only the timber that existed at the time of the sale.

Maine officials had always assumed that the century-old deeds granted perpetual rights to the public lands and that the state owned only the minerals under the soil.

That had been the contention of then Forestry Commissioner Austin Wilkins in a report to the Legislature in 1963. With the sale of the timber and grass rights, Maine was "left only a vested state equity in the soil," he had written.

Schepps had been assigned to investigate the lots by then Attorney General James Erwin following a series of stories in the Gannett newspapers that first called widespread attention to the lands.

Richardson

Wilk

He had insisted that "a distinct possibility" existed that the cutting rights had expired.

A decade later the Supreme Court agreed.

Edward Sprague, a retired woods worker and and diesel mechanic, was also a key figure in the early days of the dispute. More than anyone else he pushed the idea of the public lots and iobbied state officials and legislators to act to preserve them.

Gov. Joseph E. Brennan singled out Sprague and Schepps for special praise when he announced the last big settlement of the state claims in May.

"These people are truly the genesis of what comes before us today," Brennan said. "This is a great achievement."

But others played important roles. Former state Sen. Harrison L. Richardson served as chairman of a special public lands committee of the Legislature and pushed for the return of the lands through two legislative sessions.

His championing of the public lots may have cost him the governorship, for he had raised the ire of the paper industry and was narrowly defeated in the 1974 Republican gubernatorial primary by Erwin. The election eventually was won by conservative James B. Longley.

A Richardson bill that would have terminated the cutting rights by legislative fiat was defeated after a bitter fight, but it paved the way for the first out-of-court settlements of the long dispute.

Great Northern Paper Co. first broke the deadlock by voluntarily returning 60,000 of the 90,000 acres of cutting rights it had claimed.

Ironically, Great Northern was both the first and one of the last of the major companies to settle.

The delay proved expensive. The final exchange to face the Legislature this spring gives the state 38,235 acres of Great Northern lands worth $7.2 million, some $2.3 million of which represents a penalty for the wood the company had harvested after the cutting rights expired.

Others who contributed to the final return of the states land legacy include James Haskell, former director of the Land Use Regulation Commission, and Martin Wilk, an Augusta attorney.

Wilk, a Brunswick town councilor, first argued the public lands suit while an assistant attorney general and stayed on after switching to private practice to argue the matter before the Supreme Court and to serve as the state's chief negotiator for the final settlements.

1984-06-04 Portland Press Herald, p 13

SUN DEC 22 1974 TELEGRAM

Best of gifts -- land for Maine people

Public Lots

Christmas means presents — gifts exchanged. And Maine has exchanged presents. if you will, with Great Northern Paper this December.

As a result of an agreement Great Northern Paper Co. transferred 60,000 acres to the State. Having reached that agreement a swap was arranged which left Maine with land particularly suited for recreational use and Great Northern with land especially suitable for timber operations.

The way the swap was made is important. Briefly, this newspaper first focused public attention on the fact that over 320,000 acres of public lands, which belonged to Maine people, were on the shelf, forgotten, unused, even mislaid. Result was interest, then action by the legislature, the governor's office. Then Great Northern came forward to help resolve their part of the issue through negotiations for transfer of lands followed by an exchange fo lands more desirable to the state.

Add to this, the gift by Scott Paper of Squaw Mountain, plus the hotel and ski facilities.

But let not overmuch attention be focused on the rather temporary issues of a hotel, which will disappear; of ski lifts and trails, which will wear out; or cutting rights for the forest, which will replenish itself in 40 years.

Instead let our pleasure be focused on the land. The land is now Maine's in perpetuity; the land will not vanish. Maine people hundreds of years from now will own it still.

These are Christmas gifts of magnitude and duration. They are fitting gifts exchanged between Maine and people who live, work and profit from Maine.

The future of some 250,000 more acres of public lands is still subject to process of negotiations. We hope that the good pattern set by Great Northern and the State (and Scott and the State) will form a precedent others will follow.

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Exhibit C

Our public lots:

State's scenic jewels had a long journey home

By BOB CUMMINGS
Staff Writer

A DECADE ago only a handful of Maine residents had ever heard of public lots, a 400,000-acre public domain that the state reserved when it sold its public lands a century and a half ago — and then forgot.

Today, thanks to a historic Maine Supreme Court decision last week, the state has undisputed ownership of these long-neglected public lands.

The cutting rights to the public lands had been sold a century ago, and most had drifted into the hands of paper companies and large land-holding companies. The court ruled, however, that the state had sold only the timber that was growing at the time of the sales — and that this wood has long since either been harvested or died of old age.

About 250,000 of these acres were already owned by the state, thanks mostly to a series of out-of-court settlements during the eight years the case was winding through the court system. But the decision assures full state ownership of the 150,000 acres that had remained in dispute.

These acres are divided among several hundred small lots in the wildlands of Maine — lots ranging in size from 320 acres to about a thousand acres.

But altogether, the public lots now encompass some of the scenic jewels of eastern United States — the wild Bigelow, Mahoosuc and Deboulie Mountains, hundreds of miles of remote lake shores and streams and thousands of acres of remote forest lands.

And it was all achieved without the investment of any significant state money. In fact the public lands generated nearly $1 million dollars in income last year and projections point to at least a $3 million annual business in a few years.

Some of the public lots are not discrete parcels of land. Rather the state owns a one twenty-fourth interest in an entire township.

Essentially this means that whenever any land is harvested in these townships a 24th of the value of the harvested timber must go to the state.

In an era in which government activities are increasingly suspect, Maine's public lots qualify as a major government success story.

Ironically, it's a success story that remains little appreciated. Far more people have heard of public lots today than 10 years ago, but the vast new public domain has been largely ignored and neglected by the general public.

Each Legislature, for instance, is asked to give away a bit of the public domain. And each Legislature succeeds in doing so — largely because the public never shows up to protest.

Last spring was no exception.

About 300 families lease cottage lots in the public lands. Originally these leases were valid for only 12 months. They were reissued each year just as most of the similar leases issued by the paper companies expire annually.

They granted the leaseholders the right to use the lands for 12 months, and were renewable only if both parties chose to do so.

A few years ago legislators voted to, in effect, give the cottagers free ownership rights to the public domain. Leased lots could now be bought and sold like any other property. Leases could be canceled only if the state could show major wrongdoing or if the owners failed to pay annual lease fees.

The Legislature last spring went a step further. It took away the authority of the Bureau of Public Lands even to set the lease fees. Fees are now established by the Bureau of Taxation.

The public lands are now "taxed," rather than leased.

Why? Because 200 leaseholders showed up at the legislative hearing — while only a handful of speakers urged the public rights to its lands be protected.

BUT THE leases represent only a tiny percentage of the public lands. Most remain open to general public use.

A book could — and should — be written about the saga of Maine public lands. Maine inherited or purchased 9.5 million acres when it separated from Massachusetts in 1820.

Within three decades of gaining statehood most of this vast public domain had disappeared. It had been given away as lottery prizes, donated as subsidies to railroads — some of which never got built — and sold for pennies an acre.

Some simply disappeared — along with the records of their existence in the state archives. Land agents charged with protecting the public lands ended up owning great acres of public lands themselves.

The late Percival Baxter, who served as governor from 1920 to 1925 used to call it the "great land steal."

Strangely the records of the state land office are missing from 1868 to 1890, the era when the last of the public domain disappeared. The records are intact for earlier and later dates, but can't be found for the 23-year period, according to "A History of Lumbering in Maine," by David C. Smith, a professor of history at the University of Maine at Orono.

Public lots escaped almost by accident. Early Legislatures considered public lands a liability. Their aim was to get rid of them as quickly as possible.

But the articles of separation under which Maine split away from Massachusets required that four lots of 320 acres each be reserved when each 24,000 acre township of the public domain was sold or given away.

Early Legislatures followed the dictates of the articles of separation, largely because they thought it illegal to do otherwise.

Later Legislatures had fewer scruples. Large blocks of the long-neglected public domain were sold shortly before they were "rediscovered" in 1972.

In theory anyway, the "reserved lands" were to supply income to the church, the clergy, town governments and the schools when settlers finally came to the Maine wildlands.

But settlers never came to much of Maine. More than half the state remains unorganized "wildlands" today.

THE RESERVED lots were mostly a nuisance to the early Legislatures. People kept ripping off the public's wood and squatting on the public land.

And with no local governments and no large populations living nearby there wasn't much anyone could do about it — not until about 1850 anyway. That's when the Legislature hit on a solution.

The public lands couldn't legally be sold, or so they thought, but cutting rights to the public's trees could be sold — and were.

By 1900 all but about 50,000 acres of timber rights had been sold. The state, for much of the next seven decades, took the position that by selling the cutting rights, they had lost all surface rights to the land — that the public then only owned the minerals under the soil.

Even these weren't particularly protected, however. Gravel pits on the public lands were regularly excavated to build logging roads.

Change didn't begin until 1972, when a story in the Sunday Telegram first called attention to the neglected public domain.

"Maine is pondering the disappearance of its coastline to out-of-state developers and speculators," the Telegram reported. "And is struggling to buy enough land to preserve some minimum of public access to its lake and mountain country.

"But at the same time the recreational potential of 400,000 acres the public already owns continues to be neglected, sold and given away."

The article essentially argued that there is more to be done with land than to cut its trees. Land can be walked upon, developed for campsites, used for access to lakes and streams, and protected as wildlife habitat, even though cutting rights had been sold.

The story touched off a major squabble. Then Gov. Kenneth Curtis appointed a committee of state commissioners to investigate, the Legislature created the Bureau of Public Lands and the Maine Supreme Court issued an advisory opinion.

Most importantly, however, several claimants filed suit in Kennebec Country Superior Court asking that the state be ordered to stop interfering with their claims to the century-old cutting rights.

And the state filed a countersuit claiming early Legislatures had only sold the cutting rights to the trees that were then growing. Since these had already died, the cutting rights had long since expired.

THIS SUIT and countersuit have been around nearly 10 years. The state lost in the initial rounds. The Superior Court ruled that the cutting rights continued indefinitely, until settlers finally arrived in the wildlands and organized-governments were formed.

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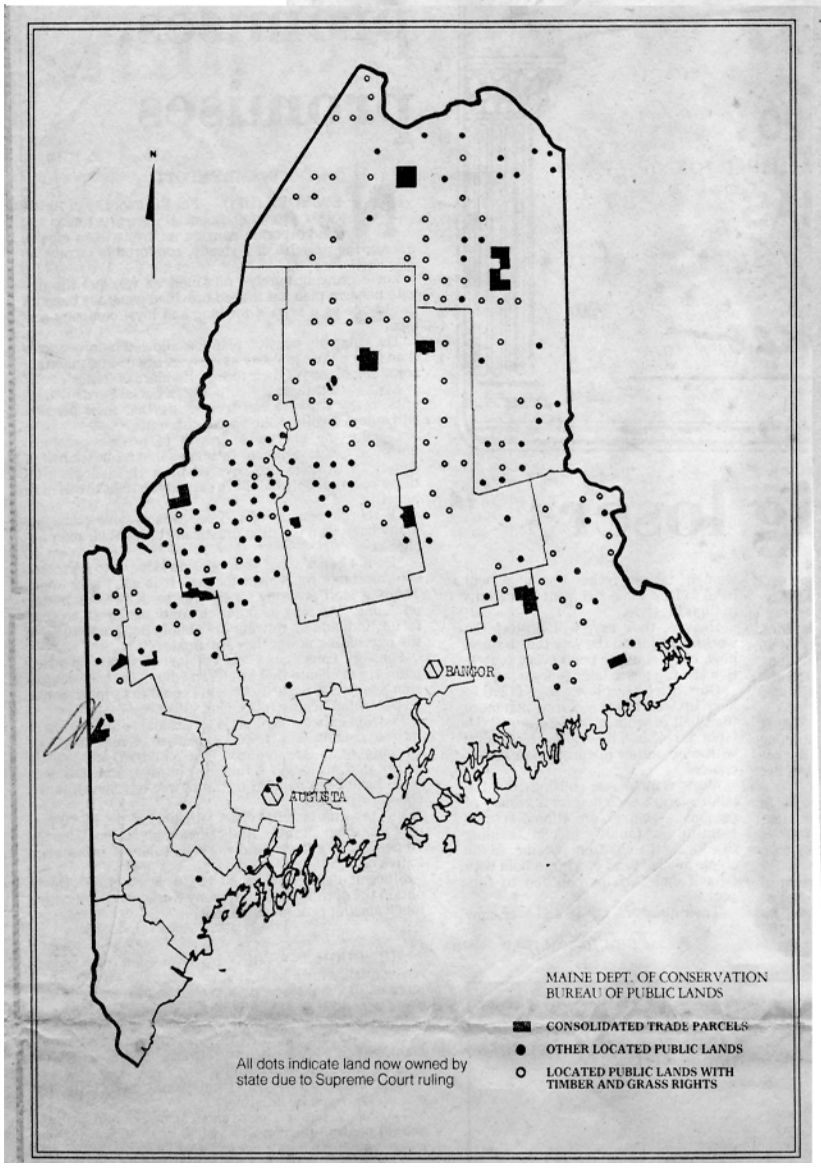
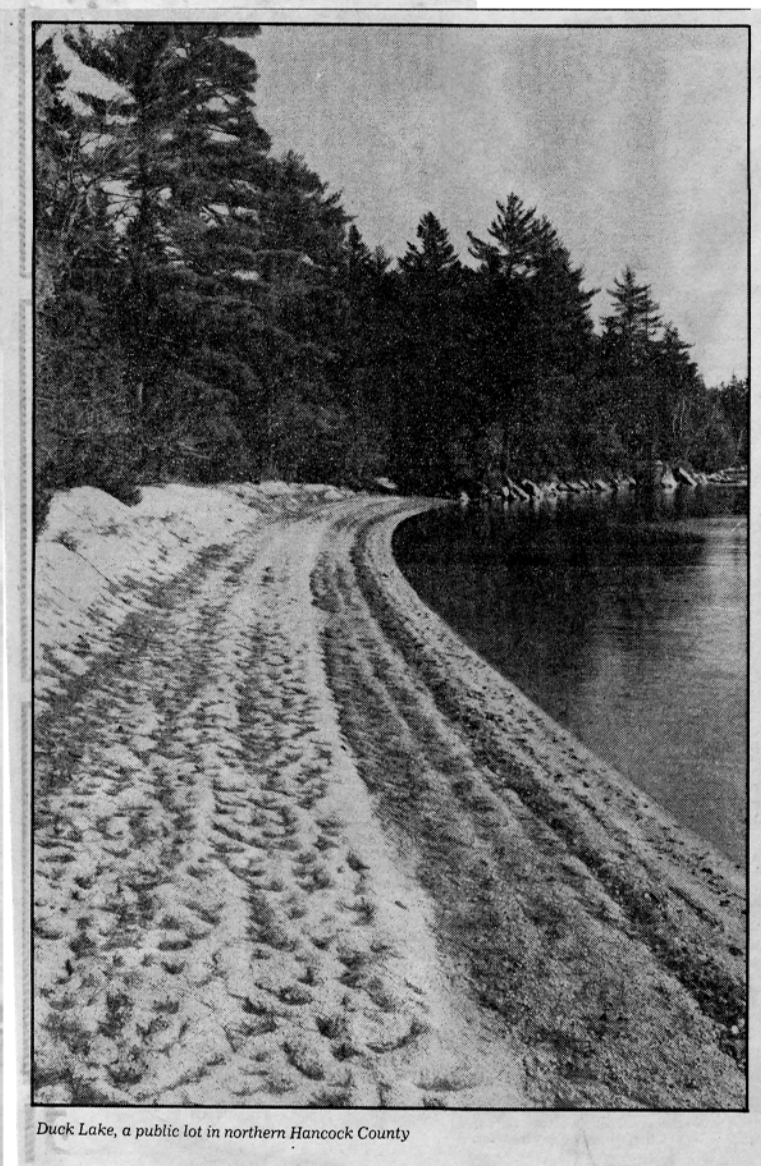
Our public lots:

State's scenic jewels had a long journey home





Duck Lake, a public lot in northern Hancock County

Our public lots:

State's scenic jewels had a long journey home

Photos by Christopher Ayres

Rocky Lake, also a public lot, in Washington County

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But, on Monday the Supreme Court, in a 3-1 decision, agreed with the state that the deeds covered cutting rights only for existing timber, not future growth. In what then Gov. Joseph Brennan called a victory of "historic importance for the people of Maine," the court rejected claims by paper companies and other large landowners that the deeds granted by the state gave them the right to harvest subsequent growth of grasses and timber.

Monday's Supreme Court decision noted that under ordinary circumstances, deeds to timber or cutting rights do not include future growth.

Maine's high court tried to duck the decision initially, ruling that the state enjoyed immunity from suits and therefore the landowners had no claims.

The Legislature last spring voted to waive its immunity so the issue could finally be resolved. While awaiting the Supreme Court ruling, a dozen companies gave back their cutting rights voluntarily, in what were, in effect, out-of-court settlements.

That's why Maine now owns 250,000 acres free and clear, including some of the most spectacular landscape in the East.

Richard Barringer negotiated the first land swap as founding director of the Bureau of Public Lands in 1974.

Great Northern Paper Co. gave back the cutting rights on nearly 60,000 acres of scattered public lots and then swapped these scattered lots for land of equal value in larger blocks.

From Great Northern, Maine got title to the township that connects Baxter State Park with the Allagash Wilderness Waterway, a big chunk of the wild Penobscot River shoreline, a portion of a popular canoeing river and lake system near Jackman, and much of the remote Deboullie Mountains in Aroostook County.

But the bulk of the public lot transactions, were engineered by Lee Schepps, who replaced Barringer when the latter became commissioner of the Department of Conservation.

Under Schepps Maine got nearly 33,000 acres from International Paper Co., 21,000 from Scott Paper Co., 16,000 from St. Regis, 15,000 from Brown Co., 14,000 from Huber Corp., 10,000 from Boise-Cascade, 8,000 from Diamond International and 1,500 from Dead River.

SCHEPPS QUIT two years ago to return to his native Texas. Until last week the current director was Lloyd Irland.

Irland, however, quit to become state economist just before the court announced its decision. He is being replaced by Bernard J. Schruender, a forester on loan from the U. S. Forest Service, where he specialized in public recreation matters.

Irland had continued the slow negotiations that lead to the voluntary return of the cutting rights on most of the lands. But Irland, a forest economist, saw his major role as beginning the management of the public lands.

He divided the lands into a half-dozen districts and hired foresters and forest planners to sell and supervise the harvesting of trees from the public forests.

"I see my principle role as producing raw materials for the Maine economy, while protecting recreational uses, and wildlife," he said.

The law creating the Bureau of Public Lands requires it to be self-supporting. Income from the sale of timber supports wildlife and recreational use of the lands, as well as the cost of managing the lands for timber production.

Irland expects nearly 40 separate logging operations this year to generate nearly $1 million dollars in income.

It's not all profit, however. The department now employs eight foresters and management of the lands will "cost about three-quarters of a million," he says.

"We had a $200,000 surplus, but we aren't sitting on a gold mine."

His comment came as legislators eyed the public lands surplus last spring as a way to resolve a tight state budget.

Irland, however, persuaded them that the money is needed to finance more public land harvesting activity.

He predicted that eventually the public lands could earn $1 million dollars a year for the state to use as it wants.

"But right now we need all the income to bring the lands into production."

Maine forests traditionally have grown more trees than the state's industry could use. As a result, much of the public lands are overstocked with overmature and low-quality trees.

Such trees just take up space in the forest, while growing slowly or not at all, Irland says.

"The immediate priority should be to harvest this low-grade wood so the forest will be healthier."

THOUGH THE emphasis is on cutting trees, Irland says the recreational and wildlife values of the public domain should be preserved.

Before major cutting is carried out, detailed inventories are made of each public lot.

The report for Squa Pan Lake in northeastern Aroostook County is typical. The land is mostly useful for timber harvesting, but the bureau sees "a potential to develop hiking and skiing trails traversing the ridgeline of Garland Hill and Squa Pan mountain. Through improvements to the old fire warden trail, access to Squa Pan Lake can be achieved.

"Both the mountain and lakeshore afford options for future recreation use and should be preserved for this purpose."

A report on Bigelow mentions use of the area by hikers and notes that the Appalachian Trail traverses the summits of the major Bigelow peaks.

"Subalpine and dwarf shrub heath communities dominate the vegetation," the Bureau of Public Land found. Recorded are numerous rare plants, including a rare alpine club moss, found mostly on the barrens of Laborador and Greenland.

Also cited is a rare bentgrass, "small and rather inconspicuous," but important to protect. It is found just below the summit of one of the major peaks.

Other rare plants surveyed include alpine sweetgrass, a mountain sandwort of the carnation family, Bigelow sedge, and a high mountain rush.

And on the shores of Horns Pond and Cranberry Pond, located high on the Bigelow ridgeline, specimens of the rare squashberry, a small shrub with maple-like leaves, and an acid berry, are reported.

Bigelow has a rare animal too, the bureau reports, the yellow nose vole. It looks something like a common meadow vole — except for its yellow nose — but it's considered one of the world's rarest and least-known mammals.

The vole has been sighted as far south as North Carolina, always in high mountain terrain. Only 12 specimens have ever been trapped in Maine — two in Bigelow col near the Avery Peak lean-to of the Maine Appalachian Trail Club.

BIGELOW, THE Mahoosucs and other mountain public lots are justifiably famous. But the public lands include dozens of equally spectacular, but less well-known attractions.

Scraggly Lake, located northeast of Baxter Park, is a crystal clear pond with an unusually large population of loons. The state owns most of the lake shore and much of the surrounding forest land.

In the latter can be found a rare white lady slipper orchid, sometimes known as the "fairy slipper."

But the big attraction is the lake, and its several miles of almost undeveloped shoreline.

A small campsite is located near the road access and bureau plans call for a small expansion of the facilities.

In Washington and Hancock counties are Rocky Lake and Duck Lake, major lakes within easy driving distance of Ellsworth and southern Washington County communities, and the spectacular Great Heath, one of the largest peat bogs in Maine.

The latter contains a rare baked appleberry and a swamp pink orchid, as well as at least 10-million tons of peat, which is being eyed by the state as a major new energy source.

Though recovery of the remaining cutting rights on the public lands had slowed, Irland was confident that eventually all would be returned, even if the Supreme Court hadn't ruled favorably.

The state a century ago sold the right to "carry away the timber and grass" only until the lands are organized "for plantation purposes."

A plantation now is sort of a primitive town government. But when most of the public lands were sold, plantations were primarily a device to enable residents to vote in state and national elections.

A series of large plantations, organized around structures where voting booths can be erected, probably would qualify as a plantation, thus ending the cutting rights for all time.

A similar proposal was defeated by the Legislature when the public lots first attracted public notice. But it was widely predicted that sooner or later a majority of legislators would vote to recover the final 150,000 acres of its public domain.

The question, of course, is moot now. The public lands have returned without the necessity of tampering with the organization of the wildlands of the state.

MAINE ONCE had more public lands than any other state in the East. Most was sold, given away or stolen.

But a tiny bit of this public domain remains, the lands preserved to support the costs of municipal governments.

As the first public lot story reported in 1972: "It may be one of the ironies of history that these lots set up to insure eventual civilization may become a major tool in preserving one of the rarest commodities of the final decades of the 20th century — natural areas and wildness.

It's a goal that the Bureau of Public Lands is well on its way to achieving, while, remarkably, generating income and providing jobs and economic activity simultaneously.

Resolve, Authorizing the Department of Conservation, Bureau of Parks and Lands To Convey Certain Lands

Preamble. The Constitution of Maine, Article IX, Section 23 requires that real estate held by the State for conservation or recreation purposes may not be reduced or its uses substantially altered except on the vote of 2/3 of all members elected to each House.

Whereas, certain real estate authorized for conveyance by this resolve is under the designations described in the Maine Revised Statues, Title 12, section 598-A; and

Whereas, the Director of the Bureau of Parks and Lands within the Department of Conservation may sell or exchange lands with the approval of the Legislature in accordance with the Maine Revised Statutes, Title 12, sections 1837 and 1851; now, therefore, be it

Sec. 1 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Wyman Township, Franklin County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey for appraised fair market value, upon issuance of necessary approvals by the Maine Land Use Regulation Commission and on such other terms and conditions as the director may direct, including maintenance and safety obligations and responsibilities, a nonexclusive linear easement to benefit TransCanada Maine Wind Development, Inc. and its successors and assigns, in the Township of Wyman, Franklin County. The easement must be located entirely within 2 separate tracts of land bounded and described as follows.

Tract One: Beginning on the southwest boundary of State Route 27 in Wyman Township, at the intersection of said highway line with the northwest boundary of the Appalachian Trail Corridor, as said intersection is shown on a plan recorded in Franklin County Registry of Deeds, Plan No. 3588; thence southwesterly along the northwest boundary of said Appalachian Trail Corridor a distance of 103 feet to the north boundary of the 150-foot-wide transmission line corridor known as the "Boralex Corridor" as shown on a plan recorded in Franklin County Registry of Deeds, Plan No. 2035; thence southwesterly and westerly following the north boundary of said Boralex Corridor a distance of 4,899 feet to the centerline of Stony Brook; thence northerly along the centerline of Stony Brook a distance of 228 feet, more or less, to a line that is parallel with and 125 feet distant northerly from the north boundary of said Boralex Corridor; thence easterly and northeasterly along said line that is parallel with and 125 feet distant northerly from the north boundary of said Boralex Corridor a distance of 4,146 feet to a line that is parallel with and 425 feet distant westerly from the northwest boundary of the aforementioned Appalachian Trail Corridor; thence northeasterly along said line that is parallel with and 425 feet distant westerly from the northwest boundary of the aforementioned Appalachian Trail Corridor a distance of 529 feet to the southwest boundary of State Route 27; thence due east crossing State Route 27 a distance of 505 feet to the northwest boundary of the aforementioned Appalachian Trail Corridor; thence southwesterly along the northwest boundary of the Appalachian Trail Corridor a distance of 364 feet to the point of beginning.

Tract Two: Beginning at the intersection formed by the south boundary of the 150-foot-wide transmission line corridor know as the "Boralex Corridor" as shown on the plan recorded in Franklin County Registry of Deeds, Plan No. 2035, with the northwest boundary of the Appalachian Trail Corridor, as shown on a plan recorded in Franklin County Registry of Deeds, Plan No. 3588; thence southwesterly along the northwest boundary of said Appalachian Trail Corridor a distance of 322 feet to a line that is parallel with and 200 feet distant southerly from the south boundary line of the above-referenced Boralex Corridor; thence southwesterly along said line that is parallel with and 200 feet distant southerly from the south boundary line of the Boralex Corridor a distance of 3,272 feet to the town line between Wyman Township and the Town of Carrabassett Valley; thence westerly along said town line a distance of 856 feet to land of Gardner Land Company described in a deed recorded in Franklin County Registry of Deeds, Book 2848, Page 119; thence northerly along land of said land of Gardner Land Company to the south boundary of the above-referenced Boralex Corridor; thence northeasterly along the south boundary of the Boralex Corridor a distance of 3,875 feet to the point of the beginning.

For reference see the deed from Huber Resources Corp. to the State of Maine, Department of Conservation, Bureau of Parks and Lands, dated March 29, 1999 and recorded in the Franklin County Registry of Deeds in Book 1836, Page 198.

The conveyance of the linear easement may include the right to utilize up to 2 crossing easements reserved by J. M. Huber Corporation as described in that certain indenture for transmission line dated May 11, 1988 and recorded at the Franklin County Registry of Deeds in Book 1038, Page 65, subject to all the terms and conditions for the crossing easements set forth in that indenture for transmission line, so that TransCanada Maine Wind Development, Inc. and its successors and assigns may cross the 150-foot-wide fee strip now or formerly of Boralex Stratton Energy Inc. as described in that certain warranty deed from Stratton Energy Associates dated September 25, 1998 and recorded at Franklin County Registry of Deeds in Book 1787, Page 2; and be it further

Sec. 2 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Bradley, Penobscot County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey for appraised fair market value and on such other terms and conditions as the director may direct, including maintenance and safety obligations and responsibilities, a linear nonexclusive easement for electric transmission purposes to benefit Bangor Hydro-Electric Company, a Maine Corporation with its principal place of business in Bangor, Maine, and its successors and assigns, across a certain lot or parcel of land in the Town of Bradley, Penobscot County, being approximately 55 acres, together with an access easement along with danger tree rights. The director may limit the easement with terms or conditions, such as but not limited to terms or conditions regarding certificates of public necessity as provided by the Public Utilities Commission. The parcel is currently occupied by Bangor Hydro-Electric Company, as lessee, pursuant to a Utility Line Lease dated February 15, 1990, as modified by a memorandum of intent dated March 24, 2005 with the Department of Conservation, Bureau of Parks and Lands as lessor and described as follows: being a strip of land 170 feet in width as lies within the State's Public Reserved Land in the Town of Bradley. The strip extends northeasterly by 2 tangents from its westerly bound to its northerly bound and measures 14,150 feet in length; and be it further

Sec. 3 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in No. 21 Township, Washington County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey for appraised fair market value and on such other terms and conditions as the director may direct, including maintenance and safety obligations and responsibilities, a linear nonexclusive easement for electric transmission purposes to benefit Bangor Hydro-Electric Company, a Maine Corporation with its principal place of business in Bangor, Maine, and its successors and assigns, a certain lot or parcel of land in No. 21 Township, Washington County, being approximately 18 acres together with an access easement along with danger tree rights. The director may limit the easement with terms or conditions, such as but not limited to terms or conditions regarding certificates of public necessity as provided by the Public Utilities Commission. The parcel is currently occupied by Bangor Hydro-Electric Company, as lessee, pursuant to a Utility Line Lease dated February 15, 1990, as modified by a memorandum of intent dated March 24, 2005, with the Department of Conservation, Bureau of Parks and Lands as lessor and described as follows: being a strip of land 170 feet in width as lies within the State's Public Reserved Land, north lot, in No. 21 Township. The strip extends northeasterly from its southerly bound to its northerly bound and measures 4,590 feet in length; and be it further

Sec. 4 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain real estate in Freedom, Waldo County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by release deed convey, for no compensation, to the Town of Freedom the Sandy Pond Dam, State ID# 475, located at the northeastern end of the 430-acre Sandy Pond in the Town of Freedom, Waldo County. The dam is predominately a rock-faced, earthen structure measuring approximately 350 feet long by 5 feet high with a 30-inch-wide fixed concrete spillway. This conveyance is intended to release all right, title and interest the State may have in and to the dam that was previously awarded to Joseph A.F. Sadowski by Department of Environmental Protection Order #L-18506-37-A-N, dated October 12, 1993, which award of ownership was subsequently voided by the Department of Environmental Protection by letter to Joseph Sadowski, dated July 1, 2005; and be it further

Sec. 5 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in St. John Plantation, Aroostook County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey for fair market value and on such other terms and conditions as the director may direct, including maintenance and safety obligations and responsibilities, a trail crossing easement being approximately 25 feet by 199 feet crossing the St. John Valley Heritage Trail and an access easement on an approximately 625.06-foot-by-25-foot-wide road to benefit the properties of Darnell and Stephanie Oliver, Eugene and Diane Berube, Don Berube, Bob and Diane Berube, Ernest Berube and George Pelletier, all of St. John Plantation, Aroostook County. For reference see Recreational Trail Easement deed from Town of Fort Kent to the Department of Conservation, dated June 19, 2000 and recorded in the Aroostook County Registry of Deeds - Northern Division in Book 1213, Page 213; and be it further

Sec. 6 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in St. Francis, Aroostook County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without

covenant convey for fair market value and on such other terms and conditions as the director may direct, including maintenance and safety obligations and responsibilities, a trail crossing easement to be approximately 25 feet by 99 feet across the St. John Valley Heritage Trail to benefit the property of Vernal, Pauline and Mike Nadeau, in the Town of St. Francis. The trail crossing easement is further bounded and described as follows: part of ancient parcel No. 37 as conveyed to the Bangor and Aroostook Railroad Company by warranty deed of Joseph Plourd dated August 13, 1909 and recorded August 17, 1909 in Book 63, Page 387 of the Northern Aroostook Registry of Deeds. Reference to B&A Plan V2v/4 June 30, 1916.

Beginning at a survey nail buried in the centerline of the former Bangor & Aroostook Railroad main line at B&A Station 703 & 35 according to B&A Plan V2v/4 dated June 30, 1916, and designated as point "A" according to plan of survey prepared for Vernal, Pauline & Mike Nadeau by Northern Maine Surveyors dated April 21, 2007;

Thence proceeding N-78°-54'-48"-E along the centerline of the former B&A Railroad main line for a distance of 169.57'; to a survey nail designated as point "B" and being the True point of beginning of the easement strip herein described;

Thence proceeding S-02°-15'-W for a distance of 50.87' to an iron pin and cap set along the southern bound of land formerly of the B&A Railroad.

Thence proceeding N-78°-54'-48"-E along the southerly bound of land formerly of the B&A Railroad, for a distance of 20.55' to an iron pin and cap set;

Thence proceeding N-02°-15'-E for a distance of 101.74' to an iron pin and cap set along the northerly bound of the land formerly of the B&A Railroad;

Thence proceeding S-78°-54'-48" W along the northerly bound of land formerly of the B&A Railroad for a distance of 20.55' to an iron pin and cap;

Thence proceeding S-02°-15'-W for a distance of 50.87' to the true point of beginning.

Said easement contains 2,035Sq. Ft. or 0.05 acre+/-.

For reference see Recreational Trail Easement deed from Town of Fort Kent to State of Maine Department of Conservation, dated June 29, 2000 and recorded in the Aroostook County Registry of Deeds - Northern Division in Book 1213, Page 213; and be it further

Sec. 7 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Mapleton, Aroostook County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey a parcel of land, which totals in area approximately .65 acres, to abutter Chandler Family LLC. and on such other terms and conditions as the director may direct. The parcel to be conveyed to Chandler Family LLC. is further bounded and described as follows:

A parcel of land situated in the Town of Mapleton, County of Aroostook, State of Maine being part of Lot numbered 33, also being part of the land now or formerly owned by The State of Maine, Department of Conservation, as recorded in Volume 4146, Page 35, at the Southern Aroostook County Registry of Deeds in Houlton, Maine. Bounded and described more particularly as follows:

Beginning at a rebar set on the southerly limit of the right-of-way of State Road (Route 227), at the easterly limit of the right-of-way of the former Bangor and Aroostook Railroad, now owned by the State of Maine, Department of Conservation;

Thence, along the easterly limit of the right-of-way of said former Railroad along a 2007 magnetic bearing of, South 33°33'30" West, a distance of 104.74 feet to a rebar set on line;

Thence, continuing along the same course and along said easterly limit, South 33°33'30" West, a distance of 25.04 feet to land now or formerly owned by the Bangor and Aroostook Railroad, as recorded in Volume 240, Page 205, and Volume 553, Page 65 (said parcel having been excluded in the sale to the State of Maine);

Thence, along land of said Railroad, North 56°11'50" West, a distance of 30.50 feet to a rebar set at the northwesterly corner thereof;

Thence, continuing along land of said Railroad, South 33°36'10" West, a distance of 136.00 feet to the southwesterly corner thereof;

Thence, continuing along land of said Railroad, South 56°11'50" East, a distance of 30.60 feet to the easterly limit of the right-of-way of the former Railroad (now State of Maine);

Thence, along the easterly limit of said right-of-way, South 33°33'30" West, a distance of 190.61 feet to a rebar set;

Thence, continuing along the same course, South 33°33'30" West, a distance of 48.13 feet to a rebar set;

Thence, crossing the source parcel, North 07°06'30" West, a distance of 63.68 feet to a rebar set;

Thence, continuing along the same course, North 07°06'30" West, a distance of 50.64 feet;

Thence, running parallel to and 25 feet west of the centerline of the former Railroad, North 33°33'30" East, a distance of 374.10 feet to the southerly limit of the right-of-way of the aforementioned State Road;

Thence, along the southerly limit of said State Road, along a curve to the left with a radius of 1597.35 feet, a distance of 50.68 feet to a rebar set (the tie course for this curve segment is South 86°12'00" East, a distance of 50.68 feet);

Thence, continuing along said southerly limit and along said curve (to the left with a radius of 1597.35 feet), a distance of 35.70 feet (the tie course for this curve segment is South 87°44'50" East, a distance of 35.70 feet) to the Point of Beginning.

The above described parcel of land containing 0.65 acres.

The above described parcel of land is based on a field survey conducted under the supervision of Daniel O. Bridgham, PLS #1027, and shown on a Plan dated April 23, 2007. All bearings are magnetic as of 2007. All monuments set were 5/8-inch metal rebar with yellow plastic caps affixed to them, with "D. Bridgham, PLS #1027" imprinted in the caps; and be it further

Sec. 8 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Jay, Franklin County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey

on such terms and conditions as the director may direct, except that the transfer must be at no cost to the Town of Jay, an approximately 50-foot-by-89-foot trail crossing easement for a town way as defined by state law along with permissions for above ground and below ground utilities to the Town of Jay. The trail crossing is further bounded and described in a survey labeled Plan of Look Brook Estates, made for Polar Enterprises, compiled by M.S.B. Associates, Inc. and recorded in the Franklin County Registry of Deeds on March 15, 1984 in Plan Book Page P-436. The trail crossing easement to be conveyed is the eastern crossing shown on the plan with a trail crossing width of 89.53 feet on the east side and 89.03 feet on the west side; and be it further

Sec. 9 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Jay, Franklin County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey on such terms and conditions as the director may direct, except that the transfer must be at no cost to the Town of Jay or any other party, a utility-only crossing for above and below ground utilities, including but not limited to electricity and intelligence lines, water and sewer, located 360 feet more or less west of the crossing described in section 8 of this resolve; and be it further

Sec. 10 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Pownal, Cumberland County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey on such terms and conditions as the director may direct, including restrictions, maintenance and safety obligations and responsibilities, an approximately 850-foot-by-20-foot access easement over a woods road to benefit the property of Robert C. and Linda J. McMahon of the Town of Pownal, Cumberland County, and their successors and assigns. The access easement is further bounded and described as follows:

A certain right-of-way located westerly of Minot Road in the Town of Pownal, Cumberland County, State of Maine, being depicted as "Parcel A" on a plan entitled "Standard Boundary Survey of the Robert C. McMahon Parcel" dated March 1, 1995 and recorded in the Cumberland County Registry of Deeds in Plan Book 195 Page 140, the centerline of said right-of-way being further bounded and described as follows:

BEGINNING at the centerline of a certain lane at a point measured 350.49' southerly along the apparent westerly sideline of Minot Road from a 5/8 inch diameter iron rod set flush at the northeasterly corner of land of Robert C. McMahon as depicted on aforesaid plan;

THENCE in a general westerly direction, along the centerline of a certain roadway and which centerline is described by a series of tie lines as follows:

S83°13'15"W 83.7'

S86°58'30"W 77.7'

S88°54'30"W 76.1'

S65°18'45"W 48.9'

S83°54'15"W 32.0'

S77°18'00"W 36.5'

S64°01'45"W 56.0'

N64°59'15"W 26.9'

S78°05'00"W 41.0'

S71°36'15"W 45.7'

S55°58'45"W 59.8'

S84°19'30"W 63.4'

N56°40'30"W 16.2'

N27°46'45"W 76.8'

N83°14'45"W 81.8'

S80°20'15"W 82.9'

to a point lying N27°30'40"W 33.7' from a 1 ¾" diameter iron pipe with a cap marked "U.S.3" at the corner of a stonewall, and land now or formerly of the State of Maine described in the Cumberland County Registry of Deeds in Book 2039, Page 159.

The width of the above described "Parcel A" is approximately 21 feet.

Reference is made to a deed from Helen C. Cowan to the State of Maine dated March 28, 1951 recorded in the Cumberland County Registry of Deeds in Book 2039, Page 159.

The bearings noted herein are based on magnetic north observed August 24, 1994.

The above description was prepared by John T. Mann, PLS, Mann Associates, Inc., Bowdoin, Maine; and be it further

Sec. 11 Director of Bureau of Parks and Lands authorized, but not directed, to convey certain land in Littleton, Aroostook County. Resolved: That the Director of the Bureau of Parks and Lands within the Department of Conservation may by quitclaim deed without covenant convey for fair market value and on such other terms and conditions as the director may direct, including restrictions, an approximately 24-foot-by-25-foot parcel to abutter Arnold Miller of the Town of Littleton, Aroostook County.

SUMMARY

This resolve allows the Director of the Bureau of Parks and Lands within the Department of Conservation to convey:

1. An easement for electric transmission lines across 2 state-owned parcels to TransCanada Maine Wind Development, Inc. The parcels are in Wyman Township abutting existing utility corridors and proximate to or abutting State Route 27 and the Appalachian Trail Corridor;

2. An easement for electric transmission lines across a state-owned parcel to Bangor Hydro-Electric Company. The parcel is in Bradley;

3. An easement for electric transmission lines across a state-owned parcel to Bangor Hydro-Electric Company. The parcel is in Township 21 in Washington County;

4. The remaining state interests in the Sandy Pond Dam to the Town of Freedom;

5. Trail crossing rights and access rights across the state-owned St. John Valley Heritage Trail in St. John Plantation;

6. Trail crossing rights across the St. John Valley Heritage Trail in the Town of St. Francis;

7. State-owned property adjacent to a state-owned abandoned rail corridor trail in the Town of Mapleton to allow a landowner to rebuild and expand following a fire;

8. To the Town of Jay trail crossing rights for a town way across a state-owned trail in the Town of Jay;

9. To the Town of Jay or any other party trail crossing rights for utilities across a state-owned trail in the Town of Jay;

10. To the abutting landowner an easement across a state-owned access road to Bradbury Mountain State Park in the Town of Pownal; and

11. State-owned property to the abutting landowner in the Town of Littleton, Aroostook County.

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-20-94

Russell Black, Richard A. Bennett, Thomas B. Saviello, Kent Ackley, Seth Berry, Chad Grignon, Denise Harlow, Margaret O'Neil, William Pluecker, Natural Resources Council of Maine, Edwin Buzzell, Greg Caruso, Charlene Cummings, Robert Haynes o/b/o Old Canada Road National Scenic Byway, Cathy Johnson, Ron Joseph, John R. Nicholas Jr, George Smith, Clifford Stevens, and Todd Towle,

Plaintiffs,

v.

Andy Cutko as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

and

Central Maine Power Company,

Defendants.

FIRST AMENDED COMPLAINT

(Title to Real Estate Involved)

(Declaratory and Injunctive Relief Requested)

(Alternative Count for Relief Under 5 M.R.S. §11001 and Rule 80C)

1. Plaintiffs bring this action to invalidate a so-called "Amended and Restated Transmission Line Lease" entered into on June 23, 2020, by Defendant Bureau of Parks and Lands ("BPL") and Central Maine Power Company ("CMP"). Execution of that lease required the approval of 2/3 of the Legislature and such approval was neither sought nor obtained.

INTRODUCTION

2. In an action harkening back to Maine's disastrous administration of its public reserved lands from the 1800's up until the 1970's, in 2014 BPL entered into a lease with CMP

of public reserved land in Johnson Mountain Township and West Forks Plantation for the construction of a transmission line (the "2014 Lease") (attached hereto as Exhibit A). That lease totally undermined the wilderness values and uses that Mainers fought for decades to restore to the public reserved lands.

3. The fight to restore and protect Maine's public reserved lands culminated in 1993, when Maine residents voted to amend the Constitution to prohibit any reduction or substantial alteration of public lands designated by the Legislature without a two-thirds vote of the Legislature. Me. Const. Art. IX, Sec. 23. Similarly, the Legislature has required that before any lease for a transmission line can be entered into, the lessee must have obtained a Certificate of Public Convenience and Necessity ("CPCN") from the Public Utilities Commission ("PUC") to ensure that there is a public benefit to the possible loss of public land. Against this backdrop, the 2014 Lease, entered into before the issuance of a CPCN and without the requisite legislative approval, was *ultra vires.* The Lease did not and could not give any rights to CMP to use the land it purported to lease, nor could the BPL Director lawfully transfer the *ultra vires* 2014 Lease from CMP to a separate entity that was the only one authorized by the PUC to construct the transmission line.

4. In a desperate and transparent attempt to cure the *ultra vires* defects of the 2014 Lease, on June 23, 2020, the day this lawsuit was filed, BPL and CMP entered into a new "Amended and Restated Transmission Line Lease" (the "2020 Lease") (attached hereto as Exhibit B).

5. The 2020 Lease terminates the 2014 Lease, slightly clarifies the acreage involved, increases the initial and subsequent payments, expressly authorizes a transfer of the lease from CMP to NECEC Transmission, LLC, the only entity authorized by the PUC to construct the transmission line, and otherwise contains provisions essentially identical to the 2014 Lease. The

only legally significant difference between the two is that the 2020 Lease was executed after the CPCN was issued in an obvious attempt to cure the flagrantly illegal nature of the 2014 Lease.

6. Notwithstanding this effort by BPL and CMP to cure the *ultra vires* flaws in the 2014 Lease, the 2020 Lease still lacks the required 2/3 approval of the Legislature. It accordingly remains *ultra vires* and does not and cannot give CMP any rights to use the public lands the 2020 Lease purports to lease.

PARTIES

7. State Senator Russell Black (R-Franklin) is an individual residing in Wilton, Maine. Senator Black served four terms in the Maine House of Representatives from 2010-2018 before serving his current term in the Maine Senate. Senator Black was a lead sponsor of L.D. 1893 "An Act to Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes," which relates to the statutes and constitutional provisions governing BPL's Lease with CMP. Senator Black has been deprived of his constitutional right to vote on both the 2014 and the 2020 Leases pursuant to Article IX, Section 23 of the Maine Constitution.

8. Former State Senate President Richard A. Bennett (R-Oxford) is an individual residing in Oxford, Maine. He served two terms in the Maine House of Representative from 1990-1994 and four terms in the Maine Senate from 1996-2004. From 2001-2002, Senator Bennett served as President of the Maine Senate. Senator Bennett served in the Maine House in the 116th Legislature when it approved the L.D. 228, codified as Article IX, section 23 of the Maine Constitution. The son of well-known naturalist and author Dean Bennett, Senator Bennett from a very young age has enjoyed recreational activities such as canoeing, backpacking, fishing, hunting, cross-country skiing and trail-running on Maine's public lands and plans to continue to do so.

9. Former State Senator Thomas B. Saviello (R-Oxford) is an individual residing in Wilton, Maine. He served four terms in the Maine House of Representative from 2002-2010 and four terms in the Maine Senate from 2010-2018. Senator Saviello served on the Environment and Natural Resources Committee for 9 years, chairing the committee for 6 years. He also served on the Inland Fisheries and Wildlife Committee and the Agriculture, Conservation and Forestry Committee. Senator Saviello was deprived of his constitutional right to vote on the 2014 Lease pursuant to Article IX, Section 23 of the Maine Constitution.

10. State Representative Kent Ackley (C-Monmouth) is serving his second term in the Maine House of Representatives. He currently serves on the Veteran & Legal Affairs Committee and previously served on the Agriculture, Conservation & Forestry committee and the Joint Select Committee on Marijuana Legalization Implementation. Representative Ackley is deeply involved in environmental conservation as Vice President of the Annabessacook Lake Improvement Association and as a board member of the Friends of the Cobbossee Watershed District. Representative Ackley is a Registered Maine Guide and a small business owner in Monmouth. Representative Ackley has been deprived of his constitutional right to vote on the 2020 Lease pursuant to Article IX, Section 23 of the Maine Constitution.

11. State Representative Seth Berry (D-Bowdoinham) is an individual residing in Bowdoinham, Maine. He is currently serving his sixth non-consecutive term in the Maine House of Representatives. Representative Berry is the former House Majority Leader and is currently the House Chair of the Joint Standing Committee on Energy, Utilities, and Technology. Representative Berry has been deprived of his constitutional right to vote on both the 2014 and 2020 Leases pursuant to Article IX, Section 23 of the Maine Constitution.

12. State Representative Chad Grignon (R-Athens) is an individual residing in Athens, Maine. He is currently serving his first term in the Maine House of Representatives

representing District 118, which includes the Somerset County communities of Athens, Bingham, Caratunk, Cornville, Embden, Harmony, Jackman, Moose River, Moscow, Wellington and Plantations of Brighton, Dennistown, Highland, Kingsbury, Pleasant Ridge, The Forks and West Forks, plus the unorganized territories of Concord, Lexington and Wyman Townships, Northeast Somerset (including Rockwood Strip), Northwest Somerset and Seboomook Lake. The lands purportedly leased to CMP are in his District. Representative Grignon has been deprived of his constitutional right to vote on the 2020 Lease pursuant to Article IX, Section 23 of the Maine Constitution.

13. Former State Representative Denise Harlow (I-Portland) is an individual residing in Portland, Maine. She served four terms in the Maine House of Representative from 2010-2018. From 2010-2018, Representative Harlow served on the Environment and Natural Resources Committee and from 2017-2018 on the Inland Fisheries and Wildlife Committee. Representative Harlow was deprived of her constitutional right to vote on the 2014 Lease pursuant to Article IX, Section 23 of the Maine Constitution.

14. State Representative Margaret O'Neil (D-Saco) is an individual residing in Saco, Maine, and is serving her second term in the Maine House of Representatives. Representative O'Neil served on an AmeriCorps term with the Maine Conservation Corps, during which time she developed a deep appreciation for the value of Maine's natural resources. Representative O'Neil worked as an Assistant Park Ranger at Ferry Beach State Park in Saco for five years. In her spare time, she enjoys hiking, running and being out on the water. Representative O'Neil has been deprived of her constitutional right to vote on the 2020 Lease pursuant to Article IX, Section 23 of the Maine Constitution.

15. State Representative William Pluecker (I-Warren) is an individual residing in Warren, Maine, and is serving his first term in the Maine House of Representatives. He serves on

the Agriculture, Conservation, & Forestry Committee and the House Committee on Engrossed Bills. Representative Pluecker is a vegetable farmer, small businessman and educator, who teaches farm apprentices everything from growing crops to online marketing. Representative Pluecker has been deprived of his constitutional right to vote on the 2020 Lease pursuant to Article IX, Section 23 of the Maine Constitution.

16. Natural Resources Council of Maine ("NRCM") is Maine's largest environmental advocacy group with over 25,000 members and supporters. NRCM's mission is "protecting, conserving, and restoring Maine's environment, now and for future generations." Many of NRCM's members have used, and plan to continue to use, the public reserved land in and around Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides.

17. Mr. Edwin Buzzell is an individual residing in Moxie Gore, Maine, and the owner of Kennebec Kayak, Inc. Mr. Buzzell is a member of NRCM and has served on the board of the Old Canada Road National Scenic Byway since 2016; he is currently President of the Board. Mr. Buzzell has worked as a commercial whitewater rafting outfitter and as a Registered Maine Guide for whitewater, recreation, fishing, and hunting in and around the public reserved lands that are the subject of BPL's Lease with CMP since approximately 1974, and plans to continue to do so. He is also an avid hunter who has harvested more than a dozen bucks in the areas spanning the proposed transmission line corridor and plans to continue to hunt in this area. In 1995, Mr. Buzzell purchased 80 acres near the public reserved lands now purportedly leased to CMP and built a home on the land for the pristine views, which will be destroyed if the transmission line is built.

18. Mr. Greg Caruso is an individual residing in Caratunk, Maine, and is a Master Maine Guide for fishing, hunting, whitewater rafting, and snowmobiling. For over twenty seven

years Mr. Caruso has worked as a guide to thousands of guests in and around the public reserved lands that are the subject of the Lease and plans to continue to do so.

19. Ms. Charlene Cummings is an individual residing in Phippsburg, Maine. She is the daughter of Mr. Bob Cummings who received two Pulitzer Prize nominations for his extensive reports as a journalist on what are today recognized as Maine's public reserved lands. Ms. Cummings has used public reserved lands in Maine's Western Mountains for recreational uses since approximately 1970 and plans to continue to do so.

20. Mr. Robert Haynes is the Coordinator of the Old Canada Road Scenic Byway, Inc. This organization manages Old Canada Road National Scenic Byway. This National Byway is one of 150 nationally designated special American roads, dedicated to preserving the natural beauty of the Kennebec and Moose River Valley. The management of this National Byway is important to enable residents and visitors to enjoy the scenic vistas and recreational opportunities Maine public lands afford in this area while traveling by automobile or while stopping to participate in recreation such as whitewater rafting, fishing, hiking and camping.

21. Ms. Cathy Johnson is an individual residing in Alna, Maine, and is a member of NRCM. She worked at NRCM for 30 years and retired as its Senior Staff Attorney and Forests and Wildlife Director in February 2020. Ms. Johnson has spent her leisure time hiking and canoeing in Maine's North Woods since1971, and plans to continue to do so.

22. Mr. Ron Joseph is an individual residing in Sidney, Maine. He is a member of NRCM and a retired wildlife biologist for the Maine Department of Inland Fisheries and Wildlife and the U.S. Fish and Wildlife Service. As a Maine resident who has used and enjoyed the Upper Kennebec Region for research and recreation since approximately 1960, and who plans to continue to do so, Mr. Joseph is particularly concerned about the threat of the transmission line corridor to the Upper Kennebec Deer Wintering Area, which is already suffering from low deer

densities and is critically important to deer populations, recreational hunters and hunting businesses.

23. Mr. John R. Nicholas, Jr. is an individual residing in Winthrop, Maine. He is the former Deputy Commissioner of the Department of Conservation, now known as the Department of Agriculture, Conservation and Forestry. Mr. Nicholas owns property in Upper Enchanted Township approximately two miles from the proposed transmission line corridor. He has fly fished the remote native brook trout ponds around the approximately 54 miles of transmission line corridor in Segment 1 for approximately 20 years and plans to continue to do so. He is familiar with the public reserved lands that are the subject of the 2014 and 2020 Leases.

24. Mr. George A. Smith is a resident of Mount Vernon, Maine. He is a full time writer covering hunting, fishing, and other outdoor activities, current events and issues, book reviews, and travel, and has been honored with awards from the Maine Press Association. He was the executive director of the Sportsman's Alliance of Maine for 18 years. He writes monthly columns for The Maine Sportsman magazine (for more than 30 years), a weekly editorial-page column for central Maine's two daily newspapers (for 25 years), and a travel column that he and his wife author for central Maine's two daily newspapers (for five years). In 2014 Islandport Press published his book of columns about Maine titled "A Life Lived Outdoors." In addition to his family, his interests include hunting, fishing, and birding throughout the Maine Woods, including its public reserved lands.

25. Mr. Clifford Stevens is an individual residing in The Forks, Maine, and owns and operates Moxie Outdoor Adventures. Mr. Stevens's business offers whitewater rafting, kayaking, canoeing and hiking, and operates in and around the public reserved lands subject to the 2014 and 2020 Leases. The proposed transmission line corridor abuts the lands that Mr. Stevens uses to operate his business and would be visible to his customers.

26. Mr. Todd Towle is an individual residing in Kingfield, Maine, and is a member of the NRCM and owner and operator of Kingfisher River Guides. As part of his fishing and guiding business, Mr. Towle conducts trips on the Kennebec River from The Forks to the Shawmut Tailwater with a focus on fly fishing for trout and salmon. The proposed transmission line corridor will affect the temperatures of Cold Stream Pond—home to native trout—located in Johnson Mountain Township and will be visible to his clients while participating in recreational activities. Mr. Towle has used the public reserved lands that are the subject of the Leases for recreational purposes since approximately 1988 and plans to continue to do so.

27. Defendant Andy Cutko is the Director of the Bureau of Parks and Lands in the Department of Agriculture, Conservation and Forestry, which is located in Augusta, Kennebec County, Maine. He is sued in his official capacity.

28. Defendant Bureau of Parks and Lands in the Department of Agriculture, Conservation and Forestry, is an agency of the State of Maine with its principal office in Augusta, Kennebec County, Maine.

29. Defendant Central Maine Power Company is a Maine business corporation that is headquartered in Augusta, Maine.

REAL ESTATE INVOLVED

30. A 300 foot wide by approximately one mile long area of public reserved land in Johnson Mountain Township and West Forks Plantation, in Somerset County, owned by the State of Maine in trust for the public, as more particularly described in the 2020 Lease attached hereto as Exhibit B.

JURISDICTION AND VENUE

31. This Court has jurisdiction over this Complaint for Declaratory and Injunctive Relief pursuant to 14 M.R.S. §§5951-5963, §6051 (13), §§6651 *et seq*., §§6701 *et seq*., and

Rules 57, 65 and 80A of the Maine Rules of Civil Procedure. In the alternative, to the extent execution of the 2020 Lease is deemed "final agency action" within the meaning of the Maine Administrative Procedure Act, which plaintiffs do not believe it is, this Court has jurisdiction over the action pursuant to 5 M.R.S. §11001 *et seq*. and Rule 80C of the Maine Rules of Civil Procedure.

32. Venue is properly laid in this Court pursuant to 14 M.R.S. § 505 because both BPL and CMP conduct business from their principal offices in Augusta, Kennebec County, Maine.

FACTUAL BACKGROUND

33. Ownership of approximately seven million acres was transferred to Maine when it separated from Massachusetts in 1820. Prior to 1890, Maine sold or gave away all but 400,000 acres of this land.

34. The remaining 400,000 acres of public reserved lands were reserved in each of the State's unorganized townships as approximately 1,000 acre lots, and in some cases 1,280 acre lots, and were intended to be used to encourage development, provide funds for the ministry, and for education. Because Maine did not develop as initially contemplated, over the years the State leased these public reserved lands at virtually no cost to camp owners, paper companies, and timber companies. The paper companies claimed that their leases, which dated back to the 1800's, allowed them to cut all the timber on the leased land in perpetuity at nominal rent.

35. An NRCM board member began to catalogue the abuses of the public lot leasing program, and in a series of articles in the Portland Press Herald in the early 1970's, reporter Bob Cummings documented the importance of these lands, the purposes for which they were originally intended when Maine separated from Massachusetts, and their highest and best use going forward. *See* articles attached hereto as Exhibit C. Eventually, after a decade of

investigation, legislative consideration, and litigation, the public lots were returned to the State. *See Cushing v. State*, 434 A.2d 486, 501 (Me. 1981).

36. After extensive negotiation and land swaps, the public lots were configured into the shape they now have. The purpose of this effort could not have been clearer—to preserve these jewels, like the Debsconeag Lake Wilderness Area, mountain ranges such as the Bigelow, Mahoosuc and Deboullie, hundreds of miles of remote lake shores and streams, and thousands of acres of forests—and make them available for public use and enjoyment, not for the benefit of private and corporate interests. *See* Bob Cummings, *Our public lots: State's scenic jewels had a long journey home*, Maine Sunday Telegram (1981) attached hereto as Exhibit D.

37. To ensure that purpose was realized, the people enacted Article IX, Section 23 of the Maine Constitution in 1993. It states: "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House."

38. 12 M.R.S. §§ 598 to 598-B implements Section 23 by designating various public lands, including public reserve lots and public reserved lands, for this constitutional protection.

39. Because the West Forks Plantation and Johnson Mountain Township parcels are public reserved lands, they constitute designated lands under 12 M.R.S. § 598-A(2) and cannot be reduced or substantially altered absent approval of 2/3 of the Legislature.

40. An agency of the State of Maine, including BPL, cannot lease an interest in land to any person for the purpose of constructing a transmission line unless the person has first received a CPCN from the PUC. 35-A M.R.S. § 3132(13) ("The State, any agency or authority of the State or any political subdivision of the State may not sell, lease or otherwise convey any interest in public land, other than a future interest or option to purchase an interest in land that is

conditioned on satisfaction of the terms of this subsection, to any person for the purpose of constructing a transmission line subject to this section, unless the person has received a certificate of public convenience and necessity from the [public utilities] commission pursuant to this section.").

The Proposed Transmission Line and Lease

41. CMP has proposed construction of a new 145 mile, high voltage direct current transmission line from Québec to an interconnection with the New England grid in Lewiston, Maine, commonly known as the New England Clean Energy Connect ("NECEC").

42. Approximately 54 miles of the transmission line route would consist of an entirely new 150 foot wide transmission line corridor. The transmission line would bisect West Forks Plantation and Johnson Mountain Township by cutting a 150 foot wide by one mile long corridor across these two parcels of Public Reserved Land and erecting towers and transmission lines approximately 100 feet tall.

43. On or about December 8, 2014, BPL entered into the 2014 Lease, a twenty-five year lease for the non-exclusive use of a portion of West Forks Plantation and Johnson Mountain Township—a three hundred foot wide by approximately one mile long area—as part of this transmission line corridor. The 2014 Lease initially provided for an initial year one lease payment from CMP of $1,400.

44. On information and belief, at no time prior to executing the 2014 Lease did BPL obtain an appraisal of the value of the land to be leased or consider the enhanced value associated with parcels required as part of the right-of-way for a linear project or the value of the electricity to be carried over the leased lands. On information and belief, the $1400 lease payment was proposed by CMP.

45. On or about June 22, 2015, BPL and CMP entered into an amendment to the Lease, which increased the initial year one lease payment from $1,400 to $3,680. Defendant Cutko has testified that he believes that this modest increase was the result of an appraisal CMP caused to be conducted, although no such appraisal was produced in response to a legislative request. All other terms and conditions of the Lease remained in full force and effect.

46. The 2014 Lease between BPL and CMP was for approximately 36.36 acres. The initial year one payment of $1,400 from CMP to BPL under this Lease was at a rate of $38.50/acre ($1,400/36.36). The initial year one payment of $3,680 under the amendment to the Lease was at a rate of $101.21/acre ($3,680/36.36).

47. In contrast, the Passamaquoddy Tribe entered into a twenty-five year transmission line lease agreement with CMP (the "Passamaquoddy Lease") in 2017 for the non-exclusive use of a portion of Lowelltown Township—a three hundred foot wide by approximately three hundred foot long area—as a part of the transmission line corridor. The Passamaquoddy Lease provides for an initial payment from CMP of $1,000,000.

48. The Lease between the Passamaquoddy Tribe and CMP was for approximately 2.066 acres (300 feet wide by 300 feet long=90,000/43,6560=2.066). The initial year one payment of $1,000,000 from CMP under the Passamaquoddy Lease was at a rate of $484,027/acre ($1,000,000/2.066).

49. If CMP were to pay BPL the same amount per acre that it paid the Passamaquoddy Tribe, then it would have paid BPL under the 2014 Lease an initial one year payment of $17,599,221 ($484,027 x 36.36)—not $3,680.

50. The 2020 Lease essentially acknowledges the lack of any meaningful appraisal undertaken by BPL by providing for an initial payment of $65,000, an increase of 18 times the

amended 2014 Lease payment, along with a requirement that CMP conduct an appraisal within twelve months to determine actual fair market value and adjust the lease payment accordingly.

51. The 2020 Lease is for 32.39 acres. Although BPL has stated that it renegotiated the 2014 Lease to reflect market value, that claim rings hollow in light of the Passamaquoddy Lease—the Passamaquoddy Lease payment, as calculated above, is $484,027/acre; the 2020 Lease initial payment of $65,000 amounts to $2,007/acre ($65,000/32.39), nearly half a million dollars less. In addition, CMP agreed to pay as an "Execution Fee" $350,000 to each of the Passamaquoddy Reservations, for a total of $700,000, on top of the $1 million initial payment.

52. Under the 2020 Lease, CMP is still not paying fair market value for its lease of public reserved lands, evidenced by (i) the significantly greater price it paid for its lease of land from the Passamaquoddy Tribe; and (ii) its agreement in the 2020 Lease to pay a stumpage fee but no payment for the value of the electricity being transmitted across the leased lands.

53. BPL neither sought nor obtained legislative approval.in connection with either the 2014 Lease or the 2020 Lease.

54. In contrast, BPL has sought and has obtained legislative approval for the lease or transfer of public reserved lands for numerous uses with far less impact than CMP's proposed transmission line, as well as for other transmission lines. *See* Exhibit E (Legislative resolves authorizing, *e.g.*, transfer of land to resolve boundary dispute; to create 30 foot by 440 foot trail; an easement to provide access to permit strengthening of earthen flood barrier; a sublease of lands to Maine Huts and Trails for a parking area) and Exhibit F (transmission lines).

55. At the time BPL and CMP entered into the 2014 Lease, CMP had not obtained a CPCN from the PUC as required by 35-A M.R.S. § 3132(13). Because CMP had not obtained a CPCN from the PUC before entering into the 2014 Lease, BPL's execution of that lease was *ultra vires.*

56. Throughout the NECEC permitting proceedings before the PUC and the DEP, numerous parties, including many of the plaintiffs here, objected to permitting NECEC on the grounds that BPL had executed the lease prior to issuance of a PUC CPCN and without legislative approval. CMP consistently insisted that the 2014 Lease was valid and could not be undone or changed, including in recent testimony before the Legislature.

57. The PUC eventually issued a CPCN for NECEC on or about May 3, 2019, but simultaneously approved a stipulation specifying that "CMP will transfer and convey the NECEC to NECEC Transmission LLC ("NECEC LLC"), a Delaware limited liability company that is a wholly owned subsidiary within the Avangrid Networks family of companies and is not a subsidiary of CMP." *Cent. Me. Power Co*., Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, Docket No. 2017-00232, Stipulation at 16 (Me. P.U.C. Feb. 21, 2019).

58. Notwithstanding denying for over 5 years that there were any defects in the 2014 Lease, CMP has now, over a year after issuance of the CPCN, executed a new lease with BPL. The 2020 Lease constitutes an admission of the illegality of the 2014 Lease. It does not and cannot cure BPL's failure to obtain legislative approval, however, and accordingly remains *ultra vires.*

COUNT I
(Declaratory Judgment)
(Violation of Me. Const. Art. IX, sec. 23)

59. Plaintiffs repeat and reallege the assertions made in Paragraphs 1 through 58 as though fully set forth herein.

60. A present dispute between the Plaintiffs and the Defendant as to the validity of the 2020 Lease exists because BPL entered into that lease without first obtaining a 2/3 vote of each House as required by Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A.

61. Article IX, section 23 of the Maine Constitution requires that public reserved land designated by the Legislature may not be reduced or substantially altered without a 2/3 vote of "all the members elected to each House."

62. The implementing statute, 12 M.R.S. § 598-A, identified public reserved lands as among the lands being "designated...under …Section 23," and similarly provides that such lands "may not be reduced or substantially altered, except by a 2/3 vote of the Legislature."

63. The Legislature defined the term "substantially altered" as changing the land "so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which the land is held by the State" and stated that "[t]he essential purpose of public reserved and nonreserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S. § 598(5).

64. As set forth in 12 M.R.S. § 1847, public reserved lands are to "be managed under the principles of multiple use to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning and that the public reserved lands be managed to demonstrate exemplary land management practices, including silvicultural, wildlife and recreation management practices, as a demonstration of state policies governing management of forested and related types of lands."

65. BPL manages West Forks Plantation and Johnson Mountain Township pursuant to the Upper Kennebec Region Management Plan ("Management Plan"), which provides for these two parcels to be used for timber management, wildlife management, and recreational uses.

66. CMP's proposed transmission line would bisect West Forks Plantation and Johnson Mountain Township by cutting a 150 foot wide by one mile long corridor. It would fragment West Forks Plantation and Johnson Mountain Township and would be the largest fragmenting feature in the Western Maine Mountains region.

67. By cutting a 150 foot wide by one mile long corridor that bisects West Forks Plantation and Johnson Mountain Township, CMP's proposed transmission line would require, among other things, vegetation removal, surface alteration, and placement of poles and wires that are approximately 100 feet tall.

68. The proposed transmission line corridor would directly impact approximately 973 acres of the region, including West Forks Plantation and Johnson Mountain Township, through forest and wetland species mortality and habitat alteration and destruction associated with the corridor footprint.

69. In West Forks Plantation and Johnson Mountain Township, the proposed transmission line would impact wildlife habitats (*e.g.*, for birds, marten, lynx, loon, moose and other iconic Maine animals), fisheries (*e.g.* wild brook trout), recreational uses (*e.g.* bird watching, hiking and hunting), and timber harvesting**.**

70. Thus, the proposed transmission line would alter the physical characteristics of West Forks Plantation and Johnson Mountain Township in a way that frustrates the essential purposes for which the parcels are held and substantially alter the uses of these public reserved lands.

71. On other occasions, BPL has recognized that transmission lines substantially alter the public land being leased and accordingly require legislative approval. *See, e.g.,* Resolve Ch. 91, LD 1913, 123rd Maine Legislature, finally passed June 19, 2007:

> This resolve allows the Director of the Bureau of Parks and Lands within the Department of Conservation to convey:

1. An easement for electric transmission lines across 2 state-owned parcels to TransCanada Maine Wind Development, Inc. The parcels are in Wyman Township abutting existing utility corridors and proximate to or abutting State Route 27 and the Appalachian Trail Corridor;

2. An easement for electric transmission lines across a state-owned parcel to Bangor Hydro-Electric Company. The parcel is in Bradley;

3. An easement for electric transmission lines across a state-owned parcel to Bangor Hydro-Electric Company. The parcel is in Township 21 in Washington County

Exhibit F at 7-8.

72. Despite the fact that the proposed transmission line would substantially alter these public reserved lands, upon information and belief, BPL did not consider whether the lease proposed in 2014 triggered the 2/3 legislative vote requirement under Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A. The 2014 Lease is silent with respect to whether CMP's intended use requires 2/3 legislative approval under Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A.

73. BPL leased the land to CMP in 2014 without first obtaining a 2/3 vote of each House as required by Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A. Execution of the Lease without 2/3 legislative approval was *ultra vires*.

74. Notwithstanding widespread public outrage over the 2014 Lease, including a legislative proposal to undo it that unanimously passed in the Committee but could not be presented to the full Legislature because of its adjournment due to the coronavirus pandemic, BPL again executed the 2020 Lease without obtaining or even seeking legislative approval as required by the Constitution. The 2020 Lease, accordingly, is *ultra vires* and cannot and does not authorize any use of these valuable public lands by CMP or NECEC Transmission LLC.

75. Plaintiffs have standing to raise this issue because (i) leasing these public reserved lands for the transmission line would interfere with their rights as trust beneficiaries and owners

of the public reserved lands and their respective abilities to continue engaging in recreational and commercial activities and, in some cases, the use and enjoyment of their properties, in West Forks Plantation and Johnson Mountain Township; and (ii) BPL's failure to seek legislative approval has deprived plaintiffs Black, Saviello, Ackley, Berry, Grignon, O'Neil, Pluecker, and Harlow of their constitutional right to vote on one or both of the Leases under Article IX, Section 23 of the Maine Constitution.

76. It appears reasonably certain that litigation to resolve the instant dispute is unavoidable; the state of facts underlying the parties' disagreement is reasonably certain; and a judicial declaration, if rendered and entered, would terminate the uncertainty regarding the parties' interests in the validity of BPL's Lease with CMP and fix the legal rights of the parties to this action.

COUNT II
(Injunctive Relief)

77. Plaintiffs repeat and reallege the allegations set out in Paragraphs 1 through 76 as if fully set forth herein.

78. Because the 2020 Lease is *ultra vires*, no rights it purports to grant may be exercised by defendant CMP and CMP should be enjoined from attempting to exercise any such purported rights.

79. Similarly, because the 2020 Lease is *ultra vires*, the Director may not lawfully transfer it from CMP to NECEC Transmission, LLC as required by the PUC stipulation and contemplated by the Lease, and he should be enjoined from any such attempt.

COUNT III
(Review of Agency Action)

80. In the alternative, Plaintiffs bring this Count pursuant to 5 M.R.S. § 11001 *et seq*. and Rule 80C of the Maine Rules of Civil Procedure to timely appeal the 2020 Lease. Plaintiffs

do not believe that this action falls under Rule 80C because (i) BPL has no rules relating to leases of public lands, in contrast to the rules it has adopted with respect to leases of submerged lands; (ii) BPL does not provide notice to abutters or the public about possible leases and accordingly persons affected by such a lease lack any meaningful opportunity to participate; as a result, a lease does not resolve the rights of all parties as required by the Administrative Procedure Act ("APA"); and (iii) BPL does not create a record as the APA requires that allows a reviewing court to determine whether its actions were arbitrary or supported by substantial evidence. Accordingly, plaintiffs include this count solely to protect their rights should the Court conclude notwithstanding the above that Rule 80C does apply.

81. Plaintiffs repeat and reallege the allegations set out in Paragraphs 1 through 79 as if fully set forth herein.

82. The 2020 Lease contains legal errors, is the result of unlawful process, is an exercise of authority beyond that granted to BPL by statute, and/or is arbitrary, capricious, or characterized by an abuse of discretion, and is unsupported by substantial evidence in the record.

WHEREFORE, Plaintiffs respectfully requests that the Court enter judgment in their favor and against Defendants and:

(A) Find and declare that the proposed transmission line would effect a substantial alteration in the use of designated lands, thus requiring 2/3 legislative approval;

(B) Find and declare that execution of the 2020 Lease was *ultra vires* and that, accordingly, the Lease is void and/or invalid because BPL executed the 2020 Lease without first obtaining a 2/3 vote of each House in violation of Article IX, Section 23 of the Maine Constitution;

(C) Find and declare that the execution of the 2020 Lease was *ultra vires* and that, accordingly, no future transfer or assignment of the Lease can be made;

(D) Enter an order prohibiting defendant CMP from undertaking any activities on the lands purportedly leased pursuant to the unlawful Lease;

(E) Enter an order prohibiting defendant Cutko or any agent of BPL from executing a transfer of the unlawful lease to NECEC Transmission, LLC;

(G) Award Plaintiffs their costs of suit, as permitted under 14 M.R.S.A. § 5962; and

(H) Award Plaintiffs such other and further relief as this Court deems just and proper.

Dated at Portland, Maine this 17th day of July, 2020.

/s/ James T. Kilbreth

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LD 125, 129th legislature: Resolve, Directing the Department of Agriculture, Conservation and Forestry To Convey Certain Lands to Roosevelt Conference Center Doing Business as Eagle Lake Sporting Camp

SUMMARY

This resolve requires the Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry to convey to Roosevelt Conference Center, doing business as Eagle Lake Sporting Camps, a 12.86-acre parcel of land in Township 16, Range 6. The resolve requires the director to sell the land at fair market value and to retain or withhold any rights to subdivide. The director is also required by the resolve to convey to Eagle Lake Sporting Camps a right-of-way along the service road to the Square Lake Road for appraised fair market value. The resolve also stipulates that the State must retain a right of first refusal to reacquire the parcel and right-of-way from the owner if the use of the parcel for a year-round sporting camp or Class A restaurant and lodge is discontinued or appropriate licenses are not maintained

LD 1635, 128th legislature: Resolve, Authorizing Certain Land Transactions by the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands

SUMMARY

This amendment removes the section of the resolve authorizing the Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry to convey certain lots or parcels of land in Adamstown Township in Oxford County to the individual lessees of each lot or parcel. It retains the section that authorizes the Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry to grant an access easement to the Town of Fort Kent across the Fort Kent State Historic Site to allow for strengthening and heightening of the earthen flood barrier along the St. John River and protect the Fort Kent Blockhouse, a National Historic Landmark, from flooding.

LD 1647, 128th legislature: Resolve, Authorizing Certain Land Transactions by the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry

SUMMARY

This amendment specifies that the segment of the Aroostook Valley Trail being transferred from the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands to the Town of Washburn is approximately 30 feet wide and approximately 440 feet long.

LD 1773, 128th legislature: Resolve, Directing the Bureau of Parks and Lands To Transfer Land in the Town of Pittston

SUMMARY

This resolve directs the Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry to transfer a portion of a parcel of land situated on Arnold Road in the Town of Pittston to the First Congregational Church of Pittston.

LD 1789, 128th legislature: An Act Authorizing Changes to the Ownership and Leases of Certain Public Lands

SUMMARY

This amendment, which is the majority report of the committee and which replaces the bill, authorizes the Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry to allow the lessee of land at Long Falls Dam Road to sublease a portion of the parcel to the Maine Huts and Trails system for a parking area. The amendment amends Resolve 2013, chapter 56, authorizing the sale of lease lots in Richardson Lake public reserved lands to the individual lessees, to authorize the director to sell an additional parcel of public reserved lands on a small island in West Richardson Pond, provides a description of the parcel and corrects the number of lessees as described in chapter 56. The amendment amends Resolve 2015, chapter 29, which authorizes the director to partition and consolidate common and undivided interests in lands in Township 10, Range 4 WELS and Township 13, Range 5 WELS, to remove language added in the bill allowing the director to reconfigure tracts and language referencing reconfigurations of parcels to be conveyed and allowing the director to acquire interests managed by Prentiss and Carlisle Management Company in Township 11, Range 4 WELS E/2. The amendment requires the bureau to report to the joint standing committee of the Legislature having jurisdiction over nonreserved public lands and public reserved lands matters on the amount of funds in the public nonreserved lands acquisition fund and the Public Reserved

Lands Acquisition Fund by county including the funds received pursuant to transactions authorized by this legislation.

LD 1424, 127th legislature: Resolve, Authorizing Certain Land Transactions by the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Land

SUMMARY

This resolve allows the Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry to dispose of the bureau's minority interests in lands adjacent to the bureau's Scopan Public Reserved Lands Unit in Aroostook County in exchange for interests of comparable value, including all minority interests held by others in the bureau's Scopan Public Reserved Lands Unit.

It allows the director to convey lands along the Southern Bangor and Aroostook Rail Trail in the Town of Westfield to an abutter, Smith's Farms, Inc. This conveyance is in exchange for a newly developed trail corridor, located on Smith's Farm property between the existing rail trail and the Prestile Stream, averaging 99 feet wide and being approximately 2,400 feet in length, or 5.47 acres.

It allows the director to convey an approximately 320-acre parcel in T.24 MD BPP in Washington County in exchange for a parcel of comparable size and value. Cherryfield Foods, Inc. will acquire state lands on which it formerly held a lease for blueberry production, which are surrounded by other lands owned and managed by Cherryfield Foods, Inc.; and in exchange the bureau will acquire an approximately 320-acre wooded parcel abutting Mopang Stream, with deeded access.

It allows the director to exchange a small parcel of land on Aziscohos Lake, a discontinued 0.4-acre leased camp lot on public reserved lands, for a 3.5-acre parcel of land with a small amount of frontage on Lower Richardson Lake, currently used as a boat launch.

It allows the director to convey the bureau's minority interest to the majority interest family owners of 2 2-acre lots on Scopan Lake for fair market value. These lots, which are located on the south shore of the lake, are not within the bureau's Scopan Public Reserved Lands Unit.

It allows the director to convey Halfway Rock Island to the United States General Services Administration or its assignee for fair market value.

LD 1527, 127th legislature: Resolve, Authorizing the Department of Agriculture, Conservation and Forestry, Division of Parks and Public Lands To Convey Certain Lands and Enter into Certain Leases with the Federal Government

SUMMARY

This resolve allows the Director of the Division of Parks and Public Lands within the Department of Agriculture, Conservation and Forestry to lease rights and lands within the Coburn Mountain public reserved lands in Upper Enchanted Township, Somerset County to the United States Government or the United States Customs and Border Protection to maintain, operate, expand, modernize and improve existing public safety communications facilities.

The resolve allows the director to sell 2 parcels of land in Dover-Foxcroft, Piscataquis County to an abutter, Dead River Company, to resolve a boundary issue.

The resolve allows the director to sell a parcel of land in Dover-Foxcroft, Piscataquis County to an abutter, McKusick Petroleum Company, to resolve a boundary issue.

The resolve allows the director to sell parcels of land in Adamstown Township, Oxford County to the West Richardson Pond Public Lot Association.

LD 1132, 127th legislature: Resolve, To Authorize the Exchange of Certain Lands Owned by the State

SUMMARY

This resolve authorizes the Director of the Bureau of Parks and Lands within the Department of Conservation, for exchange of land or interests in land of comparable market value, to convey access rights by easement to Pingree Associates, Inc., in connection with land in Township 5, Range 2, also known as Lincoln Plantation; Township 4, Range 2, also known as Adamstown Township; Township 4, Range 1, also known as Richardsontown Township; and Township C, all in Oxford County. It also authorizes the director, for exchange of land or interests in land of comparable market value, to convey a parcel of land in Nashville Plantation, in Aroostook County, to Pingree Associates, Inc

LD1158, 124th Legislature: Resolve, Authorizing Certain Land Transactions by the Department of Conservation, Bureau of Parks and Lands

SUMMARY

This resolve allows the Department of Conservation, Bureau of Parks and Lands to sell or swap a portion of the Shell Heaps Lots in the Town of Damariscotta, with the concurrence of the Maine Historic Preservation Commission, in order to advance a plan for recreational trail development on adjacent parcels.

The resolve allows the Bureau of Parks and Lands to sell an access easement crossing the Bangor and Aroostook Trail in the Town of Van Buren.

The resolve allows the Bureau of Parks and Lands to sell an easement or sell a fee portion to an abutter of a parcel of land owned by the Bureau of Parks and Lands in the Town of Brownville near the Katahdin Iron Works Multi-use Trail.

The resolve allows the Bureau of Parks and Lands to sell its minority common undivided interests in land in T12 R17 in Aroostook County.

The resolve allows for the resolution of a boundary dispute in Chesuncook Village in Piscataquis County by allowing the Bureau of Parks and Lands to transfer a fraction of an acre each to Piscataquis County and to an abutter.

LD 1803, 124th legislature: Resolve, Authorizing Certain Land Transactions by the Department of Conservation, Bureau of Parks and Lands and the Department of Inland Fisheries and Wildlife

SUMMARY

This resolve allows the Director of the Bureau of Parks and Lands within the Department of Conservation to convey to the municipal government of Monhegan Plantation any interests in Monhegan Plantation that may have reverted to the bureau upon the death of Evelyn Cazallis Carter, June 10, 1993.

The resolve also allows the Director of the Bureau of Parks and Lands to convey the right to cross the St. John Heritage Valley Trail in the Town of St. Francis to abutter Thomas Pelletier.

The resolve also allows the Director of the Bureau of Parks and Lands to convey a transmission line easement to Bangor Hydro Electric Company near Donnell Pond and Tunk Lake in the Town of Sullivan and the Town of Franklin in Hancock County.

The resolve also allows the Director of the Bureau of Parks and Lands and the Land for Maine's Future Board to allow the Frenchman Bay Conservancy to convey a transmission line easement to Bangor Hydro Electric Company across Schoodic Bog in the Town of Sullivan in Hancock County.

The resolve also allows the Director of the Bureau of Parks and Lands to sell a lot with a garage in Big Lake Township formerly known as Township 21 in Washington County.

The resolve allows the Commissioner of Inland Fisheries and Wildlife to convey a parcel of land in the Town of Kennebunk in York County to Central Maine Power Company.

STATE OF MAINE
CUMBERLAND, ss.
Portland

BUSINESS AND CONSUMER DOCKET
Location:
Docket No. BCD-CV-20-29

RUSSELL BLACK, *et al.*,
Plaintiffs
v.

ANDY CUTKO as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY,

CENTRAL MAINE POWER COMPANY, and NECEC TRANSMISSION LLC,
Defendants

DIRECTOR'S AND BUREAU'S MOTION TO DISMISS COUNT I (PLAINTIFFS' DECLARATORY JUDGMENT CLAIM)

In an Order dated April 21, 2021, this Court clarified the scope of Plaintiffs' declaratory judgment claim (Count I of Plaintiffs' first amended complaint (FAC)) and invited Defendants to file a motion for judgment on Count I. As Count I has been articulated by the Court, the Bureau of Parks and Lands and Director Cutko (collectively, the Bureau) move to dismiss Plaintiffs' Count I because Plaintiffs' claims as to the 2014 lease are moot; the Court lacks jurisdiction over the 2014 lease; the Bureau was not required to provide additional public process, including to Plaintiffs, before issuing a lease pursuant to 12 M.R.S. § 1852(4); and 2/3 legislative approval of the Bureau's lease to Central Maine Power Company (CMP) is not required as a matter of law.

RELEVANT BACKGROUND

On December 15, 2014, the Bureau, pursuant to 12 M.R.S. § 1852(4), leased to CMP a small portion of the Johnson Mountain Township and West Forks Plantation public reserved lands for purposes of electric power transmission (the 2014 lease). (A.R. I0035-60.) The 2014 lease

required an annual rent payment of $1,400, subject to adjustment following an appraisal.[1] (A.R. I0036.) The Bureau did not provide notice of the 2014 lease because no statute or rule requires it to do so, and no appeal of the 2014 lease was timely filed. *See* 5 M.R.S. § 11002(3).

In 2016, the Bureau, pursuant to 12 M.R.S.§ 1847(2), initiated a management planning process for public reserved lands in the upper Kennebec region, including the Johnson Mountain Township and West Forks Plantation public reserved lands. (A.R. II0017.) The Bureau convened a stakeholder group—the Upper Kennebec Region Advisory Committee[2]—to provide input on the management plan, issued public notices, held four public meetings, and afforded the public multiple opportunities to submit written comment. (A.R. II0016-18, 127-52.) The Bureau adopted the Upper Kennebec Region Management Plan in June 2019. (A.R. II0003.) The management plan assigns much of the Johnson Mountain Township and West Forks Plantation public reserved lands a timber management allocation, and acknowledges the existing powerline on the Johnson Mountain Township and West Forks plantation public reserved lands as well as the 2014 lease. (A.R. II0093-94, 109, 115.) None of the written comments submitted on the draft plan or the final draft plan, which comments the Bureau summarized and addressed in Appendix A to the Upper Kennebec Management Plan, criticize the Bureau's proposal to designate as a timber management area the vast majority of the Johnson Mountain Township and West Forks Plantation public reserved lands. (A.R. II0132-52.) Additionally, none of those comments address the existing powerline or the 2014 lease to CMP. (*Id.*)

[1] On June 22, 2015, after an appraisal was completed (A.R. IV0018-119), the Bureau and CMP amended the 2014 lease to increase the annual rent payment to $3,680 from $1,400. (A.R. I0061.)

[2] Plaintiff Chad Grignon was a member of the Upper Kennebec Region Advisory Committee. (A.R. II0129.)

In March 2020, the executive branch chose to explore whether it could obtain a better deal for Maine with respect to the 2014 lease. (A.R. IV0138.) Between March and May of 2020, the Bureau and CMP negotiated a replacement lease. (A.R. IV0120-257; A.R. V0001-293.) Among other changes, the parties negotiated a new annual rent of $65,000 (A.R. V0209), which accrues to the Public Reserved Lands Management Fund. 12 M.R.S. § 1849(2). The Bureau and CMP reached agreement on the renegotiated lease terms by the end of May 2020. (A.R. V0289-94.)

CMP signed the amended and restated lease on June 15, 2020, and BPL signed on June 23, 2020 (the 2020 lease). (A.R. I0012.) The 2020 lease provides:

> This Lease supersedes the Transmission Line Lease between Lessor and Lessee dated December 15, 2014, as amended by Lease Amendment dated June 22, 2015 (as amended the '2014 Lease'), and the parties acknowledge that the 2014 Lease is terminated as of the effective date of this Lease.

(A.R. I0010.) Thus, pursuant to the express terms of the 2020 lease, the 2014 lease has not been in effect since June 23, 2020. On June 25, 2020, the 2020 lease was recorded in the Somerset County Registry of Deeds, Book 5562, Page 75. (A.R. I0001.)

More than five years after the 2014 lease took effect, Plaintiffs filed a three-count complaint challenging the 2014 lease as ultra vires. The complaint asked this Court to declare the 2014 lease ultra vires because, Plaintiffs alleged, the 2014 lease required but did not receive 2/3 legislative approval. (Pls.' Compl. 20.) On July 17, 2020, Plaintiffs filed their FAC, which similarly pleads three counts and seeks relief as to the 2020 lease only.[3] (Pls.' FAC 20.) The

[3] Consistent with their requests that the Court serve as fact-finder (*e.g.*, Pls.' Mot. re. Record 8), the Plaintiffs pleaded their Count III for MAPA/Rule 80C review in the alternative only. Although the Court has allowed Plaintiffs' challenges to the 2020 lease to proceed as both a Rule 80C appeal and a declaratory judgment action, the Court has stricken the Bureau's written findings from the administrative record because they were not reduced to writing before the Bureau issued the 2020 lease. (Apr. 21 Order 13.) In the absence of the Bureau's written findings, the Bureau renews and incorporates by reference its motion to remand without vacatur, as set forth in its letter regarding the administrative record dated April 2, 2021, so that the Bureau may prepare written findings to facilitate judicial review.

Bureau and CMP each moved to dismiss Counts I and II of Plaintiffs' FAC on the basis that the 2020 lease is final agency action and reviewable pursuant to the MAPA alone.[4] *See Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 14, 60 A.3d 1248. Because Plaintiffs' FAC does not assert any due process claims or seek relief as to the 2014 lease (Pls.' FAC 20), the Bureau did not move to dismiss Plaintiffs' FAC with respect to the 2014 lease or address the process with respect to that lease. (*See* Bureau's Mot. to Dismiss 4.)

In its Order dated December 21, 2020 (Dec. 21 Order), the Court denied the Bureau's and CMP's motions to dismiss and permitted this case to proceed as both a declaratory judgment action and a MAPA (Rule 80C) appeal. (Dec. 21 Order 9-10.) Additionally, the Court concluded that Plaintiffs' declaratory judgment count may encompass challenges to the terminated 2014 lease.[5] (*Id.*) In its Order dated April 21, 2021 (April 21 Order), the Court clarified that Plaintiffs' declaratory judgment count consists of the following legal issues: whether the 2014 lease is void for a lack of a certificate of public convenience and necessity; whether a constitutional violation occurred before any administrative process was available to Plaintiffs; whether as to both the 2014 lease and the 2020 lease the Bureau was required to but did not provide a meaningful administrative process to Plaintiffs; and whether Legislative approval of both the 2014 lease and the 2020 was constitutionally required. (April 21 Order 15-16.)

As the Court has clarified the scope of the FAC's declaratory judgment count, the Court should enter judgment against Plaintiffs on Count I because Plaintiffs' claims as to the 2014 lease are moot; the Court lacks jurisdiction over the 2014 lease; the Bureau was not required to provide

[4] CMP also moved to dismiss Plaintiffs' complaint for lack of standing. The Bureau did not take a position on Plaintiffs' standing at that time.

[5] Per the Court's Order dated December 21, 2020, the Court has deferred ruling on Count II. (Dec. 21 Order 11 & n.9.)

a leasing-specific public process before issuing a lease pursuant to 12 M.R.S. § 1852(4); and 2/3 legislative approval of the Bureau's lease to CMP is not required as a matter of law.[6]

ANALYSIS

The Bureau moves to dismiss Count I pursuant to M.R Civ. P. 12(b)(1) and 12(b)(6). "When a motion to dismiss is based on the court's lack of subject matter jurisdiction, [the Court] make[s] no favorable inferences in favor of the plaintiff." *Tomer v. Me. Human Rights Cmm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335. When a motion to dismiss is based on the plaintiff's failure to state a claim, the Court "view[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Andrews v. Sheepscot Island Co.*, 2016 ME 68, ¶ 8, 138 A.3d 1197.

I. Claims Related to the 2014 Lease are Moot and Thus Not Justiciable

Because the 2014 lease terminated effective June 23, 2020, Count I as it pertains to the 2014 lease is moot and not justiciable. "Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character." *Witham Family Ltd. P'ship v. Town of Bar Harbor*, 2015 ME 12, ¶ 7, 110 A.3d 642 (quotation marks omitted) (citation omitted). Mootness is "the doctrine of standing set in a time frame: The requisite personal interest

[6] As to the 2020 lease, the Bureau preserves all arguments made in its motion to dismiss to Counts I and II of Plaintiffs' FAC, and in its reply to Plaintiffs' opposition to the Bureau's motion to dismiss, and incorporates by reference those arguments as to the 2014 lease. The Bureau also preserves all arguments in its prior filings that 12 M.R.S § 1852(4) leases are never substantial alterations. *See* section IV and n. 10 *infra*.

Because the Court has allowed certain of Plaintiffs' arguments to proceed outside of their MAPA/Rule 80C appeal (Apr. 21 Order 15-16), it is possible the Court may not defer to the Bureau's interpretation of ambiguous statutes, which would be inconsistent with separation of powers principles. *See Cobb v. Board of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271 ("If the statute is ambiguous, we defer to the agency's interpretation, and we affirm the agency's interpretation unless it is unreasonable.").

that existed at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Madore v. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 8, 715 A.2d 157 (quotation marks omitted) (alteration omitted) (citation omitted). "In general, a case is moot and therefore not justiciable if there are insufficient practical effects flowing 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 (quotation marks omitted) (citation omitted). "The Declaratory Judgments Act . . . does not present an exception to the justiciability rule." *Id*. (quotation marks omitted) (citation omitted).

In *Brunswick Citizens for Collaborative Government*, the Town acquired a parcel of land through a tax foreclosure. *Id.* ¶ 2. The Town Council voted to sell the property. *Id.* After the vote but before any conveyance of the property, the citizens group submitted to the Town Clerk an initiative petition for an ordinance that would require the Town to retain the property "for use as a public park and for access for shellfish harvesters." *Id.* ¶¶ 2-3. The Town Council rejected a motion to put the proposed ordinance out to a vote and moved to take no further action on the petition. *Id.* ¶ 3. The Town later sold the property. *Id.* ¶ 2. The citizens group filed a Rule 80B appeal, which challenged the Town's failure to act on the initiative petition, and a complaint for declaratory judgment, which sought a declaration that the Town Charter permits the voters to enact an ordinance that would overturn the Town Council's decision to sell the property. *Id.* ¶ 4. The Law Court concluded that both the Rule 80B and the declaratory judgment complaint were moot because "[n]o declaration by the court could create any legal impediment to the sale of the property," which had already occurred. *Id.* ¶ 8.

Here, the Bureau and CMP—the only parties to the 2014 lease—terminated the 2014 lease by executing the 2020 lease. (A.R. I0010.) The 2014 lease has not been in effect since June 23,

2020 (A.R. I0010, 12), and the Bureau and CMP do not dispute the validity of that termination. (Nor have Plaintiffs challenged the validity of the termination; they instead contend the 2014 lease was ultra vires.) Because the 2014 lease is no longer in effect, the 2014 lease no longer governs the contractual relationship between the Bureau and NECEC: If NECEC Transmission LLC constructs part of the NECEC corridor on the leased premises, it will do so pursuant to the 2020 lease (and various regulatory approvals), and not pursuant to the 2014 lease. In other words, no declaration by this Court will affect the 2014 lease because that lease was terminated almost one year ago. *See Brunswick Citizens for Collaborative Gov't*, 2018 ME 95, ¶ 8, 189 A.3d 248; *Town of Barnstable v. O'Connor*, 786 F.3d 130, 142 (1st Cir. 2015) (remarking that where the parties terminated the contract at issue the Court would have "little difficulty determining that the case was moot" but for the parties' dispute as to the validity of the termination) (citing *ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("It is ordinarily true that a challenge to a contract becomes moot upon that contract's expiration.")). Moreover, because the 2014 lease is no longer in existence, there are no rights under the 2014 lease to be declared. *Cf.* 14 M.R.S. § 5954. The Bureau's and CMP's execution of the 2020 lease terminated the 2014 lease and thus mooted all of Plaintiffs' claims as to the 2014 lease. The Declaratory Judgments Act cannot resuscitate Plaintiffs' moot claims as to the 2014 lease, nor be invoked to issue an advisory opinion on the 2014 lease. *Brunswick Citizens for Collaborative Gov't*, 2018 ME 95, ¶ 7, 189 A.3d 248; *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 251 (Me. 1974) ("While declaratory judgment actions are necessarily anticipatory in character, they nevertheless require adverseness of interest and a 'real controversy' for the proper presentation of issues. Declaratory judgments are not exceptions to the Court's lack of jurisdiction to render advisory opinions except as mandated by Me. Const., art.

VI, § 3."). Because all issues related to the 2014 lease are therefore moot, the Court should dismiss Count I as to the 2014 lease.

II. As to the 2014 Lease, the Declaratory Judgment Claims Articulated by the Court are not Cognizable and must be Dismissed.

Any claims related to the 2014 lease are not cognizable and must be dismissed. Final agency action is subject to judicial review pursuant to the MAPA alone unless that review is inadequate. 5 M.R.S. § 11001(1). MAPA review is "inadequate when an alleged deprivation of civil rights occurs before, and not as part of, the action or inaction for which a plaintiff seeks review." *Cayer v. Town of Madawaska*, 2016 ME 143, ¶ 16, 148 A.3d 707 (quotation marks omitted). As to the 2014 lease, MAPA review would have been adequate, were it available to Plaintiffs.

To obtain judicial review pursuant to the MAPA, persons who were not a party to the agency proceeding but who are aggrieved by the final agency action "shall have forty days from the date the decision was rendered to petition for review." 5 M.R.S. § 11002(3). That filing deadline is jurisdictional. *Martin v. Dep't of Corrections*, 2018 ME 103, ¶ 12, 190 A.3d 237 (citations omitted). Consequently, "a declaratory judgment action cannot be used to revive a Rule 80[C] claim that is otherwise barred by the passage of time." *Edwards v. Blackman*, 2015 ME 165, ¶ 23, 129 A.3d 971 (quotation marks omitted) (citation omitted) (alteration omitted); *see also Martin*, 2018 ME 103, ¶ 12, 190 A.3d 237 (observing that the MAPA's filing deadlines are not subject to equitable tolling) (citations omitted).

Like the 2020 lease, the 2014 lease was final agency action. 5 M.R.S. § 8002(4). (April 21 Order 10.) The 2014 lease took effect December 15, 2014. (A.R. I0045.) Because the 2014 lease was final agency action, Plaintiffs had forty days from the date the lease was issued—December 15, 2014—to petition the Superior Court for review. 5 M.R.S. § 11002(3). Plaintiffs

filed their complaint contesting the 2014 lease on June 23, 2020, which was several years too late. This Court therefore also lacks jurisdiction over the 2014 lease pursuant to the MAPA. *See Martin*, 2018 ME 103, ¶ 12, 190 A.3d 237.

Even if the Court had jurisdiction over the 2014 lease and even if review of the terminated 2014 lease were not now moot, MAPA review would be adequate and thus exclusive. Plaintiffs' FAC does not plead or seek relief for any alleged deprivation of civil or due process rights that allegedly occurred with respect to the 2014 lease that could have supported an independent claim outside of MAPA review. (Pls.' FAC 20-21.) But even if it had, the Bureau's determination that the 2014 lease to CMP did not substantially alter the uses of the Johnson Mountain Township and West Forks Plantation public reserved lands, which decision was made before the Bureau and CMP executed the 2014 lease, did not deprive Plaintiffs of any civil or due process rights because the Bureau's substantial alteration determination did not convey any rights, property or otherwise, to anyone. *Cf. Gorham v. Androscoggin County*, 2011 ME 63, ¶ 25, 21 A.3d 115 (allowing a section 1983 independent claim to proceed against the county when the petitioner was suspended without pay—a deprivation of petitioners' property—before having an opportunity to be heard). Had Plaintiffs timely appealed the 2014 lease, Plaintiffs' averment that the 2014 lease was ultra vires would have been reviewable pursuant to section 11007(4)(C) of the MAPA only. Additionally, whether the Bureau erred by issuing the 2014 lease before the Public Utilities Commission issued the CPCN was also reviewable pursuant to 5 M.R.S. § 11007(4)(C) only, had an appeal been timely filed and were that issue not mooted by termination of the 2014 lease. Thus, the 2014 lease was reviewable pursuant to the MAPA alone, and the Court should dismiss Count I as to the 2014 lease. *Antler's Inn & Rest.*, 2012 ME 143, ¶¶ 14-15, 60A.3d 1248.

III. Apart from the Management Planning Process, Administrative Process is not Required for a Lease Issued Pursuant to 12 M.R.S. § 1852.

As to the Bureau's management of public reserved lands, the Bureau is required to afford a public process at the management planning stage, which occurred here. The Bureau is not required to provide additional process before issuing a lease pursuant to 12 M.R.S. §1852. The Court should therefore enter judgment against Plaintiffs on this component of Count I.

The Bureau manages public reserved lands pursuant to a comprehensive plan and management plans for the various units of public reserved lands. 12 M.R.S. § 1847(2). Before adopting a management plan, the Bureau must provide "adequate opportunity for public review and comment." *Id.* As to the Upper Kennebec Region Management Plan, which includes the Johnson Mountain Township and West Forks Plantation public reserved lands, the Bureau convened a stakeholder group, issued multiple notices at different points in the process, held four public meetings, accepted written comments, and responded to those written comments. (A.R. II0016-18, 127-52.) It is through this management plan process that the Bureau determines the appropriate allocations for public reserved lands (i.e., special protection areas, backcountry recreation areas, wildlife areas, remote recreation areas, visual protection areas, developed recreation areas, and timber management areas). (*E.g.*, A.R. II0017-18.) And the outcome of that public process—adoption of a management plan with designated allocations—in turn constrains the Bureau's discretion to lease public reserved lands pursuant to 12 M.R.S. § 1852. Pursuant to 12 M.R.S. § 1847(3),"[t]he director may take actions on the public reserved lands consistent with the management plans for those lands and upon any terms and conditions and for

consideration the director consider reasonable."[7] As such, the public has a voice in the Bureau's decision to issue a lease pursuant to 12 M.R.S. § 1852.

Neither the Designated Lands Act, 12 M.R.S. §§ 598 to 598-B, nor the Bureau's leasing statute for public reserved lands, 12 M.R.S. § 1852, require additional public process before leasing public reserved lands for the uses listed in 12 M.R.S. § 1852, which uses include electric power transmission.[8] Unlike other sections of the Bureau's statutes, both the Designated Lands Act and 12 M.R.S. § 1852 are silent as to public process. *Cf.* 12 M.R.S. § 1805 (requiring an opportunity for public review and comment before designating additional ecological reserves on Bureau jurisdiction land); 12 M.R.S. § 1814-A(1) (requiring the Bureau to notify interested parties before conveying an access easement across a rail trail and defining interested parties); 12 M.R.S. § 1837(2) (requiring the Bureau to give public notice and hold a public hearing upon request before conveying nonreserved public lands); 12 M.R.S. § 1851(3), (4) (requiring the Bureau to make written findings, make those findings available before public inspection, and hold a public hearing upon request before conveying parcels of public reserved lands not exceeding 1/4 acre).

The MAPA also does not require the Bureau to afford any additional process before exercising its leasing authority pursuant to 12 M.R.S. § 1852. The MAPA imposes notice requirements for adjudicatory proceedings and rulemakings. 5 M.R.S. §§ 8052(1), 8053, 9051-A. But the 2020 lease is neither a "license" nor a "rule"; it is an interest in real property. *See* 5 M.R.S. § 8002(5) ("'License' includes the whole or part of any permit, certificate, approval,

[7] A use of public reserved lands that is consistent with the management plan is unlikely to frustrate the essential purposes for which the Bureau holds that land. *See* 12 M.R.S. § 598(5) (defining "substantially altered" for purposes of Me. Const. article IX, section 23 and its implementing Designated Lands Act).

[8] Title 12 M.R.S. § 1852(4)(A) provides: "The bureau may lease the right, for a term not exceeding 25 years, to: [s]et and maintain or use poles, electric power transmission and telecommunication facilities, roads, bridges and landing strips".

registration, charter or similar form of permission required by law which represents an exercise of the state's regulatory or police powers."); 5 M.R.S. § 8002(9) (defining "rule"). Thus, the MAPA's notice provisions for adjudicatory proceedings, 5 M.R.S. § 9051-A, and for rulemaking, 5 M.R.S. §§ 8052(1) and 8053, do not apply to the Bureau's exercise of its section 1852 leasing authority.

To date, the Legislature has not required the Bureau to provide any additional public notice or opportunity before exercising its section 1852 leasing authority. For now, public input is required at the management planning stage only. 12 M.R.S. § 1847(2). But that may change. The 130th Legislature carried over L.D. 1075 (130th Legis., 2021), which would require the Bureau to adopt rules that provide the public with notice and opportunity to comment in relation to determining whether an activity would constitute a substantial alteration of public reserved lands. Unless and until the Legislature effects such change, it was not error for the Bureau to provide to the public administrative process only at the management planning stage. *See Munjoy Sporting & Athletic Club v. Dow*, 2000 ME 141, ¶ 10, 755 A.2d 531 ("Though the Constitution protects property interests, it does not create such interests, nor does the Constitution protect those interests that are nothing more than a unilateral and abstract expectation of a future benefit."); *New England Outdoor Ctr. v. Comm'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 748 A.2d 1009. Accordingly, the Court should dismiss this part of Count I.[9]

[9] To the extent this Court determines that the Bureau was required to afford certain process to Plaintiffs before issuing the 2020 lease, the Bureau requests that the Court, in so holding, clarify whether such holding applies to just the 2020 lease, to all leases issued pursuant to 12 M.R.S. § 1852(4), or to all leases issued pursuant to 12 M.R.S. § 1852.

IV. 2/3 Legislative Approval of the 2020 Lease is Not Required as a Matter of Law.

Finally, the Court has invited the parties to address whether 2/3 legislative approval of the 2020 lease is required as a matter of law. It is not.[10] First, article IX, section 23 of the Maine Constitution is silent on leases. It does not state that all leases of all designated lands, or all leases of a certain category of designated lands, or certain types of leases, or certain individual leases constitute a substantial alteration. It leaves that to statute. Second, if all electric power transmission leases issued pursuant to 12 M.R.S. § 1852(4) constitute a substantial alteration and require 2/3 legislative approval, then, contrary to 12 M.R.S. § 1852(4), the Bureau has no authority to lease public reserved lands for electric power transmission. *But see Bowler v. State*, 2014 ME 157, ¶ 12, 108 A.3d 1257 (applying a strong presumption against repeal by implication); *Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 10, 17 A.3d 667 ("Words in a statute 'must be given meaning and not treated as meaningless or superfluous.'"); *cf.* L.D. 471 (130th Legis., 2021) (declaring, if enacted, that all electric power transmission line leases issued pursuant to 12 M.R.S. § 1852(4) constitute a substantial alteration); L.D. 1295 (130th Legis., 2021) (same). Additionally, such a holding would be contrary to this Court's prior holding in this case that the Bureau is required to decide on a case-by-case whether a lease issued pursuant to 12 M.R.S. § 1852(4) substantially alters the uses of those public reserved lands. (Dec. 21 Order 2, 8-9, 15-

[10] The Bureau preserves all arguments made in its prior filings, including those dated January 21, 2021, and February 2, 2021, that 12 M.R.S § 1852(4) leases are never substantial alterations as that phrase is used in article IX, section 23 of the Maine Constitution and its implementing Designated Lands Act. 12 M.R.S. §§ 598 to 598-B.

16.) To extent Plaintiffs adopt this argument in briefing, this Court should dismiss this aspect of Count I.

* * *

For the reasons set forth herein, the Bureau moves this Court to dismiss Count I of Plaintiffs' FAC.

Dated: June 16, 2021

Respectfully submitted,

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STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
DOCKET NO. BCD-CV-20-29

RUSSELL BLACK, et al.,

Plaintiffs

v.

ANDY CUTKO as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY,

and

CENTRAL MAINE POWER COMPANY, NECEC TRANSMISSION LLC,

Defendants

MOTION BY DEFENDANTS CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC FOR JUDGMENT AND INCORPORATED MEMORANDUM OF LAW ON PLAINTIFFS' CLAIM FOR DECLARATORY JUDGMENT UNDER COUNT I OF THE FIRST AMENDED COMPLAINT

Defendants Central Maine Power Company and NECEC Transmission LLC (together "NECEC LLC") move the Court to enter judgment against Plaintiffs and for Defendants on Plaintiffs' claim for declaratory judgment under Count I of the First Amended Complaint. Plaintiffs' request for declaratory relief fails as a matter of law for multiple reasons and judgment should be entered for CMP, NECEC LLC and the Bureau of Parks and Lands ("BPL") with respect to this aspect of Plaintiffs' claim.

With respect to the 2014 Lease, to the extent Plaintiffs seek any relief with respect to that expression of final agency action at all,[1] any determination concerning the 2014 Lease would amount to nothing more than an impermissible advisory opinion for the simple reason that the

[1] As discussed *infra* pp.3-4, the prayer for relief in Plaintiffs' First Amended Complaint does not mention the 2014 Lease, let alone seek any specific relief concerning it.

2014 Lease no longer exists and thus does not define any legal rights in the land at issue. The parties to the 2014 Lease—a group which does not include any of the Plaintiffs—terminated that lease in June 2020. Plaintiffs themselves never enjoyed any rights under the 2014 Lease and, now, neither BPL nor NECEC LLC enjoys any rights under it either. Throughout these proceedings, Plaintiffs barely have attempted to conceal that their request for a declaration concerning the historical legal status of the 2014 Lease arises from their desire to attack CMP's claim to title, right, and interest in the leased land to bolster an on-going challenge to the Maine Department of Environmental Protection's ("DEP") decision to permit the NECEC Project. But Plaintiffs' challenge to the DEP's permitting decision should be decided in the proceedings governing that decision, not here, and the Court should not countenance any further Plaintiffs' inappropriate effort to commingle the two proceedings. In short, questions concerning the legality of the 2014 Lease, and whether BPL provided an appropriate public process or required legislative approval before issuing that lease, are moot.

With respect to the 2020 Lease, Plaintiffs' claim for declaratory judgment must fail because the Maine Administrative Procedures Act ("APA") provides Plaintiffs with the exclusive means for challenging BPL's decision to grant the lease. Although NECEC LLC maintains that Plaintiffs do not enjoy standing to bring a challenge under the APA, the Court has permitted Plaintiffs to advance such a challenge.[2] Plaintiffs now seek the same relief through their declaratory judgment claim that they seek through their APA challenge: a decision by this Court vacating the 2020 Lease. The Law Court repeatedly has held that review of an administrative agency decision must be governed exclusively by the APA, absent a claim to additional relief the APA does not provide. Even if the Court rules on the 2020 Lease through

[2] *See infra* n.3.

Plaintiffs' declaratory judgment action, there is no basis to hold as a matter of law that BPL owed Plaintiffs any administrative process prior to issuing the 2020 Lease or that the BPL was required to seek legislative approval of the lease.

PROCEDURAL BACKGROUND

Plaintiffs filed the first complaint in this action in June 2020, challenging only the 2014 Lease. Plaintiffs' initial complaint advanced three counts: one seeking a declaration that the 2014 Lease was invalid because BPL issued it before the Public Utilities Commission ("PUC") issued a Certificate of Public Convenience and Necessity ("CPCN") in connection with the NECEC Project; a second count seeking a declaration that the 2014 Lease is invalid because the BPL issued it before obtaining approval of two-thirds of the Legislature pursuant to Article IX, section 23 of the Maine Constitution; and a third count seeking injunctive relief barring BPL and CMP from exercising any rights the 2014 Lease provided. Although styled as a traditional civil action under Maine's Declaratory Judgment Act, Plaintiffs' complaint sought the same relief afforded by the APA: reversal of BPL's decision to grant the lease. *See* 5 M.R.S. § 11007(4)(C) (grounds for reversing or modifying final agency action). Nevertheless, having challenged the 2014 Lease more than five years after BPL issued it, it is apparent Plaintiffs did not style their complaint as a petition for review under Rule 80C and the APA so as to avoid application of the APA's deadline for filing such a petition. *See id*. at § 11002(3) (setting forth deadlines for challenging final agency action).

On June 23, 2020, BPL and CMP executed a new lease, terminating the 2014 Lease. Plaintiffs thereafter filed their First Amended Complaint. The First Amended Complaint dropped the previous complaint's count seeking a declaration concerning the legality of the 2014 Lease with respect to the PUC's issuance of a CPCN for the NECEC Project, and, otherwise,

seeks no relief specifically concerning the 2014 Lease in its prayer for relief. Instead, Count I of the First Amended Complaint seeks a declaration concerning the validity of the 2020 Lease. Count II seeks an injunction barring NECEC LLC from exercising any rights under the 2020 Lease because of its purported invalidity. In a significant change from Plaintiffs' first complaint, the First Amended Complaint added a "count" under the APA and Rule 80C, Count III, challenging the validity of the 2020 Lease under the APA. Notably, Plaintiffs styled this "count" as one brought in the alternative, expressly stating Plaintiffs "do not believe that this action falls under Rule 80C" for a variety of reasons Plaintiffs identified. First Amended Complaint ("FAC") at ¶ 80.

BPL moved to dismiss Counts I and II of Plaintiffs' First Amended Complaint, arguing the Court should treat Plaintiffs' action as only an administrative appeal under the APA. NECEC LLC moved to dismiss those counts on the same grounds, and also moved to dismiss Plaintiffs' administrative appeal for lack of standing. The Court denied NECEC LLC's and BPL's motion to dismiss Count I and denied NECEC LLC's motion to dismiss Plaintiffs' alternative APA appeal under Count III for lack of standing,[3] thus permitting Plaintiffs to press their challenge to the 2020 Lease as both a civil claim under the Declaratory Judgment Act and an administrative appeal under the APA.[4] FAC at ¶¶ 76, 79, 80. The Court identified Plaintiffs'

[3] Although the Court denied the motion, it held open the question of whether those Plaintiffs who premise their claim to standing solely on their status as legislators may enjoy standing under the APA. Order on CMP's Motion to Dismiss for Lack of Standing at 7. NECEC LLC intends to revisit that issue in the forthcoming APA/Rule 80C briefing.

[4] Throughout this litigation, Plaintiffs and Defendants have agreed the case should not proceed *both* as a civil action under the Declaratory Judgment Act *and* as an administrative appeal under the APA. Plaintiffs have urged the Court to treat this case as only the former, while Defendants have urged the Court to treat this case as only the latter. NECEC LLC respectfully suggests treating the case as both a civil claim and an administrative appeal, despite the parties' objection

claim for injunctive relief under Count II as purely "remedial" and deferred ruling on it until after the Court decided Plaintiffs' APA claim. *Id*. at 11 n.9.

The Court subsequently requested briefing on the applicability of Article IX, section 23 to the 2020 Lease, ultimately holding that "if BPL determines that a proposed use of public lands results in 'substantial alteration,' the Legislative branch must be given the final say on the issue" by holding a vote, subject to two-thirds threshold, to authorize the BPL's proposed grant of a lease of such lands. Thereafter, the Court issued its most recent substantive order, adjudicating whether various documents would be included or excluded from the administrative record. In that order, the Court also addressed the scope of Plaintiffs' request for declaratory relief, identifying the following legal issues as within the scope of Plaintiffs' claim:

- whether the 2014 Lease is void because BPL issued it before CMP received a CPCN;
- whether the 2014 Lease was issued in violation of Article IX, section 23 before any administrative process was available to Plaintiffs to challenge the issuance of the lease;
- whether BPL failed to provide Plaintiffs with a required, meaningful administrative process before issuing the 2014 Lease or the 2020 Lease; and
- whether BPL erred in issuing the 2014 Lease and the 2020 Lease before obtaining legislative approval because such approval was required for both leases as a matter of law.

NECEC LLC addresses each of these issues below.

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to that approach, has created confusion concerning the issues to be decided by the Court and the legal rules governing such decision. For this reason alone, the Court should dismiss Plaintiffs' request for declaratory relief.

ARGUMENT

The Court should grant judgment to Defendants and against Plaintiffs on its declaratory judgment claim for the following reasons:

First, the Court should not consider any legal arguments concerning the validity of the 2014 Lease because that agreement no longer exists, binds any parties, or gives rise to any legal rights or obligations. Any questions concerning the 2014 Lease are moot and cannot be adjudicated under the Declaratory Judgment Act, and any ruling concerning the 2014 Lease would constitute an advisory ruling in violation of the Maine Constitution.

Second, Plaintiffs—none of whom hold any property interest in the leased land or in any land abutting it—do not enjoy any regulatory, statutory, or constitutional right to participate in any process BPL uses to determine whether to grant leases to particular lots of public reserved land under 12 M.R.S. § 1852. Accordingly, BPL's decision to issue the 2014 Lease and 2020 Lease cannot be unlawful by virtue of Plaintiffs' failure to receive any pre-issuance process.

Third, the Court already has determined that a lease of public reserved lands requires two-thirds legislative approval *only if* BPL first determines the lease gives rise to a substantial alteration in the use of the land at issue. There is no basis to conclude that all leases of public reserved lands require two-thirds legislative approval as a matter of law, even if those leases substantially alter the use of the land, and Plaintiffs do not appear to have advanced such an argument in this case.

I. Any Questions Concerning The 2014 Lease Are Moot And Non-Justiciable.

Plaintiffs' First Amended Complaint does not set forth any clear challenge to the 2014 Lease. The counts set forth in that pleading allege various complaints concerning the 2020 Lease, but do not state any basis for why the Court should take any action concerning the 2014

Lease. *See* FAC at ¶¶ 59-82. And the prayer for relief in the First Amended Complaint requests no relief concerning the 2014 Lease whatsoever. *See id*. at pp. 20-21. The foregoing alone serves as a basis for the Court granting judgment to NECEC LLC and BPL concerning the 2014 Lease.

In the event the Court deems Plaintiffs to have properly raised issues concerning the 2014 Lease, the Court nevertheless lacks authority to address those issues because the Maine Constitution prohibits Maine courts from issuing advisory opinions except where the Supreme Judicial Court may consider a solemn occasion. *See Dodge v. Town of Norridgewock*, 577 A.2d 346, 347 (Me. 1990) (advisory opinions prohibited by Maine Constitution). Indeed, the prohibition on advisory opinions is so absolute that it bars even the Legislature from enacting statutes authorizing the judiciary to grant such opinions. *See Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 78 (1980) (stating principle). And although "anticipatory in character," "[d]eclaratory judgment actions are not exceptions to the Court's lack of jurisdiction to render advisory opinions." *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Assoc.*, 320 A.2d 247, 251 n.7 (Me. 1974). In short, "the judiciary has no power to issue advisory rulings," *Bar Harbor Banking & Trust Co*., 411 A.2d at 78, and, accordingly, the Court may not issue a decision that "would serve no useful purpose," *Dodge*, 577 A.2d at 347. *See also In re Involuntary Treatment of S.*, 2019 ME 161, ¶ 5, 221 A.3d 135 (Maine courts will not hear cases that are moot "that is, when they have lost their controversial vitality").

Any ruling on the 2014 Lease would fly in the face of the foregoing authority. No party disputes that the 2014 Lease ceased to exist in June 2020 when BPL and CMP terminated it in the course of adopting the 2020 Lease. Addressing the legal status of the 2014 Lease thus "would serve no useful purpose" because such a ruling would not affect any legal rights or

obligations of CMP, NECEC Transmission LLC, BPL, Plaintiffs, or any other person, with respect to the land at issue. Put another way: a finding that BPL issued the 2014 Lease unlawfully would confer no new rights or benefits on Plaintiffs, just as a finding that BPL issued the 2014 Lease lawfully would confer no new rights or benefits on CMP, NECEC Transmission LLC, or BPL.

Plaintiffs have not concealed their intention to obtain a declaration concerning the 2014 Lease as part of their effort to attack CMP's claim to title, right, and interest in the leased land in connection with DEP's permitting of the NECEC Project. Obtaining a ruling on the 2014 Lease in these proceedings would fail to advance Plaintiffs' interests even in this collateral issue, as, in the on-going proceedings over the DEP permit, this Court already has ruled that the "fact that an applicant's TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP." Order on NRCM's Motion to Stay DEP Commissioner's Order at 7-8, *Nextera Energy Resources, LLC v. Maine Dep't of Envtl. Prot.*, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Ct. Jan. 11, 2021) (citing *Southridge Corp. v. Bd. Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995)).

Nothing remains at stake with respect to the 2014 Lease and the Court should not issue any decision on the merits concerning it, but instead dismiss any claim concerning it as moot.

II. Plaintiffs Did Not Enjoy A Right To Participate In Any Administrative Process Before BPL Granted Either The 2014 Or The 2020 Lease.

The issue whether Plaintiffs should have received an opportunity to participate in an administrative process conducted by BPL prior to the grant of the 2014 Lease or the 2020 Lease stems from specific allegations and theories set forth in Plaintiffs' First Amended Complaint. There, in legal argument unusual for a case-initiating pleading, Plaintiffs stated the Court should

treat its challenge to the 2020 Lease as a civil claim under the Declaratory Judgment Act, rather than as an appeal under the APA, because, *inter alia*, "persons affected by [a lease for public reserved lands] lack any meaningful opportunity" to participate in the administrative decision concerning the issuance of such a lease and thus the "lease does not resolve the rights of all parties as required by the" APA. First Amended Complaint at ¶ 80. Plaintiffs thus argued that the lack of an administrative process requires the Court to treat Plaintiffs' challenge as a civil claim rather than an administrative appeal. Plaintiffs did not argue and never have argued that the lack of an administrative process before the BPL should serve as a substantive basis for invalidating the 2014 Lease or the 2020 Lease by a declaration issued under the Declaratory Judgment Act. This omission provides sufficient grounds for the Court to enter judgment against Plaintiffs on this issue, and the underlying proposition lacks merit in any event.

There undisputedly exists no regulation or rule requiring BPL to conduct any administrative process before issuing leases for public reserved lands, let alone an administrative process permitting individuals to appear before the agency where those individuals, like Plaintiffs, claim no property interest in the leased land, any abutting land, or even in any land in the town where the land lies. There similarly exists no statute requiring BPL to conduct such a process or to enact rules governing such a process. BPL thus violated no Maine law when it issued the 2014 Lease and the 2020 Lease without inviting Plaintiffs or others similarly situated to them—a class of persons which necessarily would include each of Maine's 1.3 million residents—to be heard.[5] Although the Court's consideration of this issue can end here, two additional points merit consideration:

[5] Plaintiffs have not argued that either the United States Constitution or the Maine Constitution granted them a right to participate in an administrative process before the BPL, and any such

First, the Court's citation to *Avangrid Networks, Inc. v. Secretary of State*, 2020 ME 109, 237 A.3d 882, and *Gorham v. Androscoggin County*, 2011 ME 63, 21 A.3d 115, in its December 21, 2020, order appears to reflect the Court's openness to the argument that Plaintiffs' lack of opportunity to participate in an administrative process might permit them to pursue their challenge to the 2014 Lease and 2020 Lease through the Declaratory Judgment Act rather than through the APA. As set forth above, this concern falls away as it relates to the 2014 Lease because questions concerning that lease have been mooted by the lease's termination. As for the 2020 Lease, the Court ruled in its December order that Plaintiffs may challenge the validity of the lease through the APA and Rule 80C. As it is now clear that Plaintiffs' declaratory judgment action concerning the 2020 Lease seeks the same relief the APA authorizes—reversal of BPL's decision to grant the Lease—Plaintiffs' claim for declaratory relief must fall away as well. Where the APA provides the relief sought when one challenges agency action, it serves as the *exclusive* means of challenging that action and displaces Plaintiffs' declaratory judgment claim. *Kane v. Comm'r of Dep't of Health & Hum. Servs.*, 2008 ME 185, ¶ 30, 960 A.2d 1196.[6]

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argument necessarily would fail because Plaintiffs do not enjoy any constitutionally cognizable property interest in the leased land. *Carroll F. Look Constr. Co. v. Town of Beals*, 2002 ME 128, ¶ 11, 802 A.2d 994; *Chongris v. Bd. of Appeals of Town of Andover*, 811 F.2d 36, 43 (1st Cir. 1987) ("It is hornbook law that, to fashion a procedural due process claim under the fourteenth amendment, the plaintiffs must have possessed some constitutionally cognizable interest—in the present circumstances, a protectible property interest.").

[6] The decisions in *Avangrid* and *Gorham* underscore this point. In *Avangrid*, the Court heard the plaintiff's challenge to the proposed citizens initiative via a declaratory judgment action precisely because, as the Law Court observed, the Secretary of State had no authority to bar the initiative from the ballot because of its substantive content and thus did not make a decision that could have been challenged through the APA. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶¶ 12 n.4, 36 n.11, 237 A.3d 882. Here, BPL made such a decision by granting the 2020 lease and the Court has permitted Plaintiffs to challenge it under the APA and Rule 80C. In *Gorham*, the Law Court reversed the Superior Court's decision to dismiss a Section 1983 claim brought independent of a Rule 80C petition for review because, at the pleading stage, the

Second, with respect to the 2020 Lease, while there exists no rule-based, statutory, or constitutional requirement that BPL include persons such as Plaintiffs in its decision to grant a lease of public reserved lands, BPL does provide an administrative process with respect to its adoption of land management plans, which plans bound and shape BPL's authority to issue leases of public reserved land. *See* 12 M.R.S. §§ 1847(2) and 1847(3) (requiring land management plans and authorizing BPL to "take actions on the public reserved lands consistent with the management plans for those lands"). Indeed, before BPL granted the 2020 Lease, it held a multi-year, public administrative proceeding over the adoption of the land management plan for the Upper Kennebec Region, which includes the leased land. *See* A.R. II0016-18 (describing administrative process). That process included numerous public hearings, the opportunity for public comment, and the formation and participation of a citizens' advisory committee. *See id*. The records of those proceedings show that multiple Plaintiffs participated in various aspects of BPL's process. *Id.* at II0129 (recognizing Plaintiff Chad Grignon as a member of the Upper Kennebec Region Advisory Committee); Maine Bureau of Parks and Lands – Upper Kennebec Region Plan, Summary of Scoping Comments,[7] at 3 (recognizing comments of Plaintiff Todd Towle). BPL's diligent efforts and public engagement gave rise to its Upper Kennebec Region Management Plan, which, notably, expressly contemplates and authorizes use of the leased land for the NECEC Project. A.R. II0093.

Law Court could not determine whether the administrative appeal would provide a remedy equal to that which plaintiff sought via his Section 1983 claim. *Gorham v. Androscoggin Cty.*, 2011 ME 63, ¶ 25, 21 A.3d 115. Here, Plaintiffs seek the same remedy under both their administrative appeal and their declaratory judgment claim: invalidation of the 2020 Lease, a remedy the Court clearly may grant under the APA. Thus, under both *Avangrid* and *Gorham*, there remains no basis for Plaintiffs' declaratory judgment claim.

[7] Available at https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/docs/Upper%20Kennebec_ScopingCommentSummary.pdf, last visited June 14, 2021.

Accordingly, contrary to Plaintiffs' claims, there *was* an administrative process directly relevant to BPL's authority to lease the land at issue, Plaintiffs had every opportunity to participate in that process, and at least one of them did.

III. Leases Of Public Reserved Lands Do Not Require Legislative Approval As A Matter Of Law.

NECEC LLC does not understand Plaintiffs to have argued that all leases of public reserved lands require legislative approval as a matter of law—*i.e.*, even where such leases do not substantially alter the use of the land at issue. Nevertheless, to the extent the Court deems this issue to have been raised, the Court already addressed and decided it in its order of March 17, 2021, concerning the application of Article IX, section 23 to BPL's authority to lease public reserved lands. In that decision, the Court held BPL must "make a determination whether the leases result in a substantial alteration of the public land" and "*[i]f they do*, the leases must be approved by the Maine Legislature." Order on the Application of Art. IX, § 23 of the Maine Constitution to the Bureau of Parks and Lands' Authority to Lease Public Lots ("Order on Constitutional Question") at 2 (emphasis added). The Court similarly held that "*if* BPL determines that a proposed use of public lands results in 'substantial alteration,' the Legislative branch must be given final say on the issue." *Id*. at 16 (emphasis added).[8] These holdings followed Plaintiffs' own briefing, wherein they argued "a utility lease of public reserved lands that would reduce or substantially alter the lands is subject to 2/3 legislative approval" and urged the Court to hold a de novo hearing on whether the 2020 Lease gives rise to such a substantial

[8] As NECEC LLC will explain in the forthcoming Rule 80C briefing, Article IX, section 23's "substantial alteration" standard applies to the "uses" of public reserved lands, not to physical changes in the lands themselves. Nevertheless, for purposes of the instant issue, the salient point is that the Court already has ruled that a finding of substantial alteration is a necessary predicate to BPL seeking legislative approval of a lease.

alteration. Plaintiff's Memorandum of Law in Support of Applicability of Article IX, Section 23 to 12 M.R.S. § 1852(4) at 15, 17. Plaintiffs' proposed hearing would have been unnecessary were BPL required to submit all leases for legislative approval.

The Court's ruling thus makes clear that, where the BPL determines there to be no substantial alteration, no vote of the Legislature is required. Although NECEC LLC continues to argue BPL was authorized to issue the 2020 Lease without performing any case-by-case substantial alteration analysis, the text of Article IX, section 23 and the statutory scheme governing BPL's authority to lease public reserved lands undisputedly do not contain any language requiring all leases, regardless of their impact on the use of the land, to receive legislative approval. As BPL never has sought legislative approval for any lease of public reserved lands, such a holding would require the invalidation of every lease BPL has issued since the adoption of the amendment. In its March ruling, the Court expressly rejected the argument that its interpretation of Article IX, section 23 would give rise to such a wholesale invalidation of BPL's prior leases:

> Finally, contrary to what BPL intimated in its Rebuttal Brief, the effect of [the Court's ruling on Article IX, section 23] is not that the constitutional amendment says *every* action (including any section 1852(4) lease) is a substantial alteration that must be taken to the Legislature. Instead, BPL must exercise its delegated authority to make a determination on a case-by-case basis.

Order on Constitutional Question at 16 (bracketed phrase added; emphasis in original).

To the extent Plaintiffs ever contended that all leases must require legislative approval, the Court's March ruling clearly holds otherwise.

CONCLUSION

For the reasons set forth above, the Court should grant judgment to Defendants and against Plaintiffs on Count I of Plaintiffs' First Amended Complaint.

MOTION BY DEFENDANTS CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC FOR JUDGMENT AND INCORPORATED MEMORANDUM OF LAW ON PLAINTIFFS' CLAIM FOR DECLARATORY JUDGMENT UNDER COUNT I OF THE FIRST AMENDED COMPLAINT

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MOTION BY DEFENDANTS CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC FOR JUDGMENT AND INCORPORATED MEMORANDUM OF LAW ON PLAINTIFFS' CLAIM FOR DECLARATORY JUDGMENT UNDER COUNT I OF THE FIRST AMENDED COMPLAINT

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: PORTLAND
Docket No.: BCD-CV-20-29

RUSSELL BLACK, *et al.*,

Plaintiffs,

v.

ANDY CUTKO, *et al.*

Defendants.

PLAINTIFFS' MOTION FOR JUDGMENT

Pursuant to the Court's Order dated April 21, 2021, and the Court's Scheduling Order dated June 10, 2021, Plaintiffs submit this motion for judgment on their Declaratory Judgment Act claim. As set forth below, the 2014 Lease is void both for lack of a Certificate of Public Convenience and Necessity ("CPCN") from the Maine Public Utilities Commission ("PUC") at the time of execution and because the Bureau failed to provide any meaningful administrative process prior to execution of that lease. Both the 2014 Lease and the 2020 Lease, moreover, fail to comply with Article IX, Section 23 of the Maine Constitution because the Bureau failed to obtain the 2/3 legislative approval required by that provision for activities that reduce or substantially alter the public lands in question.[1]

FACTUAL BACKGROUND

A comprehensive overview of the factual background in this case is set forth in Plaintiffs' Rule 80C Merits Brief, which is being contemporaneously filed, and which is hereby

[1] Because execution of neither the 2014 Lease nor the 2020 Lease constituted "final agency action" as the Administrative Procedures Act defines that term, Plaintiffs believe that all their challenges to both the 2014 and 2020 Leases more appropriately lie as a declaratory judgment action. Although typically such an action would involve an evidentiary hearing, which Plaintiffs have requested, without waiving their request for such a hearing, Plaintiffs believe the current state of the record permits the court to make a determination on the reduction or substantial alteration question.

incorporated by reference. For the Court's convenience, Plaintiffs summarize here the facts that are most relevant to the three specific legal issues that are the subject of this motion.[2]

The public reserved lands at issue in this case, Johnson Mountain Township and West Forks Plantation, are located in Maine's Upper Kennebec Region. Bureau's Answer ⁋⁋ 30, 65; CMP's Answer ⁋⁋ 30, 65. Like all public reserved lands in Maine, the Bureau holds these lands in trust for the benefit of the public. 12 M.R.S. § 1846 ("The Legislature declares that it is the policy of the State to keep the public reserved lands as a public trust and that full and free public access to the public reserved lands to the extent permitted by law, together with the right to reasonable use of those lands, is the privilege of every citizen of the State."). Despite the State's obligations as trustee, it historically mismanaged the public reserved lands, leasing them at virtually no cost to private property owners, paper companies, and timber companies. Amended Complaint, Exhibits C and D; *Cushing v. State,* 434 A.2d 486, 501 (Me. 1981). After a newspaper reporter published articles calling attention to the State's historical mismanagement, efforts were made in the 1970s and 1980s to preserve the public reserved lands and ensure their availability for public use and enjoyment. *Id.*

In 1993 the Legislature adopted a resolution proposing a constitutional amendment and sent it out to the people for ratification. The people overwhelmingly adopted Article IX, Section 23 of the Maine Constitution in 1993, which states: "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House." Maine State Legislature, Amendments to the Maine Constitution, 1820 – Present,

[2] The Court's Order dated April 21, 2021, refers to "The Declaratory Judgment Record" and thus Plaintiffs refer to both the pleadings and the record before the Court in this motion.

https://legislature.maine.gov/legis/lawlib/lldl/constitutionalamendments/index.html (last visited June 7, 2021). The same Legislature that adopted the constitutional resolution then enacted 12 M.R.S. §§ 598 to 598-B to implement Section 23 by designating various public lands for this constitutional protection, including "public reserve lots." *Id*. § 598-A(2).

In 2014, BPL and CMP entered into a lease for a portion of the public reserved lands on Johnson Mountain Township and West Forks Plantation for a 300 foot wide by approximately one mile long corridor for a transmission line. Bureau's Answer ⁋ 43; CMP's Answer ⁋ 43. As designated lands, these lots cannot be reduced or substantially altered absent approval of 2/3 of the Legislature. Me. Const. art. IX, § 23; 12 M.R.S. § 598-A; Order on the Application of Art. IX., § 23 of the Maine Constitution to the Bureau of Parks and Lands' Authority to Lease Public Reserved Lots dated March 17, 2021 (hereinafter, "Order on Application of Art. IX, § 23") at 2. Notwithstanding the constitutional amendment, or the enabling legislation, or the requirement of a CPCN for a lease of public reserved lands for a transmission line, BPL entered into the lease without any process for determining whether CMP's use of the lands for a high impact transmission line would reduce or substantially alter the public reserved lands, without providing any notice to the public, without seeking any legislative approval, and without first requiring CMP to obtain a CPCN from the PUC. Bureau's Answer ⁋ 3; *see generally* Administrative Record (hereinafter, "AR").

In September 2017, CMP applied for a CPCN at the PUC, and obtained the CPCN in May 2019. AR I0002. After obtaining the CPCN, BPL and CMP entered into a subsequent lease in 2020, which, "with input from Andy Cutko," changed the caption from "Transmission Line Lease" to "Amended and Restated Transmission Line Lease." AR V0117. The purpose of that change was to "show that this 2020 Lease does nothing to 'substantially alter' the leased premises now,

while still providing a new lease agreement that is being executed after the 2019 CPCN." AR V0117.

ARGUMENT

The Bureau's execution of the 2014 Lease suffers from at least three statutory and constitutional defects: (1) the Bureau executed the 2014 Lease prior to issuance of a CPCN in violation of 35-A M.R.S. § 3132(13); (2) the Bureau executed that lease without providing any notice to or opportunity for the public, the rightful owners and beneficiaries of the State's ownership in trust of these lands, to participate in the decision-making; and (3) the Bureau failed to seek or obtain the approval of 2/3 of the Legislature as Article IX, Section 23 of the Constitution requires for any reduction of or substantial alteration to the uses of these lands. The 2020 Lease likewise suffers from the same statutory and constitutional defects related to the Bureau's failure to provide a public process and its failure to obtain legislative approval.[3]

I. The 2014 Lease is Void for Lack of a CPCN.

There is no dispute that the Bureau entered into the 2014 Lease with CMP even though CMP had not obtained a CPCN from the PUC. Since 35-A M.R.S. § 3132(13) prohibits the Bureau from leasing any public lands prior to issuance of a CPCN, the Bureau's execution of the 2014 Lease to CMP was *ultra vires* and the 2014 Lease must be declared void.

Both the Bureau and CMP admit that they entered into the 2014 Lease on or about December 15, 2014. Bureau's Answer ⁋ 43; CMP's Answer ⁋ 43. The Bureau admits that the 2014 Lease was entered into before CMP obtained a CPCN from the PUC. Bureau's

[3] In accordance with the Court's prior orders, and for purposes of this motion, Plaintiffs focus their argument regarding a lack of public process on the 2014 Lease though it applies equally to the 2020 Lease and can be properly addressed as part of the Declaratory Judgment claim.

Answer ⁋ 3. Both the Bureau and CMP admit that the PUC issued a CPCN for the NECEC project on or about May 3, 2019. Bureau's Answer ⁋ 57; CMP's Answer ⁋ 57.

Section 3132(13) provides:

> Public Lands. The State, any agency or authority of the State or any political subdivision of the State may not sell, lease or otherwise convey any interest in public land ... to any person for the purpose of constructing a transmission line subject to this section, unless the person has received a certificate of public convenience and necessity from the [public utilities] commission pursuant to this section.

Under the plain language of section 3132(13), an agency of the State of Maine, including BPL, cannot lease an interest in land to any person for the purpose of constructing a transmission line unless the person has first received a CPCN form the PUC. Yet that is exactly what BPL did in this case.

As the Law Court has previously explained, "[w]e will not enforce a contract if it is illegal, contrary to public policy, or contravenes the positive legislation of the state." *State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶ 41, 995 A.2d 651, 665 (citing *Bureau of Me. State Police v. Pratt*, 568 A.2d 501, 505 (Me.1989)). Here, BPL's decision to lease public land to CMP for the purpose of constructing a transmission line without first requiring CMP to obtain a CPCN directly contravenes 35-A M.R.S. § 3132(13). Further, it is contrary to public policy in that it bypassed the PUC's review and approval of the project—a necessary prerequisite to any such lease. If BPL had complied with section 3132(13), and required CMP to obtain a CPCN prior to entering into the lease, then the public would have at least had some kind of notice of the proposed use of public lands for a high impact transmission line. 35-A M.R.S. § 3132(2) ("The petition for approval must be set down for public hearing."). *Cf.* Kevin Decker, *Allocating Power: Toward A New Federalism Balance for Electricity Transmission Siting*, 66 Me. L. Rev. 229, 247 (2013) ("In Maine, transmission developers must apply to the Maine Public Utilities Commission (MPUC) for a

certificate of public convenience and necessity (CPCN) to build a transmission line. A CPCN is also necessary before MPUC may grant a transmission and distribution utility eminent domain authority for transmission construction.") (Internal citations omitted).

The Law Court has previously held that the failure of an agency to comply with the mandates of Title 35-A was fatal to the agency's decision. *Quiland, Inc. v. Pub. Utilities Comm'n*, 2008 ME 135, ¶ 14, 956 A.2d 127, 133 (citing *Office of Pub. Advocate v. Pub. Utils. Comm'n*, 2005 ME 15, ¶ 18, 866 A.2d 851, 856 ("We will overturn a decision if the Commission fails to follow a statutory mandate or it if commits an unsustainable exercise of its discretion."). The statutory mandate at issue in *Quiland* required public utilities to file a schedule disclosing service rates with the Commission before the schedule could be applied to a customer. *Id.* The Commission's determination that the failure to file such a schedule was immaterial was incorrect as a matter of law where the statutory mandate was not discretionary and, thus, the Commission was required to act in accordance with it. *Id.*

The holding in *Quiland*—that an entity must comply with the statutory mandates of Title 35-A—is directly applicable here. Prior to entering into the 2014 Lease, BPL had an independent obligation to make sure that the statutory mandate of Title 35-A requiring a CPCN for the transmission line was satisfied, an obligation it had recognized in the Resolve it drafted for the Legislature to approve the easement to Bangor Hydro for the Donnell Pond Transmission Line a few years earlier. Resolves 2009, ch. 209 ("*any conveyance* of state land for electric transmission is governed by Title 35-A, section 3132, subsection 13") (emphasis added). There is nothing in the Administrative Record, however, to reflect that BPL ever even considered its obligations under section 3132(13) before entering into the 2014 Lease. Whether BPL was unaware of its statutory obligation to ensure that CMP had a CPCN prior to leasing the public lands, or BPL did not know

that CMP was going to use the public lands to build a high speed electric transmission line,[4] or BPL ignored its statutory obligation, or some combination thereof, BPL's decision to enter into the 2014 Lease violated section 3132(13) and exemplifies its failure to act as trustee for these public lands. The 2014 Lease must be declared void for lack of a CPCN.[5]

II. The 2014 Lease is Invalid Because the Bureau Did Not Follow Any Type of Administrative Process and Thus Violated Plaintiffs' Rights as Beneficiaries of the Public Lands.

Pursuant to BPL's obligations to the people of Maine as trustee of the public lands, BPL was required to provide an administrative process in 2014 before executing a lease that reduced and substantially altered the uses of the public lands being leased as a matter of law. BPL's failure to provide any such administrative process violated the requirements of the Maine Constitution as well as Plaintiffs' constitutional due process rights.

As the Justices opined in 1973, Article X of the Constitution requires that, since the people are sovereign and in that capacity have reserved the public lots for their use, only public uses of those lots are allowable. The Justices in that Opinion expanded permissible uses of the public lots from benefiting education and the ministry to a broader conception of what constituted a public use, but the concept of a benefit to the public, meaning the people of Maine, remained the key:

> As a part of the Constitution of this State, identified as Article X thereof, Item Seventh of the 'Articles' is the delineation of long range controls which the people of Maine have themselves imposed upon all of the State's branches of government, including the legislative, through which the sovereign power of the people will be

[4] In a hearing before the Agriculture, Conservation and Forestry Committee in January 2020, David Rodrigues, the Bureau planner who worked on the 2014 Lease testified that he thought the lease was for "windmills to be built in that region" and that he was unaware that it was for a corridor project like NECEC. Record Addendum (hereinafter, "Add.") Add. 0161. (The Record Addendum consists of the additional material included in the Administrative Record per the Court's Order Regarding the Record. A copy of the Record Addendum and Index thereto is being filed with the Plaintiffs' Rule 80C Merits Brief.) Yet, BPL notes from 2014 reflect a discussion of use of the public lands for both a high voltage line and smaller lines for wind projects. Add. 0356-357.

[5] Given that the 2014 Lease was void at the time of its execution, as a matter of law, it cannot be "Amended and Restated" as it purportedly was in 2020.

> exercised….The accumulated past expressions of this Court lead us, therefore, to the conclusion that the meaning and legal effect of a 'reservation', as contemplated by Article X of the Constitution of Maine, is that thereby the sovereign removes the lands 'reserved' from the public domain and must continue to hold and preserve them for the 'beneficial uses' intended.

Opinion of the Justices, 308 A.2d 253, 268-70 (Me. 1973). The people of Maine through the Legislature have made clear that "it is in the public interest and for the general benefit of the people of this State that title, possession and the responsibility for the management of the public reserved lands be vested and established in the bureau acting on behalf of the people of the State." 12 M.R.S. §1847; *see also id*. §§ 1802-1804. And the "control" referenced in the *Opinion of the Justices* the people have applied to the Bureau's management of these lands, in addition to the constitutional requirement that they be managed for "public use," is that they not be reduced or their uses substantially altered without first obtaining the affirmative vote of 2/3 of the Legislature.[6]

A. The lack of a rule defining how the Bureau will determine what constitutes a reduction or substantial alteration to the public reserved lands makes the Bureau's exercise of unbridled discretion unlawful.

The Bureau's claim that no process is required, including any public participation, denies the public and their elected representatives their constitutional rights to ensure that the public lands managed on their behalf are adequately protected. To fulfill its trust obligations, statute directs that the Bureau "shall adopt, amend, repeal and enforce reasonable rules necessary" "[f]or

[6] The NECEC corridor thus poses a threshold question. It is a "high-impact" line, 35-A M.R.S. § 3131(4-A), that is disfavored on any designated lands, *see* 2 M.R.S. § 9(4). It is a wholly private undertaking, with the power it transmits being delivered to Massachusetts and the profits going to a private company. The public, beneficial use on behalf of the people of Maine required by Article X of the Constitution seems totally absent from a project that delivers no electricity directly to Mainers, nor affords them any meaningful rate relief. Similarly, the Bureau's decision to carve out a corridor in the middle of the Cold Stream acquisition to remove "complications" from CMP's acquisition process seems inconsistent with its obligation to protect the public lands. *See, e.g.*, AR II0234-237. After all, if the State is acquiring critical habitat for native brook trout and deer wintering areas, how splitting in two the land being acquired, bifurcating the connectivity of a critical area, furthers that objective seems hard to grasp. *See id.*

the protection and preservation of … submerged lands, public reserved lands … and "[f]or observance of the conditions and restrictions, expressed in deeds of trust or otherwise, of" public reserved lands and submerged lands." 12 M.R.S. § 1803(6)(A), (C). Though the Bureau has adopted a comprehensive set of rules for submerged lands that place the burden of proof of each element on the applicant and that provide for an express process for public participation, it has not adopted any rules whatsoever for the protection and preservation of public reserved lands. That failure cannot simply be glossed over.[7]

The Bureau has adopted a comprehensive set of rules for submerged lands that places the burden of proof of each element on the lease applicant, and provides an express process for public participation. *See, e.g., Britton v. Dep't of Conservation*, 2009 ME 60, ¶ 2, 974 A.2d 303 (Submerged and Intertidal Lands Act "governs an administrative program that authorizes the State to lease its submerged lands for compensation *after determining* that the proposed lease will not unreasonably interfere with such things as navigation, fishing, existing marine uses, and the ingress and egress of riparian owners in the area.") (emphasis added); 01-670 CMR c. 53 § 7(C) ("The Bureau may grant a conveyance when it finds that *the applicant has demonstrated* that the proposed use of Submerged Lands meets the following standards. …") (emphasis added). In a similar situation, when the Department of Marine Resources operates a leasing program over submerged lands, it considers whether the impact of the private lease on public uses is "unreasonable," and holds an adjudicatory hearing that allows public participation and

[7] The governing legislative committee has since made it abundantly clear to Director Cutko that the Bureau needs to have rules and a process for determining whether a proposed use of public lands would result in a substantial alteration. *See, e.g.*, Add. 0141-143, 255-256. Director Cutko acknowledged the need, promised to provide such information to the committee, but instead went ahead and negotiated and executed the 2020 Lease. Add. 0142-143; AR V0117, AR I0012.

places the burden of proof on the lease applicant to prove the reasonableness of every impact. *See e.g.* 12 M.R.S. § 6072 (6)-(7-A); 13-188 CMR c. 2.

There is no rational basis to have a rule that governs leasing of submerged lands but not one for the public reserved lands, which stand on equal footing. If the Bureau had complied with the statutory mandate and adopted rules similar to the rules it adopted for submerged lands, as the lease applicant, CMP would have had the burden of proof with respect at a minimum to whether there was a reduction or substantial alteration and whether it had obtained a CPCN. There also would have been a mechanism for public participation. Because it failed to adopt appropriate rules, the Bureau executed a lease without any public knowledge, much less any public participation, and prior to CMP obtaining a CPCN.

As this Court has previously observed, the constitutional amendment at issue in this case:

> [T]ake[s] back from the executive branch authority previously delegated to it by the Legislature. And beginning with the 116th Legislature, and then through ratification by the people of Maine, what was taken back was a final say as to whether public reserved lands could be sold, and – pertinent here – whether the uses of public lands could be "substantially altered." By design, the people of Maine also made any sale or substantial alteration of these lands challenging to achieve, as a supermajority vote is required in both Houses of the Maine Legislature.

Order on the Application of Art. IX, § 23 at 7. In this situation, where the people took back power from the Bureau and required that the Legislature act as an additional safeguard for Maine's public lands, the Bureau's actions of completely excluding the public from the administrative process—and not even providing notice to the public—is a clear violation of the Bureau's constitutional and statutory mandate. Further, the legislator Plaintiffs in this case, who served in the Legislature in 2014 (*i.e.*, State Senator Russell Black, Former State Senator Thomas Saviello, and Former State Representative Denise Harlow) were deprived of their right under Article IX, Section 23 to vote on the Bureau's lease of these public lands to CMP.

By entering into the leases with CMP, moreover, the Bureau has removed 32 acres of public reserved lands from the timber harvesting, wildlife management, and recreational uses contemplated by the Upper Kennebec Region Management Plan ("Management Plan') and the statutes. Such a deprivation is subject to the constraints imposed by procedural due process requirements. As the United States Supreme Court has explained, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). In *Mathews*, to determine whether the administrative procedures provided were constitutionally sufficient, the Court analyzed the governmental and private interests that were affected. *Id.* Specifically, the Court considered the private interests that would be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value of any additional procedural safeguards; and the government's interest in any additional fiscal and administrative burdens that would result from additional procedural safeguards. *Id.* at 334-35.

Here, where there are no procedural safeguards in place, there is no question that even the most basic of procedural safeguards such as public notice and comment, would reduce the risk that the Bureau would lease or otherwise convey public lands without first going through the statutorily and constitutionally required process of making a substantial alteration determination, that the Bureau would actually consider evidence on the issue as presented and brought to its attention by the public, and ensure that in cases where it is determined that the proposed use would reduce or substantially alter public lands, the Bureau seek 2/3 legislative approval. In light of the fact that Director Cutko has testified before the governing legislative committee that the Bureau needs to develop internal criteria for making substantial alteration determinations and to be more transparent about such determinations, Add. 0142-143, the Bureau has essentially

acknowledged the need for some kind of procedural safeguard. Absent such a safeguard, the Bureau has unbridled discretion to dispose of the public lands, creating a significant risk of an erroneous deprivation of the public's interests and bypassing the checks the constitutional amendment sought to establish.

B. The Bureau failed to exercise the independent judgment required of a trustee.

As referenced above, the public lots derive from the Constitution and the State manages them as trustee. "It is in its sovereign capacity that the State of Maine holds title, *as trustee*, to all public lots situated in unorganized townships and plantations." *Cushing v. Cohen*, 420 A.2d 919, 923 (1980). The Director of the Bureau, accordingly, has an independent obligation to protect those lands that transcends the normal relationship between a Governor and an agency. As five former Commissioners of the Department of Conservation put it: "As trust lands, their management, *their use and disposition*, and the revenues they produce must adhere to their long-term trust requirements. These are not matters subject to the momentary policy preferences of appointed administrators, such as we once were, or even of elected Governors. The State is legally bound to adhere to its fiduciary obligations." Barringer, Richard E.; Anderson, Richard; Meadows, C. Edwin Jr.; Lovaglio, Ronald; and McGowan, Patrick, "Recommendations Concerning Administration of the Public Reserved Lands Management Fund and Timber Harvest Practices on Public Lands" (2015), Irland Group Collection 1, *available at* https://digitalmaine.com/irland_group/1 (referencing advice provided to the Commission by Assistant Attorney General Gerald Reid) (emphasis added).

Yet both leases were initiated by officials in first Governor LePage's office and then Governor Mills's office. AR III0004-6; AR IV0138. The Governor, to be sure, as Chief Executive of the State, has control over the agencies administering the policies of the State, including the

Department of Agriculture, Conservation & Forestry. He or she has every right to facilitate development, including electric transmission lines that in her view will result in a benefit to the State. But the independent public trust obligations of the Bureau simply cannot be squared with allowing whatever policy objectives the Governor may have to decide the disposition of public lands, to allow that the "process remains in the Governor's office", Add. 0266, to "get[] the best deal", AR IV0140, or to squeeze Hydro-Quebec, AR V0158.

Those obligations are separate from and independent of the obligations an agency head owes the Chief Executive. The Bureau and its Director not only have a governmental—i.e. executive—function, but also a trustee function that requires the exercise of independent judgment, not the outsourcing of decisions that must be made in the public interest to the Governor's Office. As the Law Court held in *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 202-03 (Me. 1978):

> The Authority, in the action being reviewed by the Superior Court, was performing a trustee function as well as a governmental function, and it must be held accountable to that more stringent standard.
>
> Moreover, the trust created by Governor Baxter was not a "discretionary trust," in the sense that the State of Maine, or any of the three State department heads who comprise its agent, are to do what they deem best in carrying out the donor's general purposes. Rather, the members of the Authority acting for the State of Maine must administer the trust like any private trustees of a charitable trust, exercising their best judgment, informed by the Attorney General's advice on any legal question and, where necessary, by instructions from a court of equity. *See* 14 M.R.S.A. § 6051(10) (1964).

Accord, Barringer *et al.*, *supra* page 12, at 1 ("As trust lands, their management, *their use and disposition*, and the revenues they produce must adhere to their long-term trust requirements.").[8]

[8] Indeed, our public lands have been recognized by the Courts as a charitable trust. *See, e.g. Fitzgerald*, 385 A.2d at 194, and the Attorney General is given explicit authority over all charitable trusts. 5 M.R.S. § 194. Similarly, the Attorney General is designated as the public trustee for attempted changes to privately-owned lands that are subject to conservation easements. 33 M.R.S. § 477-A(2)(B). On such private land, the Attorney General is obligated to make sure that conservation easements are not terminated or amended in "a manner as to materially detract from conservation values intended for protection," *id.*, which is strikingly similar to the "reduced or substantially altered" standard for fee-owned public lands. It would make little

The same principles apply here and, in light of the Director's and Bureau's failures to fulfill their fiduciary trust responsibilities, require voiding both leases. As the Law Court has explained, "obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforceable, and will be canceled by a court of equity." *Tuscan v. Smith*, 130 Me. 36, 153 A. 289, 294 (1931). In that case, the Law Court held that a lease entered into by the Town of Skowhegan and an individual for a portion of a municipal building violated public policy where one of the selectmen was related to and the creditor of the lessee. *Id.* at 293. "Gauged by the common and accepted standards defining the obligations of public officials, the lease given by the town of Skowhegan . . . was unconscionable and unlawful. To hold otherwise would be to repudiate the doctrine that he who holds public office is in a position of public trust." *Id.* at 294. Accordingly, the Court held that the sitting justice's declaration that the lease was void was proper. *Id.* at 294. *See also Fitzgerald*, 385 A.2d at 202-03 (explaining that the agency in that case "was performing a trustee function as well as governmental function, and it must be held accountable to that more stringent standard").

Given its public trust obligations and the constitutional and statutory requirements identified above, and the fact the Bureau executed the 2014 Lease in violation of those obligations and requirements, the 2014 Lease must be declared void as a matter of law.[9]

sense for state-owned designated public lots to have a lower level of public trust protection than privately-owned fee lands.

[9] The same is true for the 2020 Lease. *See supra* note 3.

III. Both the 2014 and 2020 leases are invalid because legislative approval of both leases was constitutionally required as a matter of law.

Both the 2014 and 2020 Leases are invalid because legislative approval of both leases was constitutionally required as a matter of law due to the reduction and substantial alteration that will result from CMP's transmission line corridor.[10] As this Court has previously ruled:

> This constitutional amendment limited the scope of BPL's authority over public reserved lands by placing a condition on it: that public reserved lands cannot "be reduced or [their] uses substantially altered except on the vote of 2/3 of all the members elected to each House." Me. Const. art. IX, § 23. Thus, BPL is obligated to determine whether a particular action (including a lease for electric power transmission pursuant to section 1852(4)) reduces or substantially alters the uses of public reserved lands before it takes that particular action.

Order on the Application of Art. IX, § 23 at 15-16. Despite this limitation of BPL's authority and affirmative obligation to make a substantial alteration determination, BPL has argued throughout this litigation that, although it did not have to make a substantial alteration determination by virtue of the discredited "categorical exemption" of section 1852(4), it nevertheless made one and determined that there was not a substantial alteration. BPL maintains that it made this substantial alteration determination even though there are no written findings of fact or conclusions or any other evidence showing that such a determination was ever made.

As set forth in detail in Plaintiffs' Rule 80C merits brief, CMP's transmission line corridor both reduces and substantially alters the public lands at issue in this case as a matter of

[10] To the extent the Court believes, based upon the existing pleadings and/or administrative record, that there is not enough evidence to determine whether the transmission line corridor will result in a reduction or substantial alteration of the public lands, Plaintiffs are entitled to have the Court create a factual record. *Jones v. Sec'y of State*, 2020 ME 113, ¶¶ 27, 29, 238 A.3d 982, 986. Further, a court cannot defer to an agency's findings or conclusions on constitutional limitations because agencies have no expertise in constitutional interpretation. *LeBlanc v. United Engineers & Constructors Inc.*, 584 A.2d 675, 677 (Me. 1991); *Jones*, 2020 ME 113, ¶¶ 11-12, 238 A.3d 982. Instead, the Court conducts "an independent review of the jurisdictional requirements imposed by [a] Constitution." *LeBlanc*, 584 A.2d at 677; *Jones*, 2020 ME 113, ¶¶ 11-12, 238 A.3d 982.

law. Plaintiffs' Rule 80C Merits Brief (hereinafter, "Plaintiffs' Merits Brief") at 27-36. Rather than recite that lengthy analysis here, Plaintiffs incorporate it by reference and highlight the most significant facts in support of the conclusion that the transmission line results in a reduction and substantial alteration as a matter of law.

The clearest example is the reduction of public lands that will result from the lease. It is undisputed that the lease is for 32.39 acres and that CMP has the right to use the entire area of leased land. AR I0001; AR II0093. The Management Plan provides for three uses—timber harvesting, wildlife habitat, and recreation, but does not provide for transmission lines as one of the uses. ARII0109, 0115. Accordingly, the lease reduces the acreage of the public lands available for their designated uses. As defined by the Legislature, "Reduced" means "a reduction in the acreage of an individual parcel or lot of designated land under section 598-A." 12 M.R.S. § 598(4). By virtue of this clear and indisputable reduction, the leases were subject to legislative approval under Article IX, Section 23 of the Maine Constitution and 12 M.R.S. §§ 598 to 598-B.

As discussed in more detail in Plaintiffs' Merits Brief, moreover, the evidence in the administrative record pertaining to timber, wildlife, and recreation shows that the significant clearcutting and forest fragmentation will substantially alter the uses of Johnson Mountain Township and West Forks Plantation. Plaintiffs' Merits Brief at 27-36. The fact that the Bureau has sought approval for all other significant transmission line corridors since the constitutional amendment passed in 1993 confirms that conclusion. In 2008, the Bureau obtained legislative approval for a conveyance to Bangor Hydro for its Northeast Reliability Interconnect project, which involved importation of power from Canada with an 85 mile 345 kV transmission line running through Maine, from New Brunswick to Orrington. The easement ran along an existing

road, for an area 170 feet wide by 14,150 feet long on one parcel, and 170 feet wide by 4,950 feet long on another parcel. AR VI0012-32. In 2008, the same Resolve that approved the Bangor Hydro project approved an easement for a TransCanada transmission line, which was for a 115 kV transmission line running along an existing corridor, over an area 125 feet wide by 4,915 feet long. AR VI0030-31; AR VI0098-104. Then in 2010, the Bureau got approval from the Legislature to convey land to Bangor Hydro for a transmission line through the Donnell Pond lot, over an area that was 130 feet wide and a little over 17,000 feet long, for a total of approximately 32 acres, and ran along an existing railroad and an existing transmission line corridor. AR VI0049-62; Resolves 2009, ch. 209; AR VI0191. Considering that the transmission line corridor at issue in this case is significantly larger than these other transmission lines (300 feet wide by one mile long covering 32.39 acres), is for a high impact transmission line, and requires the creation of a new corridor, it is undisputed that it will alter the public lands at least as much as these other transmission lines. Accordingly, the Bureau was required, as a matter of law, to seek legislative approval.

The Bureau's failure to comply with its constitutional and statutory obligations in executing the 2014 Lease was illegal, contrary to public policy, and contravened the positive legislation of the state. *State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶ 41, 995 A.2d 651, 665. *See also* 17A Am. Jur. 2d Contracts § 223 ("As a general rule, an illegal contract is unenforceable; and in this regard, a contract which violates or contravenes a constitution, statute, or regulation may be illegal, invalid, unenforceable, or void. If an act is prohibited by statute, an agreement in violation of the statute is void. Stated another way, a contract which cannot be performed without violating applicable law is illegal and void."). And the 2020 Lease was even more egregious—after the Legislature in unmistakable terms informed the Bureau that the CMP

corridor would substantially alter the public lands in Johnson Mountain and West Forks Plantation (L.D. 1893), the Bureau, one week after adjournment, without notice to the Committee or the public, attempted to (i) cure the defect of the 2014 Lease by executing a new lease after issuance of a CPCN and (ii) avoid the need to make a substantial alteration determination by changing the title of the Lease to "Amended and Restated Transmission Line Lease". AR I0001-12; AR V0117. The Bureau's failure to seek the constitutionally required legislative approval in 2014 and then again in 2020 renders the leases invalid as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to judgment as a matter of law that the 2014 Lease is void for lack of a CPCN, for BPL's failure to provide the necessary process for vindication of the public's rights in the public reserved lands, and for lack of legislative approval. The 2020 Lease is similarly invalid for lack of process and the failure to obtain the approval of 2/3 of the members of each House as required by Article IX, section 23 of the Maine Constitution. Because the facts establish that the CMP's transmission line corridor will reduce and substantially alter the public lands, any proposed use of public lands for that corridor must be approved by the Legislature under Article IX, Section 23.

Dated at Portland, Maine this 16th day of June, 2021.

/s/ James T. Kilbreth

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NOTICE

Any opposition to this motion must be filed not later than July 2, 2021 as set by the Court in the Scheduling Order dated June 10, 2021 and in accordance with Rule 7(b)(1) of the Maine Rules of Civil Procedure. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

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April 2, 2021

Hon. M. Michaela Murphy
c/o Danielle Young, Clerk
Business and Consumer Court
205 Newbury Street, Ground Floor
Portland, ME 04101

Re: *Black v. Cutko*, BCDWB-CV-20-29: Bureau's Letter regarding the Administrative Record

Dear Justice Murphy:

Pursuant to this Court's order dated October 22, 2020, the Bureau of Parks and Lands and the Director (collectively, the Bureau) filed the administrative record in the captioned matter on November 18, 2020. *See* 5 M.R.S. § 11005. Pending before this Court is Plaintiffs' motion regarding record and creation of a factual record dated January 7, 2021 (Plaintiffs' motion). The Bureau and Central Maine Power Company (CMP) respectively opposed Plaintiffs' motion on January 15, 2021. The Court reserved ruling on Plaintiffs' motion until it decided whether electric power transmission leases issued by the Bureau pursuant to 12 M.R.S. § 1852(4) are categorically not substantial alterations subject to Me. Const. art. IX, § 23.

In its order dated March 17, 2021 (March 17 Order), this Court held that a section 1852(4) utility lease may constitute a substantial alteration subject to Me. Const. art. IX, § 23. (March 17 Order 1, 16.) The Court further held that, before issuing a lease pursuant to 12 M.R.S. § 1852(4), the Bureau must determine whether such lease would substantially alter the uses of the public reserved lands for which the lease is proposed. (March 17 Order 2, 8-9, 15-16.) At a status conference on March 24, 2021, the Court directed the parties to file a letter identifying any materials the parties want added to the administrative record and the proposed remedy as to Plaintiffs' motion. Regarding remedy, the Bureau offers two alternatives, either of which is acceptable to the Bureau.[1]

Preferred Remedy. The Bureau respectfully requests that this Court proceed with this case as follows: Deny Plaintiffs' request to strike from the administrative record the Bureau's memorandum dated September 24, 2020 (the 2020 memo), address Plaintiffs' proposed supplemental material consistent with the Bureau's January 15 opposition to Plaintiffs' motion (Def. Bureau's Opp. to Pls' Mot. 11, 18-23), correct the administrative record by adding the five Bureau documents identified below (copies attached), and order the parties to proceed to Rule 80C briefing on all outstanding issues.[2]

[1] The State preserves all arguments made in previous filings.

[2] Should the Plaintiffs, through their contemporaneous letter to this Court, ask the Court to supplement the administrative record with materials in addition to those identified in Plaintiffs' motion, the Court should deny that request absent confirmation from the Bureau that the Bureau considered same. If, however, the Court determines that

Requested Correction of the Administrative Record Pursuant to 5 M.R.S. § 11006(2)

When compiling the administrative record for the 2020 lease, the Bureau inadvertently omitted the documents listed below. If the Court denies Plaintiffs' request to strike the Bureau's September 2020 memorandum and proceeds to Rule 80C briefing, the Bureau requests that the Court permit the Bureau to correct the administrative record, pursuant to 5 M.R.S. §11006(2), by adding the following five documents, a copy of which are attached for the Court's consideration:

1) The Bureau's 1985 Prescription Review and Multiple Use Coordination Report for the 1986-87 commercial timber harvest, referenced in the 2020 memo, of the West Forks Plantation public reserved lands, which prescription describes the features and uses of those public reserved lands (attached as Exhibit A);

2) The Bureau's March 2006 Prescription Review and Multiple Use Coordination Report with Harvest Map for the 2006-07 commercial timber harvest, referenced in the 2020 memo, of the West Forks Plantation and Johnson Mountain Township public reserved lands, which prescription describes the features and uses of those public reserved lands (attached as Exhibit B);

3) Bureau staff notes, dated August 14, 2014, related to CMP's request for a conveyance of a property interest over public reserved lands for an electric power transmission line (attached as Exhibit C);

4) An internal marked-up copy of the 2014 lease dated September 22, 2014 (attached as Exhibit D); and

5) A Department of Administrative and Financial Services, Bureau of General Services, Professional Service Pre-Qualification List identifying Dwyer Associates, which appraised the leased premises, as pre-qualified to provide property appraisal services for state agencies (attached as Exhibit E).

Alternative Remedy: Remand without Vacatur. If this Court determines that it will not accept the 2020 memo as part of the administrative record, or if this Court determines that any additional evidence proffered by Plaintiffs that has not been considered by the Bureau should become part of the administrative record, *see* 5 M.R.S. § 11006(1)(B), this Court should remand the matter to the Bureau without vacatur.

"'Administrative agency findings of fact will be vacated only if there is no competent evidence in the record to support a decision.'" *Carryl v. Dep't of Corrs.*, 2019 ME 114, ¶ 8, 212 A.3d 336 (quoting *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128). Here, any such remand would be without vacatur because this Court necessarily will not have determined that there is no competent evidence in the record to support the Bureau's decision to issue the 2020 lease without 2/3 legislative approval because it will not yet have reviewed the Bureau's findings. *Carryl*, 2019 ME 114, ¶ 8, 21 A.3d 336; *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566 (listing the limited scenarios in which the Court will vacate an agency decision); *see Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74 ("The party attempting to vacate the agency's decision bears the burden of persuasion.").

Process on Remand. In the event of remand, the Bureau would, as stated in conference on March 24, 2021, issue a public notice; accept public comments for fourteen days on the issue of substantial alteration;

any such additional proposed documents are material to the issues on review, this Court should remand the matter to the Bureau pursuant to 5 M.R.S. §11006(1)(B). Any proffered legislative materials would not trigger a remand because, regardless of whether the Bureau considered such, the parties are free to cite legislative materials for permissible purposes. *See Wawenock v. Dep't of Transp.*, 2018 ME 83, ¶¶ 13, 15, 187 A.3d 609.

consider all such evidence received; prepare new written findings; and submit to this Court such material, including the five documents listed above, as a supplement to the administrative record. On remand, Plaintiffs would be able to submit to the Bureau for consideration the information enumerated in Plaintiffs' motion, aside from deposition or hearing testimony from Bureau decisionmakers and staff, including Director Cutko and Mr. Rodrigues, to which Plaintiffs have not demonstrated they are entitled. *See Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918-19 (Me. 1984). Because the Bureau is willing to accept public comment, a remand would address Plaintiffs' concerns regarding the opportunity to address the Bureau, while respecting the Bureau's role as fact-finder.

* * *

Absent the Bureau's 2020 Memo, the Administrative Record Would Lack Sufficient Findings to Facilitate Judicial Review and the Court Must Remand the Matter to the Bureau. In its March 17 Order, this Court held that before authorizing a proposed use of designated lands, the Bureau must determine on a case-by-case basis whether the proposed use would substantially alter the designated lands. (March 17 Order 2, 8-9, 15-16.) Because that decision must be made by the Bureau (*id.*), the only grounds upon which this Court may judge the propriety of the Bureau's determination on the question of substantial alteration are those invoked by the Bureau. *See Palian v. Dep't of Health & Human Servs.*, 2020 ME 131, ¶ 41, 242 A.3d 164. Thus, for the administrative record to be sufficient to facilitate judicial review, it must contain the Bureau's written findings on the question of substantial alteration as to the 2020 lease. As the Law Court has repeatedly stated:

> Meaningful judicial review of an agency decision is not possible without findings of fact sufficient to apprise the court of the decision's basis. In the absence of such findings, a reviewing court cannot effectively determine if an agency's decision is supported by the evidence, and there is a danger of judicial usurpation of administrative functions.

Appletree Cottage, LLC v. Town of Cape Elizabeth, 2017 ME 177, ¶ 9, 169 A.3d 396 (quoting *Mills v. Town of Eliot*, 2008 ME 134, ¶ 19, 955 A.2d 258 (quotation marks omitted); *see* M.R. Civ. P. 80C(f) ("[A] copy of the agency's decision on appeal, whether written or transcribed, shall be included in the record.").

The administrative record for the 2020 lease consists of three general categories of documents: the final agency action (the 2020 lease), the Bureau's formal written findings on the question of substantial alteration (the 2020 memo), and the evidence upon which the Bureau's final agency action and findings are based. *See* 5 M.R.S. §§ 11005, 11006; M.R. Civ. P. 80C(f). Plaintiffs have moved this Court to strike from the administrative record the 2020 memo because that memo post-dates the 2020 lease. (Pls.' Mot. 2.) If the Court grants Plaintiffs' motion to strike the 2020 memo from the record, the record would not be sufficient to facilitate judicial review.[3]

Absent the Bureau's formal findings on the question of substantial alteration, a remand to the Bureau is preordained. *Carroll v. Town of Rockport*, 2003 ME 135, ¶ 30, 837 A.2d 148 ("[W]hen an administrative board or agency fails to make sufficient and clear findings of fact and such findings are necessary for judicial review, we will remand the matter to the agency or board to make the findings."); *Chapel Road Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶ 13, 787 A.2d 137 ("The remedy for any agency's failure to . . . make sufficient and clear findings of fact is a remand to the agency for findings that permit meaningful judicial

[3] Although the 2020 memo does post-date the 2020 lease, the Court may nevertheless consider the 2020 memo; the 2020 memo is anchored by the 2014 considerations document (A.R. III0033), synthesizes the information in the record, and is consistent with the Bureau's actions as to prior leases of public reserved lands and the 2020 lease to CMP, including as explained to the Legislature's Committee on Agriculture, Conservation and Forestry. (*See* Def. Bureau's Opp. to Pls.' Mot. 16-18; Def. CMP's Opp. to Pls.' Mot. 5-8.)

review.") (internal quotation marks omitted) (alteration in original); *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶¶ 10-19, 769 A.2d 834; *Carl L. Cutler Co.*, 472 A.2d at 918-19. In respect of Maine's heightened separation of powers, this Court must decline Plaintiffs' invitation to assume the Bureau's role of fact-finder on the question of substantial alteration and to "embark on an independent and original inquiry." *Appletree Cottage, LLC*, 2017 ME 177, ¶ 9 (quoting *Chapel Road Assocs.*, 2001 ME 178, ¶ 13, 787 A.2d 137); *see* 5 M.R.S. § 11007(3) ("The court shall not substitute its judgment for that of the agency on questions of fact."); *Suzman v. Comm'r, Dep't Health & Human Servs.*, 2005 ME 80, ¶¶ 24, 29, 876 A.2d 29 (refusing to consider the Superior Court's findings when the Superior Court made factual findings instead of remanding to agency for same); *see also Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128 ("Respecting [Maine's] constitutional separation of powers, Me. Const. art. III, and statutes governing administrative appeals, [this Court's] review of state agency decision-making is deferential and limited.").

Nor does 5 M.R.S. § 11006(1)(A) or (D) afford the Court latitude to make its own findings of fact as to whether the 2020 lease substantially alters the uses of the West Forks Plantation and Johnson Mountain Township public reserved lands.[4]

5 M.R.S. § 11006(1)(A) does not apply. Title 5 M.R.S. § 11006(1)(A) allows the Court to take evidence of "alleged irregularities in procedure before the agency which are not adequately revealed in the record." "[A] *prima facie* showing of the 'alleged irregularities in procedure'" is a prerequisite to invoking 5 M.R.S. § 11006(1)(A). *Carl L. Cutler Co.*, 472 A.2d at 918; *Reed v. Dunlap*, No. BCD-AP-20-02, 2020 WL 2106817, at *1-2 (Me. Super. Ct. Apr. 3, 2020). "Under that rule the party requesting the taking of additional evidence must file 'a detailed statement, in the nature of an offer of proof, of the evidence intended to be taken.'" *Carl L. Cutler Co.*, 472 A.2d at 918. Plaintiffs have not alleged bias against the Director, much less made the required prima facie showing of bias, for the Court to take evidence pursuant to 5 M.R.S. §11006(1)(A). Nor have Plaintiffs alleged other irregularities in procedure. Although Plaintiffs may contend the Bureau's procedure is lacking—indeed, the Bureau contends no public process is required, did not convene any public process, and has no rules requiring same—allegations of a lack of process are distinguishable from allegations of irregularities in required process. Further, the absence of formal findings on the question of substantial alteration would not constitute an irregularity in procedure; it would mean the record is insufficient for judicial review and the matter must be remanded to the Bureau. *See Carl L. Cutler Co.*, 472 A.2d at 918-19 ("The remedy available to the court when the record is insufficient for judicial review is a remand to the agency for further findings or conclusions.").

5 M.R.S. § 11006(1)(D) does not apply. Title 5 M.R.S. § 11006(1)(D) allows the Court to remand to the agency or to conduct a de novo hearing "[i]n cases where an adjudicatory proceeding prior to final agency action was not required, and where effective judicial review is precluded by the absence of a reviewable record." Title 5 M.R.S. § 11006(1)(D) is not applicable to the captioned matter because there *is* an administrative record for the captioned matter. As mentioned above, the 2020 memo is one of many documents (approximately one hundred fifty) comprising the administrative record. Admittedly, the 2020 memo is an important document without which the record would be insufficient to facilitate judicial review and remand would be necessary. But even if this Court strikes the 2020 memo from the record, there will still very much be an administrative record supporting the 2020 lease, which lease is the action precipitating the captioned matter. Title 5 M.R.S. § 11006(1)(D) therefore does not apply.

[4] Title 5 M.R.S. § 11006(1)(C) does not apply because the Bureau was not required to convene any public process, much less hold a hearing, before leasing public reserved lands for electric power transmission pursuant to 12 M.R.S. § 1852(4). *Cf.* L.D. 1075 (130th Legis. 2021) (requiring the Bureau to promulgate rules establishing a process, including "public notice and comment," for determining whether a proposed activity would substantially alter the uses of designated lands).

If there were no administrative record, and 5 M.R.S. § 1006(1)(D) were potentially applicable, the appropriate remedy pursuant to 5 M.R.S. § 1006(1)(D) would still be remand to the Bureau, as opposed to the Court conducting a de novo hearing, because, as this Court held, the question of substantial alteration is one the Bureau must decide (March 17 Order 2, 8-9, 15-16). *Compare Palian*, 2020 ME 131, ¶¶ 41, 47, 242 A.3d 164 (remanding for the agency to explain a determination that the agency alone is authorized to make); *with Blue Sky West, LLC v. Me. Rev. Servs.*, 2019 ME 137, ¶¶ 20-22 (approving the Court's de novo adjudication of a dispute centered on a statute of general applicability—Maine's Freedom of Access Act—where the parties acquiesced to de novo adjudication based on a stipulated statement of facts).

* * *

The Court may accept the 2020 memo as part of the record, along with the documents listed in and attached to this letter, and order the parties to proceed to Rule 80C briefing, or this Court may remand the matter to the Bureau without vacatur for new findings, which findings will account for materials submitted to the Bureau, including by Plaintiffs, during a fourteen day public comment period. The Court may not conduct a de novo hearing on the question of substantial alteration, nor may it otherwise substitute its judgment for that of the Bureau's on questions of fact. 5 M.R.S. § 11007(3).

Respectfully submitted,

/s/ Lauren E Parker

Lauren E. Parker
Assistant Attorney General

Enclosures

cc: James T. Kilbreth, Esq.
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STATE OF MAINE
Bureau of Public Lands

PRESCRIPTION REVIEW AND MULTIPLE USE COORDINATION REPORT

Public lot: West Forks Plt. Compartment: 28

District: Holeb Schedule for entry FY 1986

Region: Western

Prepared by Marc Albert Marc Albert Date: 3-15-85

Recommending approval: Thomas C Dark Date:
(Regional Manager)

This prescription (does)/does not (circle one) meet BPL Interim Timber Management Procedures.

Authorization to ship to Quebec needed (yes/(no)).

Reviewed, concerns have been resolved, and recommending approval:

Signature (I.D. Team)	Title	Date
John Witherell	Col	9/13/85
P. B. Walker	Res. Planner	9/13/85
J Charles	Ch. of Sels.	9/13/85
Leigh Hoar	D. L. M. C.	10/1/85
Gary G Gorman	SCWB	10/1/85

DIRECTOR'S DETERMINATION

Approved by: [signature] Date: 10/3/85
(Director)

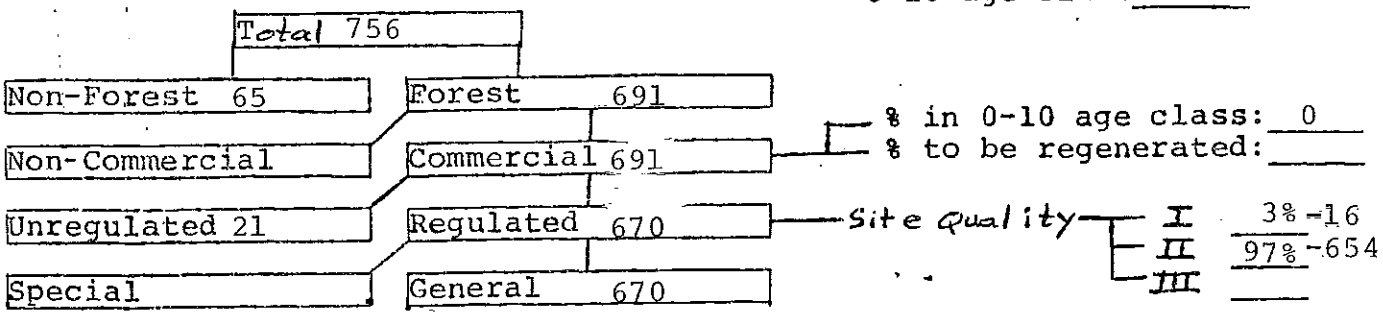
Amendment prepared by _____ Date: _____

Amendment of prescription approved by _____ Date: _____
(Director)

COMPARTMENT SUMMARY

LAND CLASSIFICATION ACREAGE:

% of district in 0-10 age class _____



TIMBER SALE SUMMARY:

Season of Operation: Winter/Summer/Yr. Rd
Start date 9/85 Length of Operation 2y

Stand No.	Uneven-age Management Cut Acres	Even-age Management Cut Acres			Saw Log Vol. (MBF)		Pulp Vol. (Cords)		Total Vol. (Cords)		Next Activi FY
		Inter.	Regen.	Removal	SW	HW	SW	HW	SW	HW	
1	103				96	10	625	140	817	160	2005
2	21						50		50		2005
3	23				20	100	75	183	115	383	2005
4	26					40	85	279	85	359	2005
5		21		10	95		272	19	462	19	1990/20(
6	94				40	30	225	627	305	687	2005
7		43			30	20	197	312	257	352	2005
8	37						135			135	2005
9	16					20		37		77	2005
10		6					30		30		2005
11		10					30	20	30	20	2005
12	77				10	50	146	537	166	637	2005
13	63					15	368	272	368	302	2005
14	76					40	60	563	60	643	2005
TOTALS	536	80		10	271	365	2298	2989	2745	3774	
				Grand Totals	636		5287		6519		

CULTURAL TREATMENT SUMMARY (ACRES):

Stand No.	Site Prep. for natural	Site Prep. for Artific.	Prescribed Burn	Planting	Release	Pre-Comm. Thinning	Pruning
TOTALS							

ROAD MILEAGE:

SUMMER:

APP 2 mi _____
Construct Reconstruct

WINTER:

APP 1½ mi _____
Construct Reconstruct

BRIDGE NUMBERS:

1 _____
Construct Reconstruct

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 1 Acreage 103

A. Description of the featured stand

1. Type: S/M/H/P/C Species: RS;Be/BF/YB/Rm/Ced.

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 6 Age NA

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 106 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/Inadequate/NA Species: BF

6. Site Quality: I/II/III

7. Operability: Winter/Summer/Year-round

8. Remarks: This mixedwood stand lies on rolling terrain in the Western end of the lot. The wood varies from patches of low quality stems through two aged stems. The beech is generally of very poor quality and the fir is suffering from budworm feeding. The red spruce is of good quality.

B. Management Objective (Even/Uneven): To grow saw timber sized and quality red spruce and yellow birch. Harvesting the beech, red maple, and fir at pulpwood sizes. A 20 year cutting cycle should be used.

C. Prescription

1. Activity: Selection cut ; Removing the Fir (5.22 cords/acre) The Hardwood over 26" (.46 cords/acre); thin Spruce (.85 cords/acre); remove low quality Beech (.93 cords/acre)

2. Method: Marked wood

D. Residual Stand

1. Type: S/M/H/P/C Species: RS;Be/YB/RM/ced, BF

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 6

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 80 Featured

4. Remarks: 7.46 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment Exam
2005	Selection Cut

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 2 Acreage 21

A. Description of the featured stand

1. Type: (S)/M/H/P/C Species: Black Spruce
2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 6 Age 150+
3. Stocking: 10-39%/(40-59%)/60-99%/100%+ BA 103 Featured
4. Condition: Non-stocked/High-risk/Sparse/(Low-quality)/Mature/Immature/ Two-aged/All-aged/In process of regeneration
5. Regeneration: Adequate/(Inadequate)/NA Species: _____
6. Site Quality: I/II/III/(IV)
7. Operability: (Winter)/Summer/Year-round
8. Remarks: "Unregulated acreage" Black Spruce swamp with a few scattered dead Fir and an occasional blow down.

B. Management Objective (Even/(Uneven)): Harvest Spruce pulp on an opportunity basis along the periphery of the stand.

C. Prescription

1. Activity: Harvest the merchantable wood along the edge of the stand.
2. Method: Marked wood

D. Residual Stand

1. Type: (S)/M/H/P/C Species: Black Spruce
2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 6
3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 80 Featured
4. Remarks: Due to the fact that the stand is unregulated, there will be very little change.

E. Next Activities

Year	Type
1995	Compartment exam

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 3 Acreage 23

A. Description of the featured stand

1. Type: S/M/(H)/P/C Species: Be/SM/RS;YB/RM

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 9 Age 100

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 110 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/(All-aged)/In process of regeneration

5. Regeneration: Adequate/Inadequate/(NA) Species: NA

6. Site Quality: I/(II)/III

7. Operability: Winter/Summer/(Year-round)

8. Remarks: The Red Spruce, Sugar Maple and Yellow Birch are of good quality. The Beech is of poor quality. The stand has good age class diversity, something that should be maintained.

B. Management Objective (Even/~~Uneven~~): To grow the Sugar Maple, Yellow Birch, and Red Spruce to saw timber sizes with a 20 year cutting cycle.

C. Prescription

1. Activity: Selection Cut ; Removing Beech 9" and over 5.51 cords/ acre, Fir .69 cords/acre, thin the Spruce 2.57 cords/acre and thin the Hardwood 2.45 cords/acre.

2. Method: Marked Wood

D. Residual Stand

1. Type: S/M/(H)/P/C Species: SM/RS;Be/YB/RM

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 7

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 70 Featured

4. Remarks: 11.22 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection harvest

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 4 Acreage 26

A. Description of the featured stand

1. Type: S/M/(H)/P/C Species: Be/RS,SM/RM/BF

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 7 Age NA

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 150 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/(Two-aged)/All-aged/In process of regeneration

5. Regeneration: Adequate/(Inadequate)/NA Species:

6. Site Quality: I/(II)/III

7. Operability: Winter/Summer/(Year-round)

8. Remarks: This hardwood stand is at the verge of becoming a mixedwood stand. The beech is low quality with the Sugar Maple and Spruce being of good quality.

B. Management Objective (Even/(Uneven)): To convert this hardwood stand to a mixedwood stand growing Red Spruce and Maple to saw log sizes with a cutting cycle of 20 years. This conversion is going to be a natural process due to the amount of softwood in the stand in the advanced regeneration and small pole sizes.

C. Prescription

1. Activity: A selection cut removing low quality Beech and some of the over mature Maple and Spruce. Beech 5.51 cords/acr Spruce 5.24 cords/acre and 2.57 cords/acre respectively.

2. Method: Marked wood

D. Residual Stand

1. Type: S/M/H/P/C Species: RS,SM/RM/Be,BF

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 7

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 100 Featured

4. Remarks: 14.01 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection harvest

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 5 Acreage 39

A. Description of the featured stand

1. Type: (S)/M/H/P/C Species: RS;BF/ced,RM/YB/Be

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 7 Age 100

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 108 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/(Immature)/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/(Inadequate)/NA Species: RS/BF

6. Site Quality: I/(II)/III

7. Operability: (Winter/Summer)/Year-round

8. Remarks: A very patchy softwood stand varying from wet areas of dead Fir with a few scattered Spruce to rolling areas of very good Spruce and fair RM to ledgy areas of small Spruce.

B. Management Objective (Even)/Uneven): To grow saw timber sized Spruce in 120 years.

C. Prescription

1. Activity: Salvage the damaged Fir and Spruce.

2. Method: Mark the spruce, designate all Fir; ¼ of the area patch cut, 1/5 of the area uncut and the remaining area thinned. The size of the patch cuts will be under 2 acres in size.

D. Residual Stand

1. Type: (S)/M/H/P/C Species: RS;ced,RM/YB;BE/BF

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 7

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 80 Featured

4. Remarks: The resulting stand will be a series of patches: some clear cut, some uncut, interspersed with thinned areas. The S2 Stand has 23.50 cords/acre gross volume.

E. Next Activities

Year	Type
1995	Compartment exam
2005	Thin stand

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 6 Acreage 94

A. Description of the featured stand

1. Type: S/M/H/P/C Species: Be/Sm,RS/RM;YB
2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 9 Age NA
3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 102 Featured
4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration
5. Regeneration: Adequate/Inadequate/NA Species: Be,RS
6. Site Quality: I/II/III
7. Operability: Winter/Summer/Year-round
8. Remarks: The central hardwood stand having some of the best wood and most difficult access. The Maple is of very good quality with the Beech being of low quality.

B. Management Objective (Even/Uneven): To grow saw timber sized and quality Sugar Maple with a 20 year cutting cycle.

C. Prescription

1. Activity: Selection Cut removing Beech 8" and up 5.86 cords/ acre, the Fir .69 cords/acre, 1/3 of the Spruce 1.71 cords/acre, and some low quality Hardwood .815 cords/acre.
2. Method: Marked wood removing some of the Beech and mature Maples as well as the scattered Softwood.

D. Residual Stand

1. Type: S/M/H/P/C Species: SM,Be/RM,RS,YB
2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 9
3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 70 Featured
4. Remarks: 9.07 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection cut

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 7 Acreage 43

A. Description of the featured stand

1. Type: S/(M)/H/P/C Species: RS,ced/BF;YB/SM/RM
2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 8 Age 100
3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 150 Featured
4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/(Two-aged)/All-aged/In process of regeneration
5. Regeneration: Adequate/(Inadequate)/NA Species: RS/BF
6. Site Quality: I/(II)/III
7. Operability: (Winter/Summer)/Year-round
8. Remarks: Softwood over topped by low quality Hardwood.

B. Management Objective ((Even)/Uneven): To grow quality Red Spruce on a 120 year rotation. Converting this mixedwood stand to a Softwood one.

C. Prescription

1. Activity: Commercial thinning, removing the damaged Fir and low quality Hardwood. By removal of the low quality Hardwood, the stand will become a softwood stand.
2. Method: Marked wood; The volume of Fir is 3.65 cords/acre, .93 cords/acre of Spruce and 8.63 cords/acre of Hardwood.

D. Residual Stand

1. Type: S/(M)/H/P/C Species: RS,ced,BF;YB/SM/RM
2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 7
3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 100 Featured
4. Remarks: It will take more than one harvest to convert to a Softwood stand. 13.25 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Light commercial thinning

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 8 Acreage 37

A. Description of the featured stand

1. Type: S/M/H/P/C Species: BF/RS;SM/YB,Be

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 7 Age NA

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 77 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/Inadequate/NA Species: Be & RS

6. Site Quality: I/II/III

7. Operability: Winter/Summer/Year-round

8. Remarks: A variable mixedwood stand mostly being unevenaged. The topography varies from wet flats to ledgy out croppings. The wood is very patchy.

B. Management Objective (Even/Uneven): To grow Red Spruce and Maple logs with a 20 year cutting cycle.

C. Prescription

1. Activity: Selection cut/salvage. Removal of the high risk and unacceptable Fir along with some of the low quality Hardwood.

2. Method: Marked wood patches centered on high risk Fir with some light individual tree marking.

D. Residual Stand

1. Type: S/M/H/P/C Species: RS;BF/SM/YB;Be

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 7

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 70 Featured

4. Remarks: The residual will be patchy in appearance due to the variable in the stand--120 sq. ft. to 40 sq. ft. Most of the removal being nonfeatured stems. 3.65 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection cut

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 9 Acreage 16

A. Description of the featured stand

1. Type: S/M/H/P/C Species: SM/BE,RS;YB/Rm/BF

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 10 Age NA

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 70 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/Inadequate/NA Species:

6. Site Quality: I/II/III

7. Operability: Winter/Summer/Year-round

8. Remarks: A very nice Hardwood stand, large Sugar Maple.Many having logs mixed with smaller Beech and Softwoods.

B. Management Objective (Even/Uneven): To continue the unevenaged character of this stand and grow high quality Sugar Maple logs with a cutting cycle of 20 years.

C. Prescription

1. Activity: Selection cut, removing stems across all size classes concentrating on the nonfeatured stems and the low quality Beech.

2. Method: Marked wood

D. Residual Stand

1. Type: S/M/H/P/C Species: SM;Be,RS/YB/RM

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 10

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 60 Featured

4. Remarks: Removal of mostly unfeatured stems will do little to residual BA. 2.3 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection cut

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 10 Acreage 17

A. Description of the featured stand

1. Type: (S)/M/H/P/C Species: RS

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 6 Age 85+

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 120 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/(Immature)/
Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/(Inadequate)/NA Species: BF

6. Site Quality: I/(II)/III

7. Operability: Winter/Summer/(Year-round)

8. Remarks: This softwood stand is growing on a series of ledges near Tomhegan Stream. The wood varies from being 3" in DBH and 20' tall on the ledge tops to 10" DBH and 90' tall in the hollows between the ledgey knolls.

B. Management Objective ((Even)/Uneven): To grow saw timber sized and quality Spruce in 120 years.

C. Prescription

1. Activity: Do a commercial thinning in areas where the terrain allows about 1/3 of the area.

2. Method: Marked wood ; Removing Balsam Fir, low quality Spruce and low quality Hardwood.

D. Residual Stand

1. Type: (S)/M/H/P/C Species: RS

2. Size: Seedling-sapling/(Pole)/Sawtimber Ave. DBH 6

3. Stocking: 10-39%/40-59%/(60-99%)/100%+ BA 100 Featured

4. Remarks: Approximately 5 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	A light commercial thinning

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 11 Acreage 54

A. Description of the featured stand

1. Type: S/M/H/P/C Species: RS,RM/BF,YB

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 6 Age NA

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 126 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/Inadequate/NA Species: BF,RS

6. Site Quality: I/II/III

7. Operability: Winter/Summer/Year-round

8. Remarks: This mixedwood stand is growing on steep slopes along both sides of Tomhegan Stream. The land slopes down to the stream from both edges of the stand. There are several ledges interspersed through the stand.

B. Management Objective (Even/Uneven): To grow Red Spruce and Red Maple to saw log sizes on a 20 year cutting cycle.

C. Prescription

1. Activity: Do a series of skid trail layouts with small (under 1/5 acre) group selection patches in areas when terrain allows covering less than 1/5 of the area.

2. Method: Marked wood

D. Residual Stand

1. Type: S/M/H/P/C Species: RS,RM/YB,BF

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 6

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 100 Featured

4. Remarks: Approximate removal of 5 cords/acre over 10 acres

E. Next Activities

Year	Type
1995	Compartment exam
2005	Light selection cut

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 12 Acreage 77

A. Description of the featured stand

1. Type: S/M/H/P/C Species: Be/SM;RS;YB/RM

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 6 Age NA

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 115 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/Inadequate/NA Species: Be

6. Site Quality: I/II/III

7. Operability: Winter/Summer/Year-round

8. Remarks: This hardwood stand lies between Tomhegan Stream and Little Wilson Hill Pond. The access is somewhat restricted. The Sugar Maple and Yellow Birch are of good quality with the Beech being of poor quality.

B. Management Objective (Even/Uneven): To grow sawlog sized and quality Sugar Maple on a 20 year cutting cycle.

C. Prescription

1. Activity: Selection cut removing low quality Beech some of the mature Sugar Maple and the scattered softwood.

2. Method: Marked wood; Removing Fir .69 cords/acre, 1/3 of the Spruce 1.54 cords/acre, Beech 8" and up 5.86 cords/acre and low quality Hardwoods 1.91 cords/acre.

D. Residual Stand

1. Type: S/M/H/P/C Species: SM;Be,YB/RM

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 6

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 70 Featured

4. Remarks: 10 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection cut

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 13 Acreage 63

A. Description of the featured stand

1. Type: S/M/H/P/C Species: RS;BF/YB/Be,SM/ced.

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 7 Age NA

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 110 Featured

4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration

5. Regeneration: Adequate/Inadequate/NA Species: Be, RS

6. Site Quality: I/II/III

7. Operability: Winter/Summer/Year-round

8. Remarks: This mixedwood stand lies along both shores of Little Wilson Hill Pond. The quality of the Spruce, Maple, and Yellow Birch is quite good. The Beech and Fir are of low quality. There are also scattered large old growth Hemlock in this stand.

B. Management Objective (Even/Uneven): To grow Red Spruce, Yellow Birch and Sugar Maple to sawlog sizes on a 20 year cutting cycle.

C. Prescription

1. Activity: Selection Harvest removing the Fir 5.22 cords/acre, the Beech 2.17 cords/acre and the low quality Hemlock and Hardwood 2.39 cords/acre.

2. Method: Marked wood removal of low quality Beech, Fir and old growth Hemlock.

D. Residual Stand

1. Type: S/M/H/P/C Species: RS;YB;SM/Be/BF

2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 7

3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 70 Featured

4. Remarks: 9.78 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection harvest

RESOURCE SITUATION AND MANAGEMENT RECOMMENDATIONS

I. TIMBER Stand # 14 Acreage 76

A. Description of the featured stand

1. Type: S/M/H/P/C Species: Be/SM;RM/Hop/YB,Hem
2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 7 Age NA
3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 104 Featured
4. Condition: Non-stocked/High-risk/Sparse/Low-quality/Mature/Immature/ Two-aged/All-aged/In process of regeneration
5. Regeneration: Adequate/Inadequate/NA Species: Be RS
6. Site Quality: I/II/III
7. Operability: Winter/Summer/Year-round
8. Remarks: This hardwood stand lies on the West end of the compartment. The quality of the hardwood except for the Beech is good. The Beech often occuring in small patches is low quality.

B. Management Objective (Even/Uneven): To grow quality hardwood sawlogs with a 20 year cutting cycle.

C. Prescription

1. Activity: Selection cut removing the Fir and Hemlock .70 cords/acre, 70% of the Beech 5.44 cords/acre, and the low grade Hardwood 2.52 cords/acre.
2. Method: Marked wood, remove the low quality Beech, old growth hemloc and some of the mature and over mature hardwoods. Some clear cut patches under 2 acres in size will be laid out in low quality Beech areas.

D. Residual Stand

1. Type: S/M/H/P/C Species: SM;Be,RM/Hop/YB
2. Size: Seedling-sapling/Pole/Sawtimber Ave. DBH 7
3. Stocking: 10-39%/40-59%/60-99%/100%+ BA 70 Featured
4. Remarks: 8.75 cords/acre removal

E. Next Activities

Year	Type
1995	Compartment exam
2005	Selection harvest

II. INSECT/DISEASE

A. Situation: There is light Budworm Feeding on the residual Fir;ie those that were not killed in the past. The Beech are often suffering from the effects of the Beech Bark Disease complex.

B. Recommendation: Harvest the Fir and where possible the Beech.

III. WILDLIFE Date of visit by biologist 3-20-85

A. Situation: There is very little wildlife sign on the lot.

B. Recommendation: Maintain riparian zones along the streams and ponds to assure future travel zones.

IV. LAND USE/WATER

A. Situation: The outlet to Little Wilson Hill Pond flows across the lot as does Tomhegan Stream. They are zoned P-SL2. Wilson Hill Pond lies entirely within the lot and is zoned P-GP. There is also a power line running along the northern end of the lot.

B. Recommendation: By complying with the Bureau's policy of Ripia-Zones, no problem will exist with harvesting as prescribed within the Land Use Zones.

V. RECREATION/VISUAL

A. Situation: Dispersed hunting and fishing. Some die hards try to use the power line that runs along the north line as a snow mobile trail. Wilson Hill Pond is fly fishing only. There is a small camping site on the north end of the pond.

B. Recommendation: Our harvest will improve access, thereby increasing use of the land for recreation. Improvement of this campsite may be in order.

VI. SOILS/GEOLOGY

A. Situation: The soils vary from glacial fills to Black Spruce swamps with many areas of exposed ledges. The topography is very rough with many steep ledges and ridges.

B. Recommendation: Much of the lot will be harvested in Winter, eliminating any errosion problem.

VII. ENGINEERING/SURVEYING

A. Situation: Access to the lot is difficult. There are currently gravel roads near the west end and crossing the eastern end. The central portion has problems due to several factors. The lay out of the lot is 3¼ miles by 4/10 mile, Tomhegan stream with its associated ledges and steep banks crosses the lot, Wilson Pond on the east end, and most prominently the general topography has very steep ridges, lots of exposed ledges usually running north and south across the lot. The building of an east/west road would be nearly impossible and very expensive.

B. Recommendation: The extreme east and west ends are no problem. The central area may be accessed from the north through the Johnson Mtn. lot, on the south through Scott road system (Depending upon where and when they build it as well as how much it will cost us to use it). More information is necessary before a final decision can be made.

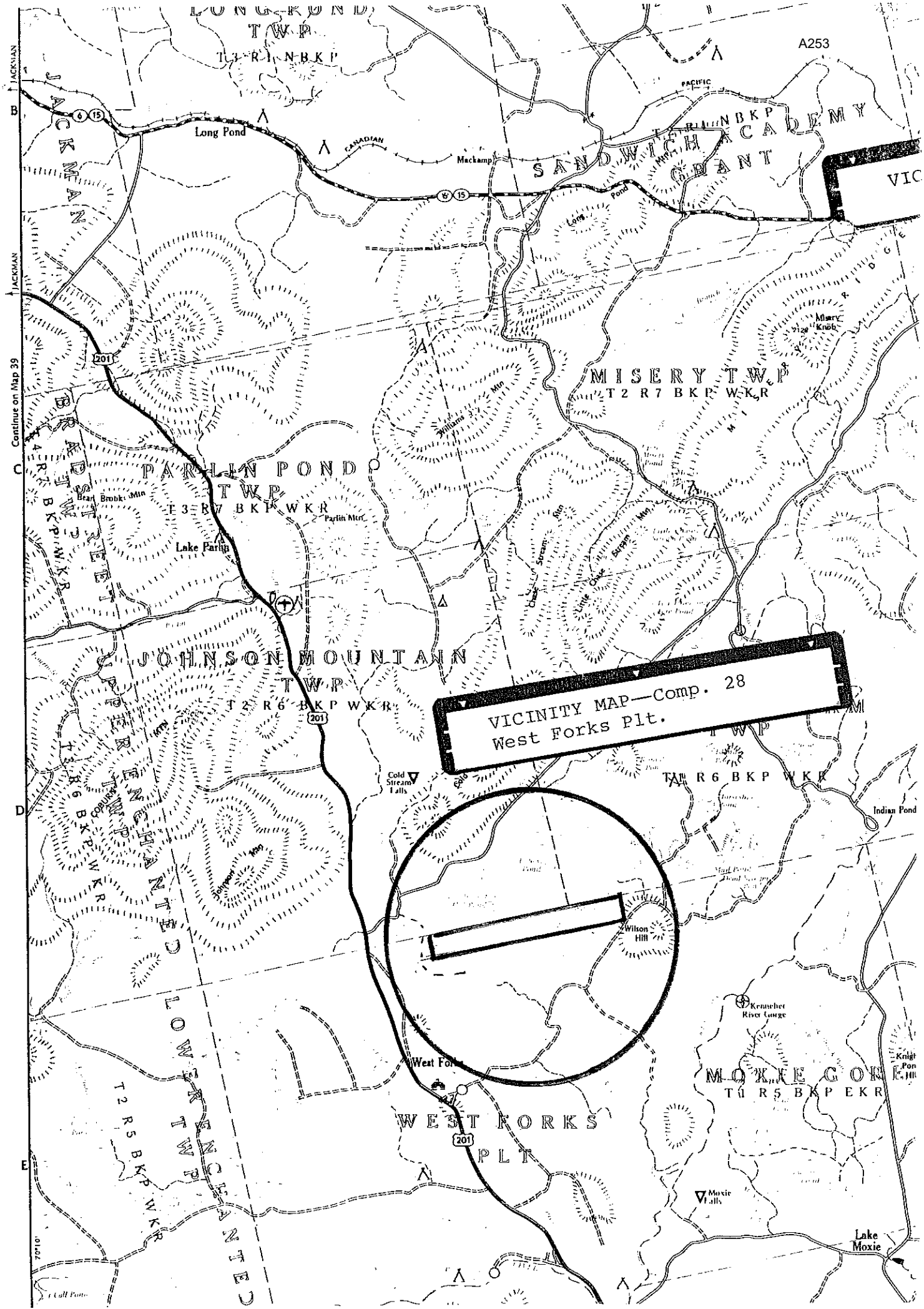
VIII. OTHER

A. **Situation:** This lot lies to the south of the Johnson Mtn. East lot and has a common boundary.

B. **Recommendation:** Harvest this lot and Comp. 24, Johnson Mtn. East, as a single unit reducing costs to the operator.

IX. MAPS

A. Vicinity map.
B. Compartment map.
C. LURC map.
D. Other.

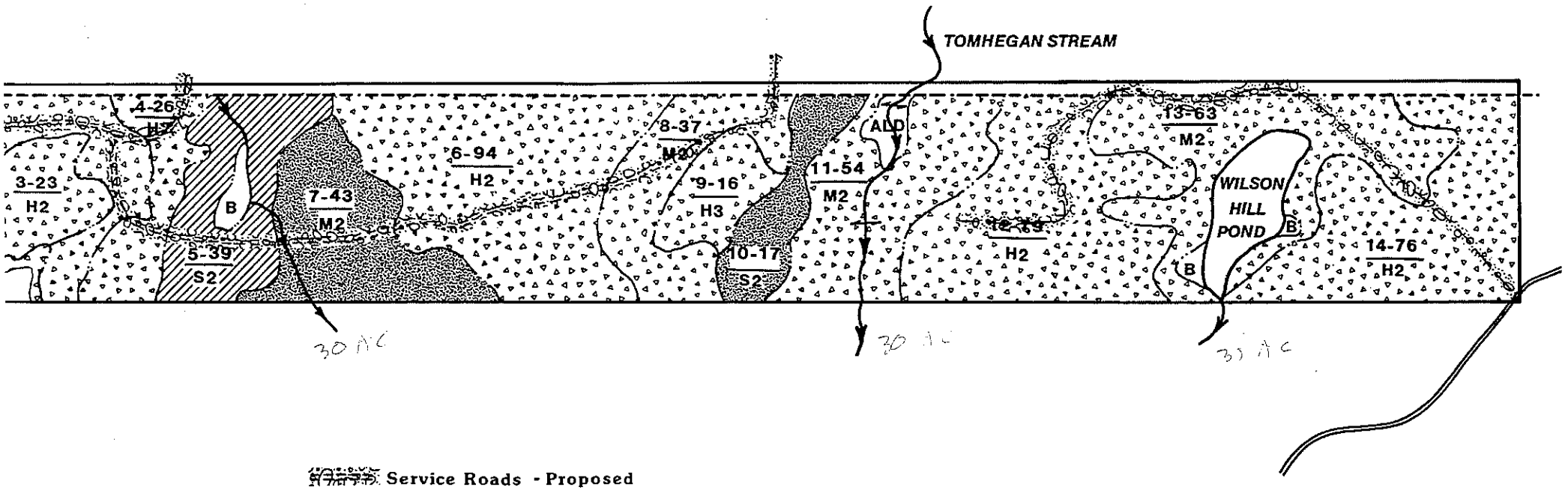

VICINITY MAP—Comp. 28
West Forks Plt.
LONG POND TWP
T1 R1 NBKP
SANDWICH ACADEMY GRANT
MISERY TWP
T2 R7 BKP WKR
PARLIN POND TWP
T3 R7 BKP WKR
JOHNSON MOUNTAIN TWP
T2 R6 BKP WKR
T1 R6 BKP WKR
WEST FORKS PLT
T2 R5 BKP WKR
MOXIE GORE
T1 R5 BKP EKR
Long Pond
Mackamp
Lake Parlin
Cold Stream Falls
Wilson Hill
West Forks
Kennebec River Gorge
Moxie Falls
Lake Moxie
Indian Pond
Misery Knob
Parlin Mtn
Bear Brook Mtn
Williams Mtn
JACKMAN
Continue on Map 39
201
15

LURC MAP—Comp. 28
West Forks Plt.
P-SL2
P-SP
P-SL2
Wilson Hill
Pond
1100
1200
1000
1100
Tomhegan
BM
Stream
W. GN

LURC MAP—Comp. 28
West Forks Plt.
A255
Wilson Hi
Po
1100
P-SL2
Tomhegan
1000
BM
807
Stream
M-GN
1000
M-GN
P-SL2
M-GN
Stream

WEST FORKS PLT.

COMP. #28



Service Roads - Proposed

Temporary Roads - Proposed

Gravel Road

Unimproved Gravel Road

Patch Clearcut

Selection Cut

Thinning

Salvage Cut

Type Boundary

Transmission Lines

ıan 60% Softwood
Softwood
an 30% Softwood

han 60'
Density
Density
Density
ensity

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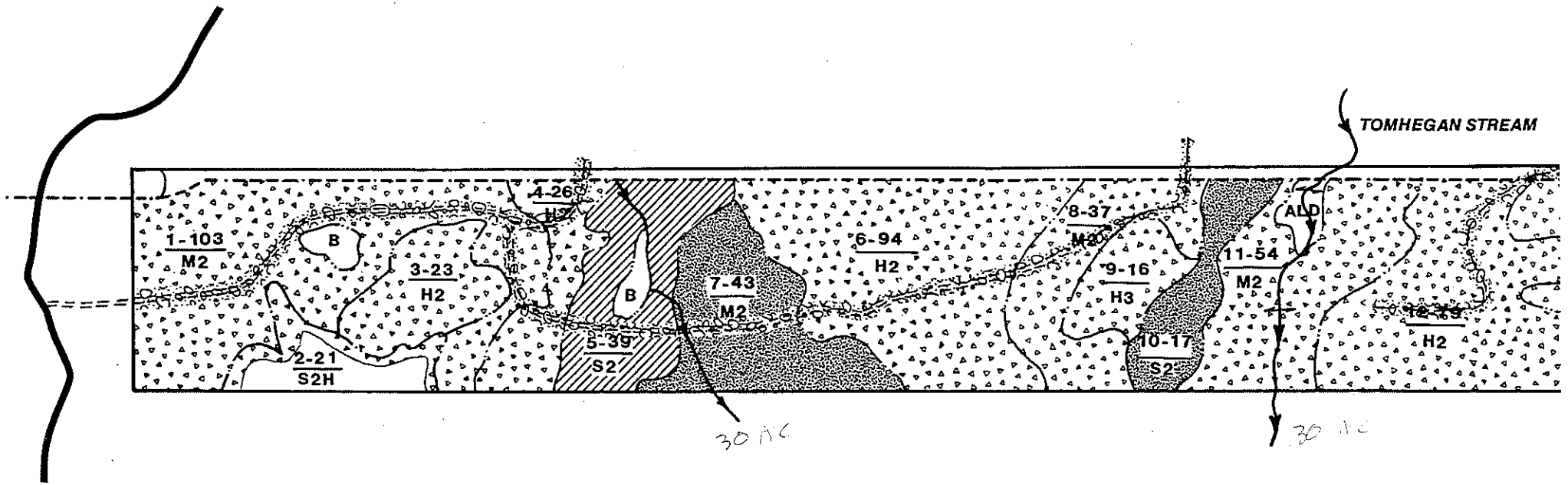
WEST FORKS PLT.

COMP. #28



LEGEND

- Forest Type Boundary
- Brook
- Power Transmission Lines

B - Bog

S - More than 60% Softwood
M - 30-60% Softwood
H - Less than 30% Softwood
1 - 0-30'
2 - 31-60'
3 - Taller than 60'
A - 71-100% Density
B - 41-70% Density
C - 11-40% Density
D - 0-10% Density

3-11 / S2 — Stand-Acreage / Forest Type

- Service Roads - Proposed
- Temporary Roads - Proposed
- Gravel Road
- Unimproved Gravel Road
- Patch Clearcut
- Selection Cut
- Thinning
- Salvage Cut

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A257

STATE OF MAINE

Bureau of Parks & Lands

PRESCRIPTION REVIEW AND MULTIPLE USE COORDINATION REPORT

Public Lot: Johnson Mtn. (W324) and West Forks Plantation (W328)

Schedule for entry FY: 2006

Region: Western **SHU:** ZW3

Prepared by: Leigh E. Hoar III **Date:** September 2005

Recommending approval: _____ **Date:** 1-8-06
Regional Manager

This prescription does/does not (circle one) meet BPL Timber Management Procedures.

Authorization to ship to Quebec needed (yes/no).
(General/Limited).

Reviewed, concerns have been resolved and recommending approval:

Signature (I.D. Team)	Title	Date
_____	Forester	3-8-06
_____	Biyeln Preserve Mgr.	3/8/06
_____	FORESTER	3/16/06

DIRECTOR'S DETERMINATION

Approved by: _____ Date: _____
Director

Amendment prepared by _____ Date: _____

Johnson Mountain and West Forks Prescription

Wetland-29 acres
Road-20 acres
Utility corridor-36 acres
Riparian-244 acres
Timbertype (regulated)-1156 acres
Total compartment-1241 acres

COMPARTMENT OVERVIEW - Description of the compartment as a whole

The Johnson Mountain and West Forks lots abut one another north to south across their common town line. Both are completely surrounded by Plum Creek. The Johnson Mountain lot is 517 acres and the West Forks lot is 724 acres. Access is from Rt. 201 though Plum Creek's Marshall Yard eastward on the Capital Road for 1.6 miles to the Wilson Pond Road then south 1.4 miles to the road which allows entrance to both lots from the west. The Capital Road is a major gravel road and the Wilson Pond Road is a good summer gravel road. The old summer road leading into Johnson Mountain and West Forks is used only sporadically by the curious, ATV riders and a few hunters in the fall so is in poor condition but repairable. Central Maine Power has a power line running through the West Forks lot 1-2 chains south of the common town line with Johnson Mountain.

Johnson Mountain and West Forks were both harvested using handcrews in 1986/87 by the Bureau. Most of the acres were operated to remove high-risk and poor quality trees. Current cover types show mixedwood and hardwood being nearly equal in acreage at 40% and 36% respectively and softwood at 24%. The trees are generally quite big with 92% of the acres for the various types falling in the "3" size class. 78% of the wooded acres are a "B" stand density due not only to reasonably high basal areas but also to very large hardwoods with big crowns. While it was not calculated, the quadratic mean stand diameter for many of the hardwood stands is probably over 12" and possibly 13".

The general objective of the harvest is an improvement harvest and to regenerate quality spruce and hardwood. Judging from both site and regeneration, the two lots appear to have good hardwood and softwood potential. Despite the sawtimber designation and "B" density, many of the softwood acres appear to have been harvested in patches with most of the remaining unharvested areas containing small suppressed stems beneath larger trees. The goal in the softwood stands is twofold: to harvest suppressed and high-risk stems to improve growth on dominant and codominant trees and also to release existing spruce regeneration. The lots also have good hardwood sites as evidenced by the abundance of large sugar maple. Many of the sugar maple have become overmature and are losing quality. Sapling-sized beech regeneration dominates the understory throughout many areas of the hardwood stands but sugar maple, yellow birch and occasionally white ash are a large component of the seedling-sized regeneration. Group selection and cutting beech saplings within the groups will be important treatments in order to release seedling-sized stems. Yellow birch pole and sawtimber is under represented in both of the lots and should be retained where possible in order to maintain a greater post harvest proportion than currently exists. In stands where thinning from below is a recommended treatment, a processor will be required to perform the operation. Areas harvested with a processor may be designated after a sample patch has been marked and the operator is harvesting appropriately.

Insect and Disease: These lots have very little quality beech. Nearly all the beech is heavily infected with nectria. There are pockets throughout the hardwood stands with pole-sized beech which may have been suppressed for a long time and, combined with nectria, are dead and dying. The best beech was found in the extreme northeast corner of the West Forks lot. There are still a few smooth barked sawtimber-sized trees with large, healthy crowns. Poor quality, merchantable beech stems will be harvested to release sugar maple, yellow birch and white ash seedlings and any nectria-free beech will be

left uncut. To facilitate growth of sugar maple, yellow birch and white ash, cut beech saplings 3' to 4' above the ground, in areas harvested using group selection.

Wildlife and Ecology: Date of visit by biologist: 10 November 2005.

Wildlife of all species was noted during compartment exam and there are also many excellent den trees on both lots. Browsing by deer and moose is extremely heavy on seedling-sized stems. Browsing is particularly fierce in old main skid trails where it is so heavy the seedling-sized sugar maple can barely reach three feet tall. Winter deer activity seems low, there are no cooperative or zoned deer wintering areas and the cover in general is rather poor, fragmented and generally are not conducive to winter deer use. There was only one heavily used game trail noted in either lot and it leads from an old summer road in Johnson Mountain to Little Wilson Hill Pond. There will be no activity around this trail. Where even rudimentary connectivity does exist between patches of softwood, minimize any disruption to possible deer use.

There are no MNAP sites within our database which fall on either the Johnson Mtn. or West Forks lots. Nothing uncommon was noted during compartment exam. Seven natural community types were noted during compartment exam: spruce/fir-cinnamon fern forest, spruce/fir-wood sorrel-feather moss forest, cedar/spruce seepage forest, spruce-heath barren, spruce/northern hardwoods forest, hardwood seepage forest and beech/birch/maple forest.

All stands in both Johnson Mountain and West Forks have large diameter late successional species but no entire stand scored higher than a "5" on the late successional index. Some of the sugar maple are old growth and also retain quality. Large diameter sugar maple are common throughout both lots as well as a very few yellow birch and some red spruce. One 19 inch red spruce however, was cored and found to be only 105 years old. An area of stand 6 has a higher basal area of large diameter trees than the rest of the stand and scored a "9" on the late successional index. There will be no harvesting in that part of the stand.

Land Use and Water: There are no outstanding or unusually limiting LURC zones within either lot. The majority of Johnson Mountain and West Forks is zoned M-GN and there are P-GP, P-SL2, P-WL2 and P-WL3 subdistricts.

Recreation and Visual: Recreation on the Johnson Mountain and West Forks lots is in the form of dispersed deer and partridge hunting in the fall, two bear baits and some fishing on Wilson Hill Pond. There are no visual areas of interest and no public use road.

Soils and Geology: Soils range from glacial tills to extremely rocky with ledge outcroppings on both lots. The West Forks lot also has a spruce-heath barren which is primarily peat with little to no soil. Noranda Exploration, Inc. had a mining claim on the Johnson Mountain lot in the mid-80s and had mapped the entire area for mineral exploration.

Engineering and Surveying: The lot contains approximately 2.7 miles of old summer road and 1.5 miles of old winter road. There is 400 feet of old summer road crossing Plum Creek from the Wilson Pond Road to the west line of the West Forks lot. Two gravel pits on the West Forks lot were noted during compartment exam. Any summer activity will require major maintenance of the roads. No new road construction will be required but rehabilitation of 2.1 miles each of summer and winter road and the installation of approximately 30 culverts are necessary for access to harvest timber. The portion of old summer road east of the stream crossing in West Forks will be opened as winter road because the abutments at the site of the old bridge crossing will need to be replaced for summer use. In addition to road construction, two temporary bridges each with a span of 20' will need to be built on existing abutments. The abutments should be adequate for winter use.

The south line of the West Forks lot was brushed and blazed in the spring of 1989 but the other lines of both lots are in poor condition and in some places have blown down so as to be nearly

indistinguishable. The internal line between the lots is in poor condition, too. Seven of the eight corners should be replaced. The exception is the southwest corner of the West Forks lot which is rebar capped with plastic. The northwest corner of the West Forks lot and the common corner to the southeast of Johnson Mountain are extremely old and were covered with grass. Only stones were marking the corners.

Income Summary

Product	Volume	Price/ton or MBF	Total
Spruce/fir logs	325 MBF	$155/MBF	$50,375
Spruce/fir pulp	1262 tons	$8/ton	$10,096
White pine logs	8 MBF	$150/MBF	$1200
Cedar shingle	84 tons	$10/ton	$840
Sugar maple logs	63 MBF	$250/MBF	$15,750
Yellow birch logs	7 MBF	$175/MBF	$1225
Red maple logs	36 MBF	$100/MBF	$3600
Paper birch logs	2 MBF	$150/MBF	$300
Hardwood pulp	4063 tons	$6/ton	$24,378
Total	----------	------	**$107,764**

Total volume is 3151 cord equivalent.

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
1-M3C	34	34	100/90

Species: YB-40%; CE-25%; RM-15%; BF-10%; RS-5%; SM,PB-<5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate

Species: SM,BF,YB,RS
Height: 2'-15'

Site Quality: II-80%, III-20%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: Despite being "C" density, the entire stand was not treated during the last entry resulting in pockets of high-risk fir, red maple and paper birch. Much of the paper birch has since died. The remainder of the stand contains healthy yellow birch, sugar maple and spruce except for a small pocket in the northeast part of the stand where the entire overstory is in poor condition. Though sugar maple is not a major component of the stand there are small areas where it dominates the overstory and is regenerating. Cedar is a common component occurring in the southern part of the stand. It occurs both in patches and individually and is generally healthy with a few high risk stems. Regeneration of all species is plentiful and this is one of the few stands in either West Forks or Johnson Mountain that is not choked with seedling and sapling beech. There is an intermittent brook with a broad valley running through the stand and a wet softwood inclusion in the northwest part of the stand. Most of the ground in the stand is good summer ground but wet ground lies both to the west and south making access winter only.

B. Management Objective and Prescription: Multi-aged. Manage for the production of yellow birch, red spruce, sugar maple and cedar sawlogs. Harvest high risk stems using single tree selection on a cutting cycle of 20 years. Marked wood.

C. Residual Stand

Type: M3C

Species: YB,CE,RM,RS,SM

BA: 70/60 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
2-S2B	61	61	140/140

Species: RS-85%; WP,BF,PB,CE-<5%

A. Featured Stand

Age: 120+

Regeneration: Adequate

Species: BF,RS,YB,PB,RM,WP
Height: 1'-10'

Site Quality: II-10%, III-70%, IV-20%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: Terrain in this stand varies from rolling, ledgy knolls to forested wetland. The last harvest utilized handcrews to remove high-risk spruce and fir. The stand is quite patchy in nature now, particularly on the ledgy knolls, with dense clumps of healthy spruce over smaller suppressed stems of spruce and a few fir. There is more densely forested inclusion wrapping from the southwestern to the southeastern rim of Little Wilson Hill Pond where white pine is interspersed with spruce. A major game trail leads from the road to the south through this inclusion and to the pond. There is a second inclusion in the southwestern finger of the stand which borders on non-commercial land and is loosely forested with high-risk spruce with thinning crowns. Regeneration in the stand is good except beneath the densest clumps of spruce and is bordering on inadequate in a portion of the southwestern finger.

B. Management Objective and Prescription: Multi-aged management for the production of spruce and white pine sawlogs using a rotation age of 140 years. This entry is designed to treat those patches of the stand which contain the rolling knolls of the denser spruce and any high-risk patches, as the 2nd stage of a 3-stage shelterwood. Perform an overstory removal in the inclusion in the southwestern finger of the stand. No activity is prescribed for the southeastern rim where the game trail passes through dense softwood as it was the only major game trail noted during compartment exam. Marked wood.

C. Residual Stand

Type: S3C

Species: Unchanged

BA: 110/110 Total/5"+

Remarks: The rotation age for this stand is extended for this treatment in order to encourage establishment of regeneration and further growth of existing regeneration.

D. Next Activities

Year	Type
2026	Overstory removal

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
3-H3B	234	234	100/90
21-H3B	45	45	120/90

Species: Stand #3 SM-40%; BE-30%; RS,RM-10%; YB-5%; BF,BA-<5%
Stand #21 SM-50%; BE-20%; RS,YB-10%; RM-5%; BF,HE-<5%

A. Featured Stands

Age: All-aged

Regeneration: Adequate

Species: BE,SM,YB,RM,RS
Height: 2'-20'

Site Quality: II-85%; III-15%

Operability: Non-spring

Remarks/ Stand History/ Non-timber concerns: Both stands are dominated by healthy sugar maple and have a mid-stratum of small pole-sized beech which is dying. Beneath the mid-stratum the regeneration is primarily sapling-sized beech with striped maple a problem in some areas. Seedling regeneration is also dominated by beech but contains a good component of sugar maple and yellow birch. The previous harvest by the Bureau was an improvement cut targeting red maple and poor quality beech. Both retain a strong presence in the stand. There are many large, old sugar maple in stand #3 and it rated a "5" on the late successional index. One sugar maple was over 200 years old and clearly represents an old growth component. Spruce is a minority of the species in the stands but sawtimber-sized individuals are found as well as pockets of pole-sized trees and seedling regeneration. The southeast side of stand 21 contains a series of wet runs and also two vernal pools.

B. Management Objective and Prescription: Multi-aged for the production of sugar maple, yellow birch and spruce sawlogs and beech mast. Harvest using single-tree and group selection. In stand #3, create 32 groups one half acre in size and cut all sapling-sized beech, hornbeam and striped maple within the groups 3'-4' above the ground to reduce sprouting. Cut smaller beech, hornbeam and striped maple lower. Create 6 one half acre groups in stand #21. Between the groups and in areas where beech competition is not an issue, use single-tree selection to release existing regeneration, the crowns of crop trees and also harvest high risk stems. Retain all but the worst spruce and yellow birch. Retain the old growth component and its important characteristics, in proportion to its current representation in the stand. Use a cutting cycle of 20 years. Marked wood in areas harvested using single tree selection and designation for group selection.

C. Residual Stand

Type: H3C

Species: SM,BE,YB,RM,RS

BA: St. #3 - 70/60, St. #21 – 90/60 Total/5"+

Remarks: The number of groups is based on having 20% of the operated area in groups. A slight deviation in the number of groups is acceptable.

D. Next Activities

Year	Type
2026	Selection and group selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
4-S3A	24	24	160/150

Species: RS-65%; WP-15%; BF,YB,RM-5%; CE,PB-<5%

A. Featured Stand

Age: 90+

Regeneration: Adequate

Species: BF,RS,YB,RM,RM,WP
Height: 1'-3'

Site Quality: III-100%

Operability: Dry summer or winter

Remarks/ Stand History/ Non-timber concerns: The southern half of this stand was thinned during the Bureau's last entry to remove high-risk fir and spruce. Basal area is lower where activity occurred. The northern half of the stand contains spruce, some high-risk fir and an occasional white pine and hardwood. Regeneration is good except in the denser areas and a few seedling red maple, yellow birch and white pine are establishing with the spruce and fir. Deer use is dispersed within the stand but moose browsing of the fir regeneration is occurring in the less dense southern half of the stand with the result of releasing spruce regeneration.

B. Management Objective and Prescription: Single-aged management for the production of spruce sawlogs using a rotation age of 120 years. Perform a thinning from below and remove high-risk spruce and fir in the northern half of the stand. Retain some hardwood shading where it is appropriate to reduce hardwood seedling establishment and growth. Harvest only those trees in the southern half of the stand which are high-risk. Marked wood.

C. Residual Stand

Type: S3B

Species: RS,WP,YB,RM,CE,BF

BA: 120/110 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Shelterwood harvest

T.C.

Here are the missing pages for J.M./W.F.

Eric

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
5-S3B	71	71	130/120

Species: RS-60%; BF-25%; YB-5%; SM,RM,PB-<5%

A. Featured Stand

Age: 75

Regeneration: Adequate

Species: RS,BF,WP,PB,YB
Height: 1'-6'

Site Quality: III-100%

Operability: Dry summer or winter

Remarks/ Stand History/ Non-timber concerns: This is a softwood stand with a 6 acre hardwood inclusion. The current condition of much of the stand is very good as both the spruce and fir are young and vigorous. Fir is in surprisingly good condition and in the south central portion of the stand where it occurs more abundantly and in three distinct age classes: 75, 60 and 45 years old. Rot is slight, even in the 75 year old fir, but height of the oldest age class and possibly the middle age class may present a risk of blowdown. The previous operation removed high-risk spruce and fir and left the stand in an exceptionally patchy condition making identification of contiguous areas impossible. Some areas have more than 200 square feet of basal area and others have 40 square feet. The northeastern corner of the stand is the sparsest and health of the overstory spruce is poor. Regeneration in all but the denser areas is abundant and moose browsing has given the spruce an advantage. The hardwood inclusion is populated primarily be sugar maple and spruce with red maple being the next most common species. Hardwood quality seems poor though health is adequate. Regeneration is primarily yellow birch, red maple and spruce. There may be a raptor nest on the edge of the hardwood inclusion.

B. Management Objective and Prescription: Single-aged management for the production of spruce sawlogs using a rotation age of 120 years. Thin the denser softwood patches from below to remove suppressed stems. Where previous harvesting left a lower basal area and health of the overstory is good, remove only high-risk trees. Retain the two youngest age classes of fir where wind firmness is not an issue. Perform an overstory removal in the northeastern corner. Management in the inclusion will focus on the production of spruce and yellow birch sawlogs using multi-aged management on a 20 year cutting cycle. Harvesting in the inclusion will be an improvement cut to remove primarily red maple and high-risk stems. Retain all but the worst spruce and yellow birch. Marked wood.

C. Residual Stand

Type: S3C

Species: RS,BF,YB,SM,RM

BA: 100/90 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Crown thinning

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
6-H3B	45	41	90/90

Species: YB,RM-30%; RS-20%; SM-15%; BF-5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate

Species: BE,SM,YB,RS,RM
Height: 1'-15'

Site Quality: II-70%, III-30%

Operability: Non-spring

Remarks/ Stand History/ Non-timber concerns: Softwood is a greater component to the central portion of this stand while sugar maple dominates the east and west sides. The previous harvest covered the entire stand and removed high-risk and poor quality spruce, fir, sugar maple and beech. The central part of the stand is a dry, rocky knoll sloping sharply west into more poorly drained soils with red maple, spruce and yellow birch dominating the overstory. The slope eastward is gentler and contains an inclusion of large, old sugar maple with a crown closure closer to "A" density than the "B" found in the stand as a whole. The sugar maple are quite numerous and represent an old growth component not found to the same degree in other stands in either West Forks or Johnson Mountain. The inclusion rated an "8" on the late successional index without including a lichen score and a "9" on the index with a lichen score. An old skid trail runs east to west through the inclusion. The western side of the stand is similar to the eastern but with fewer large, old trees and much more obvious evidence of logging. Sugar maple quality is an issue throughout the stand as many of the trees are decadent and quality is declining. Red maple is in a similar state and to a lesser degree, yellow birch as well. Regeneration is good throughout the stand and while beech is dominant it does not create a second stratum like it does elsewhere in the compartment. Regeneration in the central portion of the stand is primarily spruce and fir.

B. Management Objective and Prescription: Multi-aged for the production of sugar maple, yellow birch and spruce sawlogs using a cutting cycle of 20 years. Harvest high-risk and poor quality trees using single-tree and group selection. Create 4 groups one half acre in size and cut all sapling-sized beech, hornbeam and striped maple within the groups 3'-4' above the ground to reduce sprouting. Cut smaller beech, hornbeam and striped maple lower. Set aside a retention patch in the inclusion on the eastern side of the stand. The retention patch will be approximately 4 acres in size and the old skid trail may be used to access the rest of the stand though no harvesting will occur within the inclusion other than what is necessary along the trail, leaving the forest canopy largely undisturbed. Marked wood in areas harvested using single tree selection and designation for group selection.

C. Residual Stand

Type: H3C

Species: YB,RS,SM,RM,BF

BA: 60/60 Total/5"+

Remarks: The number of groups is based on having 20% of the operated area in groups. A slight deviation in the number of groups is acceptable.

D. Next Activities

Year	Type
2026	Selection and group selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
7-M3C	20	20	80/70

Species: YB-40%; RS-30%; BF,SM,RM-10%

A. Featured Stand

Age: 100+

Regeneration: Adequate

Species: YB,SM,BE,RM,BF
Height: 3'-15'

Site Quality: II-30%, III-60%, IV-10%

Operability: Summer or winter

Remarks/ Stand History/ Non-timber concerns: This stand was typed as softwood for the previous prescription and the last entry was intended to remove primarily high-risk fir. There must have been a lot here. Aside from a pocket of high-risk fir and a few hardwood in the southwest corner, stand health is generally good. The site is generally dry, ledgy ground and seems well suited to spruce and yellow birch. There is a small cliff running north/south just east of the stream flowing from Little Wilson Hill Pond. A small brook flows between the cliff and the stream for a few chains before entering the stream just north of the town line. Regeneration is excellent throughout the stand and while seedling-sized spruce is less than common there are a few small pole sized trees. While it acts to train young hardwood, the presence of striped maple is, and will remain, a problem for the foreseeable future.

B. Management Objective and Prescription: Multi-aged management for the production of spruce, sugar maple and yellow birch sawlogs using a cutting cycle of 20 years. Harvest high-risk stems of all species using single-tree selection. Marked wood.

C. Residual Stand

Species: YB,RS,SM,RM,BF

Type: M3C

BA: 60/50 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
8-M3B	38	38	140/130

Species: RS-40%; YB-25%; RM-15%; BF-10%; WP,HE,BE-<5%

A. Featured Stand

Age: 100+

Regeneration: Adequate

Species: RS,BF,BE,YB,SM
Height: 1'-10'

Site Quality: III-100%

Operability: Summer or winter

Remarks/ Stand History/ Non-timber concerns: The topography of the stand is rolling with softwood occurring on knolls and softwood and poor quality hardwood on the lower areas in between. Spruce quality is good with fir appearing throughout the area individually and in small patches. During the previous handcrew harvest, many small diameter, suppressed softwood stems were never cut. Hardwood quality is poor as a whole and there is an inclusion in the south central part of the stand where red maple is competing with healthy yellow birch and small pole spruce. Regeneration is good throughout the stand but striped maple is a problem particularly in the hardwood inclusion.

B. Management Objective and Prescription: Multi-aged for the production of spruce sawlogs using a rotation age of 120 years. Perform a thinning from below in the denser softwood areas and harvest poor quality and high-risk stems in the hardwood inclusion with a focus on red maple. Treatment in the softwood areas will be a 3-stage shelterwood but activity in the inclusion will be a selection harvest removing poor quality stems overtopping yellow birch and spruce. Marked wood.

C. Residual Stand

Type: M3C

Species: RS,YB,RM,WP,HE

BA: 100/90 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	2nd stage of a 3-stage shelterwood

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
9-M2C	8	0	60/60

Species: CE,RM-35%; BS,BA-15%

A. Featured Stand

Age: All-aged

Regeneration: Inadequate

Species: BA,CE,BF,BS
Height: 1'-4'

Site Quality: IV-100%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: This stand occupies a bowl and is the headwater of a small brook which flows out of the east end of the stand then southward. The site is saturated and growth on all species is stunted and the trees are of very poor quality. Hardwood and softwood snags are common and many appear to be wildlife trees for small bird species.

B. Management Objective and Prescription: No activity

C. Residual Stand

Type:

Species:

BA: Total/5"+

Remarks:

D. Next Activities

Year	Type

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
10-M3B	54	54	120/110
13-M3B	95	95	120/110
20-M3B	32	32	130/120

Species: Stand #10 RS-50%; SM-35%; BF,CE,RM,BE-<5%
Stand #13 RS-40%; SM-25%; BF-15%; YB,PB-5%; WP,HE,BE-<5%
Stand #20 RS-25%; YB-20%; BF-15%; CE,SM-10%; WP,HE,RM,BE-5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate Species: BF,RS,BE,YB,RM
Height: 1'-20'

Site Quality: II-55%, III-40%, IV-5%

Operability: Operability varies throughout all three stands.

Remarks/ Stand History/ Non-timber concerns: All three of these stands are extremely variable in terms of site and uniformity of cover type. The majority of all three are purely mixedwood but there are also numerous inclusions of both pure softwood and pure hardwood. The last entry into these stands was intended to remove high-risk fir and spruce, thin spruce and harvest poor quality beech and other hardwood. Treatments were single-tree selection and patch cuts. Ages range from seedling/sapling of all species to a sugar maple and yellow birch old growth component. There is a lot of 70-80 year old spruce and fir in small softwood inclusions in stand #13 which were not entered during the last harvest. There is also a small, pure fir inclusion which is about 50 years old at the southern end of stand #20 in the riparian area along the eastern side of Tomhegan Stream. Spruce quality is good but there are many high-risk fir which were missed during the last harvest and some which have become high-risk in the 20 years since. Hardwood quality is also good with the exception of beech, many of the red maple and the old growth component. Regeneration is excellent in all but the tightest softwood inclusions and stand #13 has a lot of pole sized spruce. In areas tending more greatly toward hardwood, sapling-sized beech is shading sugar maple and yellow birch seedlings.

B. Management Objective and Prescription: Multi-aged for the production of spruce, pine sugar maple and yellow birch sawlogs using a cutting cycle of 20 years. Single-aged management will be more appropriate in some of the softwood inclusions using a rotation age of 120 years for spruce and 80 years for fir. Where multi-aged management occurs, harvest high risk stems of all species using single-tree and group selection where appropriate. Perform a crown thinning in the 70-80 year old spruce/fir inclusions. In an attempt to mimic natural disturbance, make ½ tree-height groups in the fir inclusion along Tomhegan Stream in stand #20. Perform overstory removal on wetter sites where windfirmness is questionable. Marked wood and designation.

C. Residual Stand

Type: M3C Species: RS,SM,YB,CE,WP

BA: St. #10&13 - 90/80, St.#20 – 100/90 Total/5"+

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
11-S2B	11	11	150/150
16-S2B	15	15	150/150

Species: Stand #11 RS-95%; CE-5%
Stand #16 RS-75%; CE-25%

A. Featured Stand

Age: 100

Regeneration: See below

Species: BF,RS,RM,YB,BA,CE
Height: 1'-20'

Site Quality: III-75%, IV-25%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: Both of these sites are dry, rocky uplands sloping into cedar swamps. The spruce is generally large pole with some small sawtimber size trees. Some parts of both stands were harvested during the mid-80s though many areas remained uncut presumably because the trees were of to small a diameter to cut with handcrews. What remains of the spruce is healthy with many suppressed stems. Areas which were harvested show very good crop tree growth and regeneration is excellent. Regeneration in the unharvested areas is low to nonexistent. In the wet areas of both stands, cedar is of very poor quality and crowns are quite thin. Basal area is on par with the stand average but seems much more open. Fir regeneration is heavily browsed by moose but both moose and deer activity is very light outside regenerated areas in either stand.

B. Management Objective and Prescription: Multi-aged for the production of spruce sawlogs using an extended rotation age of 140 years. As the first of a 3-stage shelterwood system, harvest the areas untreated during the last entry. In areas where activity occurred before, harvest high-risk stems. Marked wood.

C. Residual Stand

Type: S3C

Species: RS,CE

BA: 120/120 Total/5"+

Remarks: The extended rotation is intended for this rotation only.

D. Next Activities

Year	Type
2026	2nd stage of a 3-stage shelterwood

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
12-S3B	24	24	140/140

Species: RS-90%; BF-10%

A. Featured Stand

Age: See below

Regeneration: Adequate

Species: RS,BF,YB,PB
Height: 2'-12'

Site Quality: III-100%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: This stand lies on the western most boundary of the West Forks lot and contains spruce in two distinct age classes: 55 and 100. The half of the stand south of the road is on an exposed, rocky, west facing slope and the north half gradually flattens. The western boundary line is difficult to distinguish due to heavy cutting on adjacent ownership and blow down has occurred where the stand was harvested more heavily in the past. Health of the overstory is good though many smaller spruce and fir are suppressed. Regeneration is good in all except the denser areas of the stand. Deer use is minimal due to a lack of connectivity with other stands

B. Management Objective and Prescription: Single-aged for the production of spruce sawlogs using an extended rotation age of 140 years. Treat this stand with a thinning from below to remove suppressed stems and also harvest high-risk stems from the overstory. The harvest should be light in order to avoid compromising wind firmness. Marked wood.

C. Residual Stand

Species: RS,BF

Type: S3B

BA: 110/110 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	First stage of a 2-stage shelterwood

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
14-S3B	35	18	180/160

Species: RS-70%; BS-20%; BF,CE-5%

A. Featured Stand

Age: See below

Regeneration: Inadequate

Species: RS/BS,BF
Height: Inches

Site Quality: III-10%, IV-30%, NC-60%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: Better than half of this stand is bog with an overstory of very thin, wispy, decadent black spruce. The basal areas given above are for the commercially forested acres. The remainder of the stand is both flat class IV ground and dry, ledgy class III. Health of the overstory within the commercial area is good though growth is slow. Most of the red spruce in the stand is 100+ years old but one side of the stand has a vigorous 65 year old age class. Evidence of release in the older trees and the age of the younger trees indicate a disturbance in the 1930s. There are many smaller suppressed stems in the portion of the stand with the old age class of spruce. Regeneration is poor due to site and density of the stand.

B. Management Objective and Prescription: Single-aged for the production of spruce sawlogs using a rotation age of 120 years. As the 1st stage of a 2-stage shelterwood system, harvest high-risk and suppressed trees in the denser, older areas of the stand. Salvage any black spruce in the non-commercial area which can be reached without compromising the integrity of the bog. Perform a crown thinning on the side of the stand with the 65 year old age class. Marked wood.

C. Residual Stand

Species: RS,BS,CE,BF

Type: S3B

BA: 150/130 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	2nd stage of a 2-stage shelterwood

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
15-M3B	58	58	110/110
22-M3B	61	61	120/110

Species: Stand #15 RS-45%; RM-30%; BF-10%; BE-5%; WP,CE,YB-<5%
Stand #22 RS-55%; YB-15%; BE-10%; BF,SM,RM,PB-5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate

Species: BE,RS,YB,BF,SM
Height: 2'-12'

Site Quality: II-15%, III-75%, IV-10%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: Both stands are similar not only in terms of composition but in terms of topography. Each has low ground supporting primarily softwood surrounding or adjacent to a wetland or water body then transitioning upslope along rocky, rolling knolls to hardwood. A great deal of variability within each stand was noted but the difference between these stands and stands 10, 13 and 20 is the poorer site quality here. Both stands are more suited to softwood though stand 22 will likely always have a strong red maple/beech component in the uplands. The previous harvest removed high-risk fir and low quality beech using a combination of selection harvesting and patch cuts. Spruce health and quality are good though a great deal of damage from the previous harvest was noted in stand 22. Beech quality is still poor overall but red maple is reasonably good. A few sugar maple are present in the stands but quality is poor. Regeneration is adequate except for sapling-sized beech overtopping seedling-sized stems of more favorable species in those areas where a greater degree of hardwood occurs. There is a small wetland north of the road in stand 22 along the line shared with stand 21, with a few small elm along the edge. The southern part of this stand contains a series of wet runs and several orchids were found during compartment exam.

B. Management Objective and Prescription: Multi-aged management for the production of spruce, yellow birch and red maple sawlogs using a cutting cycle of 20 years. Manage to increase the softwood component in stand 15 and to retain beech in the uplands of stand 22 for mast production. Perform a selection harvest removing high-risk and poor quality stems. Retain elm for its uniqueness. Marked wood.

C. Residual Stand

Type: M3C

Species: RS,YB,RM,BE,BF

BA: Stand #15-80/80, stand #22-100/90 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
17-M3C	61	61	110/90

Species: RS-30%; SM,BE-20%; BF,YB-10%; RM,CE-5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate

Species: BE,RM,BF,SM,YB
Height: 1'-20'

Site Quality: II-55%, III-35%, IV-10%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: The terrain in this stand is flat except for the eastern and southeastern edges where it tips in those directions respectively. Cover type variability is another theme this stand has in common with the rest of the compartment though here both hardwood and softwood occur more exclusively to one another. There is a pocket of spruce and high-risk fir in the northwest corner of the stand and a brook valley of spruce and poor quality cedar at the base of a bank on the eastern side of the stand. Spruce health is generally good but both fir and cedar are questionable. A small, meandering brook flows from Johnson Mountain south through the western portion of the stand along a broad area of ground slightly lower than that surrounding it. Other than a lot of alder, the forested composition of the brook valley is similar to the stand but quality is extremely poor. The overstory throughout the rest of the stand is comprised of large, overmature sugar maple and very poor quality beech. Sapling-sized beech creates a mid-stratum over seedling sized sugar maple, red maple and yellow birch. Old main skid trails are acting as linear groups but sugar maple regeneration in them is being browsed so heavily and growth is slow enough that it cannot grow beyond three feet tall.

B. Management Objective and Prescription: Multi-aged management for the production of spruce, sugar maple, red maple and yellow birch sawlogs using a cutting cycle of 20 years. Harvest using single-tree and group selection. Create 8 groups one half acre in size and cut all sapling-sized beech, hornbeam and striped maple within the groups 3'-4' above the ground to reduce sprouting. Cut smaller beech, hornbeam and striped maple lower. Retain all but the worst yellow birch. Harvest high risk trees of all species using single-tree selection in the softwood pockets. Marked wood.

C. Residual Stand

Species: RS,SM,YM,RM,BE

Type: M3C

BA: 80/60 Total/5"+

Remarks: The number of groups is based on having 20% of the operated area in groups. A slight deviation in the number of groups is acceptable.

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
18-S3A	22	21	140/140

Species: RS-80%; BF,WP,CE,YB-5%

A. Featured Stand

Age: 100+

Regeneration: Inadequate

Species: RS,BF,CE,WP,YB
Height: Inches

Site Quality: III-70%, IV-30%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: The northwestern third of this stand lies in a bowl and has small brook flowing northeast and into Tomhegan Stream. The overstory is comprised of slow growing cedar and spruce and actually appears quite open despite the "A" density of the stand as a whole. Alder occurs in patches throughout this area. To the east and southeast of the brook the land slopes sharply up, southeast, through an unregulated area (steep) and onto rolling, ledgy ground. Small sawtimber spruce with a few fir, pine and yellow birch make up the overstory with little regeneration beneath. Many stems are suppressed. The basal area in the portion of the stand southeast of the unregulated area is approximately 170 square feet. Deer use is minimal in this stand.

B. Management Objective and Prescription: Single-aged for the production of spruce and pine sawlogs using a rotation age of 120 for spruce and pine. Due to the issue of wind firmness, this entry will be the first stage of a two-stage shelterwood. Harvest suppressed and high-risk stems. Marked wood.

C. Residual Stand

Type: S3B

Species: RS,WP,CE,YB,BF

BA: 100/100 Total/5"+

Remarks: Reduce the basal area in the portion of the stand southeast of the unregulated area no more than 40 square feet.

D. Next Activities

Year	Type
2026	Establishment entry of a two-stage shelterwood

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
19-H3A	9	9	110/110

Species: SM-70%; YB-15%; RM-10%; RS-5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate

Species: SM,YB,HH,BE,RM
Height: 1'-10'

Site Quality: II-100%

Operability: Non-spring

Remarks/ Stand History/ Non-timber concerns: This is the nicest stand of hardwood in the West Forks/Johnson Mountain ownership. The site is certainly a high class II and may be close to a I. Quality is an issue with some trees but many have excellent form. All species are healthy and the site is regenerating well without a lot of beech or hornbeam competition. There are small sawtimber and pole-sized sugar maple, yellow birch and red spruce. Part of this stand was lightly harvested during the Bureau's last entry. Browsing by deer and moose is evident but not overwhelming.

B. Management Objective and Prescription: Multi-aged for the production of sugar maple, yellow birch and spruce sawlogs using a cutting cycle of 20 years. Selection harvest of high-risk and poor quality trees. Marked wood.

C. Residual Stand

Type: H3B

Species: Same as above

BA: 80/80 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
23-S3B	19	19	140/140

Species: RS-75%; BF,WP,CE-5%; HE,RM,PB-<5%

A. Featured Stand

Age: All-aged

Regeneration: Inadequate

Species: BF,YB,BE,SM,WP
Height: 6"-2'

Site Quality: III-95%, IV-5%

Operability: Winter

Remarks/ Stand History/ Non-timber concerns: This stand is a ring primarily of softwood around Wilson Hill Pond and nearly the entire stand is within 5 chains of it. Most of the timber around the stand is spruce but there are areas where fir occurs as the sole species. Hardwoods are mixed in with softwood which effectively compromises the quality of the edge of the entire pond as a travel corridor. Health of the stand is good but the fir is older and between 35' and 50' tall making it a risk for wind throw before the next entry. There are many pole-sized stems throughout the stand but regeneration is generally poor.

B. Management Objective and Prescription: Multi-aged for the production of spruce sawlogs using a cutting cycle of 20 years. Perform a light harvest of high-risk and poor quality trees of all species except the fir patches which will be harvested in 10^{th} acre groups. Retain all hemlock, cedar and white pine. Marked wood.

C. Residual Stand

Type: S3B

Species: RS,WP,CE,BF,HE

BA: 110/110 Total/5"+

Remarks:

D. Next Activities

Year	Type
2026	Selection harvest

STAND PRESCRIPTION AND MANAGEMENT RECOMMENDATIONS

Stand	Total acres	Treated acres	BA Total/5"+
24-H3C	83	83	80/60

Species: SM-35%; YB,BE-15%; RS-10%; HH-10%; WA,BF,PB,RM,HE-<5%

A. Featured Stand

Age: All-aged

Regeneration: Adequate

Species: BE,SM,HH,WA,RM,YB
Height: 3'-20'

Site Quality: II-70%, III-25%, IV-5%

Operability: Non-spring

Remarks/ Stand History/ Non-timber concerns: Parts of this stand were cut rather heavily during the harvest in the mid-80s to remove low quality beech, hemlock and mature and overmature hardwood. Basal area ranges from 20 square feet in some areas to 100 square feet in others. Health of all species but the beech and a few red maple is good and there is a small area in the northeast corner which has more healthy, full crowned beech than appear anywhere else on either lot. Quality of the few spruce is good and hardwood quality is generally good with a few exceptions. Spruce is primarily confined to the western half of the stand which is also where the bulk of the yellow birch are found. Despite its low appearance in the hierarchy of the species list, white ash is a surprisingly common seedling-sized component of the regeneration. Both sapling beech and hop hornbeam dominate the regeneration where harvesting was light and are suppressing seedling sugar maple, white ash and yellow birch. Three large bigtooth aspen are growing along an old road in the northeastern corner of the stand near a gargantuan, hollow sugar maple and there are several sapling and small pole-sized elm in a wet area between the road and the power line.

B. Management Objective and Prescription: Manage on a multi-aged cycle of 20 years for the production of sugar maple, yellow birch and white ash sawlogs using single-tree and group selection. Target areas of the stand where quality and health are poor. Release any spruce regeneration to maintain its component in the stand. Encourage further beech regeneration in the northeast part of the stand where it is healthiest but cut beech and hop hornbeam saplings elsewhere in the stand where group selection is used and beech quality is poor. Create a small grouse patch immediately adjacent to the bigtooth aspen. Retain elm for its uniqueness. Marked wood.

C. Residual Stand

Type: H3C

Species: SM,YB,BE,RS,WA

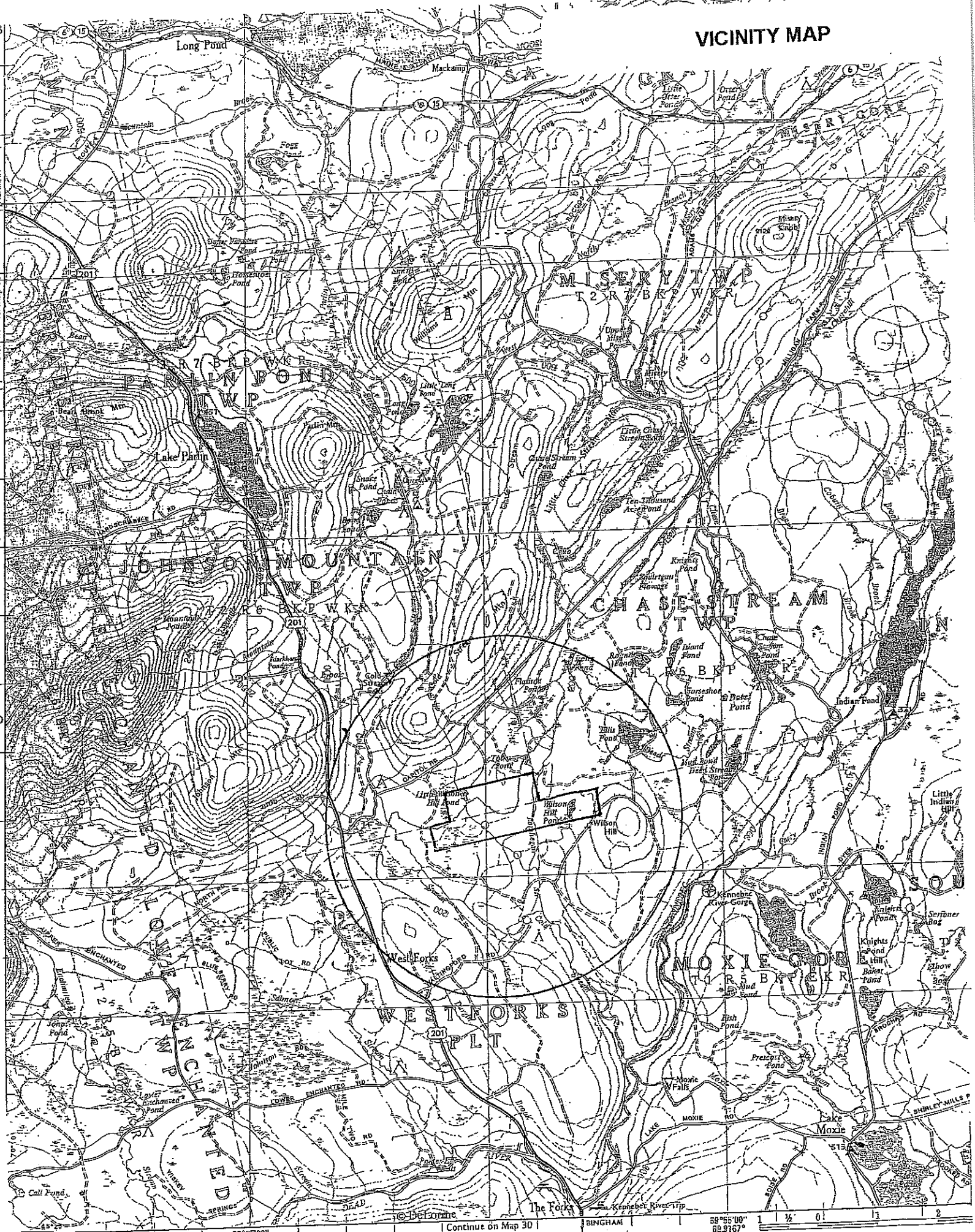
BA: 60/40 Total/5"+

Remarks:

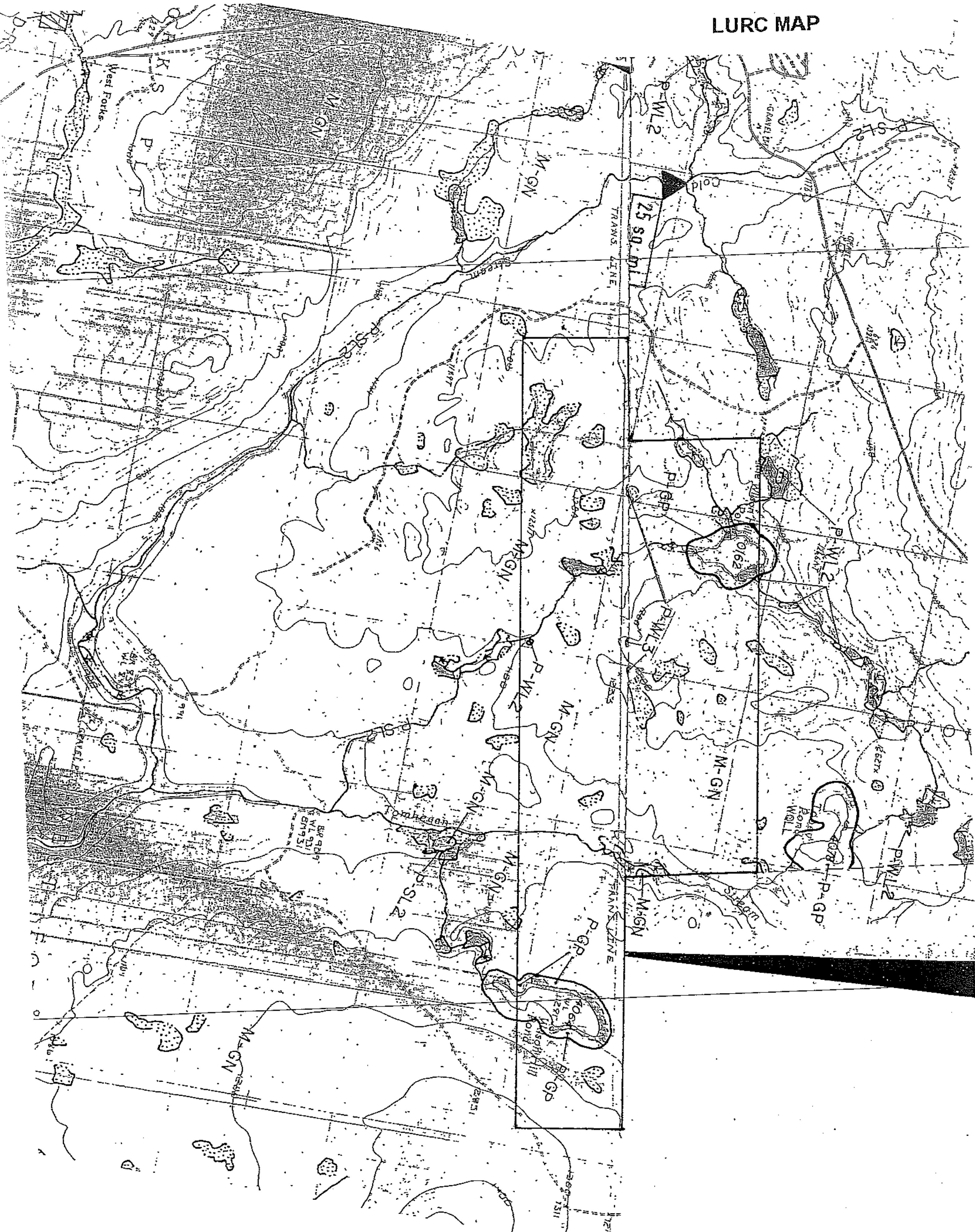
D. Next Activities

Year	Type
2026	Selection/group selection harvest

VICINITY MAP



LURC MAP


West Forks
P-WL2
M-GN
TRANS. LINE
25 SQ. MI.
P-SL2
P-GP
P-WL3
Tomhegan
P-GR
Stream

Johnson Mountain (W324) and West Forks Plantation (W328) Public Lots
Stand Type and Harvest Map

A283

Declination 18.5 W

0 20 40
Chains

Capital Road

Johnson Mountain

Tobey Pond

Little Wilson Hill Pond

Wilson Pond Road

Wilson Hill Pond

Tomhegan Stream

West Forks Plantation

1-M3C 34ac
2-S2B 61ac
3-H3B 234ac
4-S3A 24ac
5-S3B 71ac
6-H3B 45ac
7-M3C 20ac
8-M3B 38ac
9-M2C 8ac
10-M3B 54ac
11-S2B 11ac
12-S3B 24ac
13-M3B 95ac
14-S3B 35ac
15-M3B 58ac
16-S2B 15ac
17-M3C 61ac
18-S3A 22ac
19-H3A 9ac
20-M3B 32ac
21-H3B 45ac
22-M3B 61ac
23-S3B 19ac
24-H3C 83ac

Stand Type

S - >66% Softwood
M - 33% to 66% Soft.
H - <33% Softwood
P - >66% Pine
A - >66% Aspen
O - >66% Oak
C - >66% Cedar
F - >66% intolerant hardwood of fire origin (e.g. aspen, birch, red maple)

Crown Closure

A - 85% to 100%
B - 67% to 84%
C - 33% to 66%
D - <33%

Timber Size Class

1 - Seedling/sapling stands
2 - Pole stands
3 - Sawtimber stands
For sawtimber- SW >= 10" DBH
HW >= 12" DBH
BA > 50%

Ex: Stand #1, 48.1 acres, H2B timbertype =
1 - 48.1ac
H2B

Legend

- Intermittent stream
- Stream
- Snowmobile trail
- Old road or trail
- Winter road to reopen
- Surfaced summer road
- Surfaced summer road to reopen
- Major gravel road
- Utility line

- Stand type boundary
- Lands boundary
- Gravel pit
- Wetland
- Pond <10 acres
- Great pond
- Unregulated area
- Selection harvest
- Overstory removal

G:\Workspace\Kenn\WForks_JohnsonMtn\WForksJohnsonMtn_typehar.wor

— Call Ken Freye — CMP corridor — 621-4753

Input by Friday - Guidelines -

Ken Freye 8/14/14
— Project to increase capac. for wind plus Canadian Power.
— Cold Stream
— Disc w/ PC. - retaining area in Capital Rd.
— Need to cross Public lots
— Public lots
— Proposed centerline based on air photos, subj to change based on ground recon
— 300' wide
— Initial line - high voltage 170-200' wide
— add'l width for generator leads - wind
— Understory in corridor -
— vegetation - only mg species
cycle - 4 years. Capable species - capable of growing > 10-15'
— but open to discussion
— Only clear what is needed

- Value - calc fee value & pay up front for 25 yr lease.

template
- Send copy of sample lease
- He will send shape file
- Height of towers 85-100'
  Steel
  similar to Rte 17 crossing in Chelsea
  Could be one or 2 poles
- Existing line across bottom of West Forks — goes from Harris dam to Jackman
- Could consider collocating into new line

Jackman tie line 100' wide West boundary over to 201

- Spencer Rd — route over to Canada

- Timeframe — ASTP response to RFP in 4th Qtr. Oct-Dec] NESCO & State Committee

Nesco seeking proposals from Utilities

Like to have RTI or substantial agreement

N.H. Northern Pass project - stalled

CMP - potential utility corridor

see attached map

- review resource issues, if any
- put together memo, outlining options
- lease or conveyance
- do we have any pending deals or things we want from CMP

TPL Option - goes through Mar 15, 2015.

9/22/14 Ken Fry. - move to West. Bounce by CMP - Eliminate old 100' - Willing to Have appraisal.

TRANSMISSION LINE LEASE

BETWEEN

DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
DIVISION OF PARKS AND PUBLIC LANDS
And

This Lease Agreement is made by and between the State of Maine, by the Bureau~~Division~~ of Parks and ~~Public~~ Lands, Department of Agriculture, Conservation and Forestry, (hereinafter called the "Lessor") acting pursuant to the provisions of Title 12 MRSA §1852(4), and_____, **a company with its principal place of business at _____, (hereinafter called "Lessee").** For the considerations hereinafter set forth, the Lessor hereby leases to Lessee, and Lessee hereby takes from the Lessor, the non-exclusive use of a portion of the Johnson Mountain and West Forks Plantation North East~~_____~~Maine Public Reserved Lands in **Somerset ~~_____~~County, Maine**, which property is described in Exhibit "A" and shown on Exhibit "B" attached hereto and incorporated herein and being approximately a Three Hundred~~_____~~(300) foot wide by approximately Five Thousand Five Hundred ~~_____~~foot~~mile~~ long transmission line corridor located on a portion of the property. Which, together with the improvements now or hereafter to be placed thereon, is hereinafter referred to as the "Property or Premises", subject to the following terms and conditions:

Take

Comment [DAR1]: This is an estimate measured off an aerial, it should be verified.

1. Term:

a. This lease shall be in effect from the date of execution of this instrument for a term of twenty-five (25) years and at no less than 5 year intervals, the term of this lease may be extended by mutual agreement for additional years as will grant Lessee a remaining lease term totaling no more than twenty-five (25) years, so long as Lessee is in compliance with the conditions of this lease. Lessee shall not request lease term extension any more often than once every five years. Notice of any lease extension shall be given to Lessor at least six (6) months prior to the expiration of any initial term or renewal period.

asap.

b. Lessor reserves the right to terminate this Lease at any time during the term hereof ~~with cause, pursuant~~to the extent permitted under ~~to~~ the provisions contained in paragraph 15 Default.

c. Lessee has the right to terminate this Lease upon at least ninety (90) days prior written notice to Lessor, or such lesser notice period as agreed to by Lessor in writing.

d. Any notice required by this paragraph, whether by Lessee or Lessor, shall be sent postage pre-paid, registered or certified mail, return receipt requested, to the party at the address set forth herein.

30 - acres
30 - cord/acre / Price x cord = $45,000
1000 - Cords. $45/cord.

- Stumpage,
- Not clearing all 300'.

2. Rent. Lessee shall pay to the Lessor rental as follows:

A one time payment of ~~Thirty-five Thousand Dollars ($35,000)~~ ~~annual rent of _____ per year~~ due on the date of execution of this lease. Lessee may extend the lease for a five year period as provided in Item 1 (a), above by making a payment of ~~Seven Thousand Dollars ($7,000) and each year thereafter for the initial five years~~, at which time and each five years thereafter the Lessor may adjust the annual rental in an amount not to exceed the average increase in the Consumer Price Index as published by the Bureau of Labor Statistics, United States Department of Labor over the preceding five year period.

Comment [DAR2]: We are researching the rent and deciding on whether it should be a one time or an annual payment.

Trees/Timber CMP owns Timber Cut, contractor

3. Use. The Property shall be used by the Lessee as follows: to erect, construct, reconstruct, replace, remove, maintain, operate, repair, upgrade, and use poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity ("Facilities"), all as the Lessee, its successors and assigns, may from time to time require upon, along and across said Property; to enter upon the Property at any time with personnel and conveyances and all necessary tools and machinery to maintain the Premises and facilities; the non-exclusive right of ingress to and egress from the Premises over and across the land of others and of the Lessor ~~on East Stream Road _____ Road~~; to transmit electricity ~~and~~ communication over said wires, cables, or apparatus installed on Lessee's other facilities. Communication use and facilities shall only be for Lessee's own internal use. The Lessor further grants to said Lessee the right to establish any and all safety and reliability regulations applicable to said transmission line corridor which said Lessee deems necessary and proper for the safe and reliable construction and maintenance of said structures, wires, and apparatus and for the transmission of electricity.

Comment [DAR3]: Only for CMP communication use in connection with this utility line. Other Communication use and rights to lease are reserved by Lessor.

- Fiber optic
- Primarily Internal
- Reciprocal Fair Point.

4. Quiet Enjoyment. So long as Lessee pays the rent and performs all of its non-monetary obligations and otherwise complies with the provisions of this Lease, the Lessee's possession of the Premises for its intended use will not be disturbed by the Lessor, its successors and assigns except as otherwise provided under the terms of this Lease. Notwithstanding any provision to the contrary herein, Lessor reserves the right to enter onto the Premises at any time and from time to time to inspect the Premises.

5. Access:

a. It is agreed by the parties to this Lease that Lessor is under no obligation to construct or maintain access to the Premises, notwithstanding any provisions of any federal, state and local law to the contrary. ~~However, the Lessee shall be allowed to cross _____ Road for access to the Premises for construction, maintenance and repairs, subject to reasonable restrictions and regulations imposed by Lessor, and the rights of others using said road. Upon reasonable advance notice to Lessee, Lessor reserves the right to close, lock or otherwise restrict access along or through _____ Road at any time it appears reasonably necessary to protect the safety of persons or property. Such situations include, but are not limited to, spring mud season, or periods of high fire danger. Lessee shall immediately repair any damage to the road caused by Lessee. Lessor is under no obligation to provide maintenance to the road. If Lessee wishes to undertake performing~~

Comment [KHF4]: This section of corridor does not appear to be accessed by a road located on the Public Lot

- Firpoint use CMP Facility
- contract with Fair Point.

- Fiber inside Ground wire.
- 12 Pair ±
- Not Exclusive.

Roads
- General access with Plum Creek.
- Getting in detail from plum creek. access.

~~repairs or upgrades to the _____Road, Lessee must acquire prior written approval from Lessor.~~ Lessee shall ~~also~~ acquire prior written approval for the construction or use of any other access location across Lessor's land abutting the Premises~~.~~ which approval shall not be unreasonably withheld, delayed, or conditioned.

b. The Lessor expressly reserves the right for itself or its guests, servants or agents to pass and repass over the described Premises ~~and _____Road~~ at any and all times with machinery and equipment necessary for the operation or conduct of Lessor's uses as it may from time to time exist, provided that: said uses will comply with the above referenced safety regulations and any applicable state law, and will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies; that the Lessor shall provide Lessee with at least three~~3~~ business days prior written notice if Lessor will be on the Premises with construction or logging equipment; and that such use will not unreasonably interfere with the rights of Lessee herein conveyed.

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- Temporary Road in corridor
- MATTS,
- No fill Material
- more Substantial Portable Bridge.

Trees.

6. Lessee Covenants. The Lessee covenants as follows:

a. No buildings, either permanent or temporary, may be constructed or placed upon the described Premises, except temporary structures during construction of the Facilities, such as field trailers.

b. Crossing mats for stream or wetland crossings shall not be made of ash or hemlock, so as to avoid introduction of invasive pests associated with these species.

c. ~~Herbicides and pesticides shall not be used on the Premises.~~ No hazardous or toxic waste substance or material, ~~chemical defoliants,~~ residual pesticides or fertilizers, other than organic compost, shall be used or kept upon the Premises or any portion thereof, nor shall any livestock or poultry be kept temporarily or permanently thereon. Herbicides may only be applied after acquiring prior written approval from Lessor and shall only be applied by applicators licensed by the State of Maine in formulations and dosages approved by the Environmental Protection Agency and Lessor. One month– prior to all pesticide applications, Lessee shall provide information to Lessor, including, but not limited to pesticides to be used, dates and methods of application, application locations and reasons for use.

d. There shall be no vegetation removal that would result in less than 50% ~~areal~~aerial coverage of woody vegetation and stream shading within 25-feet of a stream.

e. There shall be no vegetation maintenance or disturbance within a 50-foot radius around the high water boundary of a significant vernal pool from March 15 – July 15; provided, however, that Lessee may take all appropriate actions with regards to vegetation management to ensure that Lessee is in compliance with all federal and state laws, rules and regulations imposed upon Lessee as the owner and operator of the Facilities.

f. Lessee shall not make any strip or waste of the Leased Premises or of any other lands of Lessor. Vegetation c~~C~~learing within the Leased Premises for Lessee's Facilities shall be limited to standards approved by the Maine Public Utilities

Commission and shall encourage a ground cover of woody species with a maximum mature height of less than 15 feet., ~~nor cut nor destroy any growth nor make any clearings except Lessee may cut vegetation using mechanical methods to meet the conductor safety zone requirements and for safety purposes. Lessee shall make every effort to minimize clearings and cutting of vegetation.~~

g. ~~Lessee shall make every reasonable effort to be in conformance with the "Recommended Best Practices for Utility Corridor Construction and Maintenance on Division of Parks and Public Lands at Cutler" document, dated January 2013, which a copy is attached to this lease.~~

h. Lessee agrees not to kindle any outside fires on the Premises or any other land of the Lessor, except in accordance with applicable federal, state and local regulations, and hereby agrees to assist with any means at Lessee's disposal in putting out fires occurring on the Premises or adjacent areas, and to report promptly such fires to Lessor or its representative and to the appropriate authorities~~y~~

i. Lessee agrees to maintain the Premises in a neat and sanitary manner and to provide for proper disposal of all garbage, trash, septic (for purposes of this Lease, "septic" shall mean, but is not limited to, sewage, wash water, black water, gray water and slop water), and other waste in compliance with all applicable federal, state and local laws and in a manner so as not to be objectionable or detract from the aesthetic values of the general area. Lessee shall not discharge any untreated or partially treated sewage or other waste materials directly or indirectly into any body of water including but not limited to, any wetland, stream, river, lake, pond, or groundwater. In addition, Lessee covenants that it bears the responsibility for any noncompliance with all federal, state and local laws and regulations governing septic and other waste disposal resulting from Lessee's activities and Lessee shall indemnify and hold harmless Lessor from and against any and all actions, suits, damages and claims by any party by reason of noncompliance by Lessee with such laws and regulations. Such indemnification shall include all Lessors' costs, including, but not limited to reasonable attorneys' fees.

j. No non-forest waste, debris, garbage or trash shall be deposited, discharged, dumped or buried upon the Premises. Forest woody waste (e.g. wood chips and stumps) may be disposed of on the premises, but may not be disposed of in piles. Stumps shall be buried in "stump dump" holes, except that small numbers of stumps (four or less) may be left aboveground. All non-forest waste shall be disposed of legally and not on property of Lessor.

k. Lessee shall not build permanent roads on the Premises without obtaining prior specific written permission from the Lessor; provided, however, Lessee may construct a minimal number of temporary roads and trails to facilitate the construction of the transmission line (tree clearing; pole setting, wiring). At the time ~~the~~ construction is completed, all temporary roads and trails shall be dismantled and put to bed or converted to permanent access trails. All access trails shall be built to Best Management Practices (BMP) standards as shown in the "Maine Motorized Trail Construction and Maintenance Manual" written by the Bureau of Parks and Lands Off-Road Vehicle Division, dated May 2011~~.)~~ and all

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roads shall be built to Best Management Practices (BMP) standards as used herein, are those forest management and road construction practices set forth in the publication entitled, "Best Management Practices for Forestry: Protecting Maine's Water Quality," prepared by the Maine Department of Agriculture, Conservation and Forestry, Maine Forest Service, in such publication's most current version at the time of the grant of this lease, and as the same may be further amended, supplemented or replaced after the date of the execution of this lease. .

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k. Prior to start of construction, Lessee shall provide an Access and Maintenance Plan to Lessor for review and approval. This plan shall provide details and maps on proposed access points, temporary trails, inspection and maintenance access, and descriptions of any proposed bridges, temporary or permanent.

l. Natural Plant Community and Significant Vernal Pool field surveys must be conducted by Lessee or Lessee's designee prior to all construction. Lessee shall send to Lessor a copy of all completed surveys.

m. Lessee shall be in compliance with all Federal, State and local statutes, ordinances, rules and regulations, now or hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises. Lessee further shall not construct, alter or operate the described Premises in any way until all necessary permits and licenses have been obtained for such construction, alteration or operation. Lessee shall provide written confirmation that Lessee has obtained all material permits and licenses to construct and operate the Facilities. Lessee shall furnish Lessor with copies of all such permits and licenses, together with renewals thereof to Lessor upon the written request of Lessor. This lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits. Prior to such termination, however, Lessor shall provide written notice to Lessee of such failure and Lessee shall have 906030 days in which to seek to cure such failure, and shall be permitted a reasonable period of time thereafter to prosecute and obtain any such necessary permits. No termination hereunder shall be permitted during the pendency of any pending permitting application process, proceedings or appeals relating thereto.

7. Liability and Insurance.

a. Lessee shall without unreasonable delay inform Lessor ~~immediately~~ of all risks, hazards and dangerous conditions caused by Lessee which are outside of the normal scope of constructing and operating the Facilities of which Lessee becomes aware of with regards to the Premises. Lessee assumes full control of the Premises, except as is reserved by Lessor herein, and is responsible for all risks, hazards and conditions on the Premises caused by Lessee.

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b. Except for the conduct of Lessor and Lessor's guests and agents, Lessor shall not be liable to Lessee for any injury or harm to any person, including Lessee, occurring in or on the Premises or for any injury or damage to the Premises, to any property of the Lessee, or to any property of any third person or entity. Lessee shall indemnify and defend and hold and save Lessor harmless, including, but not limited

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to costs and attorneys' fees, from: (a) any and all suits, claims and demands of any kind or nature, by and on behalf of any person or entity, arising out of or based upon any incident, occurrence, injury or damage which shall or may happen in or on the Premises that is caused by the Lessee or its Agents; and (b) any matter or thing arising out of the condition, maintenance, repair, alteration, use, occupation or operation of the Premises, the installation of any property thereon or the removal of any property therefrom that is done by the Lessee or its Agents. Lessee shall further indemnify Lessor against all actions, suits, damages and claims by whoever brought or made by reason of the nonobservance or nonperformance of Lessee or its Agents of: (a) any obligation under this Lease; or (b) any federal, state, local law or regulation pertaining to Lessee's use of the Premises.

c. The Lessee shall keep in force a liability policy issued by a company fully licensed or designated as an eligible surplus line insurer to do business in this State by the Maine Department of Professional & Financial Regulation, Bureau of Insurance, which policy includes the activity to be covered by this Lease with adequate liability coverage over at least one million dollars for each occurrence and two million dollars in annual aggregate in general commercial liability coverage to protect the Lessee and the Lessor~~Department~~ from suits for bodily injury and damage to property. Nothing in this provision, however, is intended to waive the immunity of the Lessor. ~~Upon execution~~Upon execution of this Lease, the Lessee shall furnish the Lessor with a certificate of insurance as verification of the existence of such liability insurance policy.

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8. Lessee's Liability for Damages. Lessee shall be responsible to Lessor for any damages caused directly or indirectly by Lessee or its guests, servants or agents, including, but not limited to, interference or meddling with any tools, machinery, equipment, gates, buildings, furniture, provisions or other property of the Lessor on the Premises, its agents, employees or guests.

9. Tax Proration. Lessee shall pay when due all taxes levied on the personal property and improvements constructed by Lessee and located on the Premises. Lessor shall be responsible for any real property taxes levied on the Premises based on unimproved land. Lessor shall have no ownership or other interest in any of the Facilities on the Property and Lessee may remove any or all of the Facilities at any time.

10. Lease Assignment, Sublease and Colocation: Lessee shall not assign or sublease in whole or part without prior written consent of Lessor, which consent shall not be unreasonably withheld. Lessor may lease the Premises for other compatible uses and colocation of other utilities so long as such rights do not extend to access to the Facilities, ~~,;~~ said uses will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies, ~~;~~ and ~~that~~ such use will not interfere with the rights herein conveyed, including the right to build such additional Facilities as may be accommodated on the Premises using transmission line spacing standards approved by the Maine Public Utilities Commission.

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Comment [DAR5]: Lauren, Are these MPUC existing standards that do not change or can the MPUC change spacing standards when requested by the utility company? The State will retain other utility rights, but if Lessee can request spacing changes and potential additional pole locations, how could the State grant an underground fiber optic cable?

11. Lessee's Removal of Structures: Lessee must obtain Lessor's advance written consent, which consent shall not be unreasonably withheld, delayed or conditioned, to the method of removal before any structures or improvements are removed from the Premises.

- Don't have. Spacing right Now · 85-100' to edge
- Set standard
- clearing corridor
- 100' Line to Line.
- New line for CMP. 345 kV

12. Surrender. Upon termination of this Lease for any reason, Lessee shall deliver the Premises to Lessor peaceably, without demand, and in reasonably good condition clear of trash and debris, unusable equipment, unregistered vehicles and abandoned equipment and structures, located on the Premises by Lessee or its Agents. If such trash and debris and other unusable equipment, unregistered vehicles and abandoned equipment and structures are not removed within one hundred eighty days (180) days of the termination of this Lease, the Lessor shall thereafter have the right to remove it and charge the Lessee with the costs of such removal and disposal. Any other personal property, fixture, or structure on the Premises belonging to Lessee shall be removed by Lessee, unless Lessor requests in writing, that the other personal property, fixture, or structure may remain and Lessee agrees in writing ~~to~~ not to remove ~~in writing~~it. If the Lessee fails to remove such other personal property, fixture, or structure such items shall be deemed the property of the Lessor two hundred and ten days (210) days after termination of the Lease and the Lessor shall thereafter have the right to remove it and charge the Lessee with the costs of such removal and disposal. In the event that any of this other personal property, fixtures, or structures on the Premises are impracticable of being removed within one hundred eighty days (180) days, Lessee may be allotted up to one year to remove the items, with prior written approval from Lessor, which approval shall not be unreasonably, delayed, or conditioned. Any holding over by Lessee without Lessor's prior written consent shall be considered a tenancy at sufferance.

13. Default.

a. The following shall constitute a default under this Lease: (1) Lessee's failure to perform any of its monetary ~~and/~~or nonmonetary obligations under this Lease; (2) the filing of any bankruptcy or~~/~~ insolvency petition by or against Lessee or if Lessee makes a general assignment for the benefit of creditors which is not resolved or withdrawn within 30 days of such petition being filed; (3) an execution, lien or attachment issued against the Lease, the Premises, or Lessee's property on the Premises, unless Lessee provides Lessor with satisfactory assurances and evidence that such execution, lien or attachment will be released within a reasonable time not to exceed ninety (90) days or such other time as is required under any ~~applicable circumstance~~, law or proceeding for the removal thereof; (4) the assignment or sublease of this lease to any third party without Lessor's prior written consent; or (5) the violation of any state, federal or local laws, rules, regulations or ordinances; or (6) Lessee shall abandon the leased premises.

b. Upon the occurrence of any such event of default and subject to any applicable cure period ~~(is there a cure period for 5 above?)~~ as defined in 6 (m), above, Lessor may, in addition to (and not instead of) any other remedies available at law or in equity, terminate this lease with notice or demand to Lessee and enter and take possession of the leased premises. Lessee shall be liable to Lessor for loss and expense, including reasonable attorney's fee, incurred by reason of such default or termination hereof. Prior to enforcement of any remedy permitted hereby, Lessor shall provide Lessee with written notice of an event or occurrence of default under this section 13 (a)(1) and Lessee shall have a reasonable period ~~as the circumstances~~ of time as the circumstances giving rise to the default dictate to cure said default whicth period shall not exceed [90] days; provided that if Lessee has

Comment [DAR6]: Lauren, does 90 days seem reasonable to you?

provided Lessor with satisfactory assurance that it has undertaken the appropriate actions to cure said default and such default has not been cured within the said time permitted, the cure period shall be extended as applicable.

14. Statutory Authority Over Public Lands. Lessor retains the right to revise this lease, from time to time and throughout the term of this lease in order to be in compliance with State Law. Lessor shall send notice to Lessee of the proposed revision. Upon receipt of such notice, Lessee shall have the option to terminate the lease. Lessee may exercise said option to terminate by notifying Lessor in writing within 30 days of receipt of notice. Said termination shall become effective upon Lessor's receipt of the notification of the termination. If Lessee does not exercise the option to terminate, the proposed revision shall become effective 40 days from the date the Lessor sent the notice to Lessee. Lessor will draft a lease amendment for the revision and submit to Lessee for signature and return to Lessor. If Lessee fails to sign the amendment within 30 days from the date the lease amendment is sent by Lessor, this lease shall terminate. [jlc note: I've seen this provision in state leases before but am not sure what to do with it here. I would recommend removal or possible modification. The utility, and any project lender, should object to this kind of provision given the risk of changes in state law affecting the facilities. If the facilities have been constructed in compliance with state law, there should be no right to cause a termination and affecting the removal of the facilities during the term]

Comment [DAR7]: Lauren, Can we remove this? Didn't we get a determination from your office that a lease is a contract and the legislature should not be able to break an existing contract?

15. Mechanics Lien. If any notice is filed at the county registry of deeds of a builder's, supplier's or mechanic's lien on the Premises, arising out of any work performed by or on behalf of Lessee, Lessee shall cause such lien to be discharged or released immediately and shall indemnify Lessor against any such claim or lien, including all costs and attorneys' fees that Lessor may incur in connection with the same.

16. Succession; No Partnership. This Lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors in interest and assigns of the parties hereto. Nothing in this agreement shall be construed to create an association, joint venture, trust or partnership covenant, obligation, or liability on or with regards to any of the parties to this agreement.

17. Waiver. Any consent, express or implied, by Lessor to any breach by Lessee of any covenant or condition of this Lease shall not constitute a waiver by the Lessor of any prior or succeeding breach by Lessee of the same or any other covenant or condition of this Lease. Acceptance by Lessor of rent or other payment with knowledge of a breach or default by Lessee under any term on this Lease shall not constitute a waiver by Lessor of such breach or default.

18. Force Majeure. Except as expressly provided herein, there shall be no abatement, diminution or reduction of the rent or other charges payable by Lessee hereunder, based upon any act of God, any act of the enemy, governmental action, or other casualty, cause or happening beyond the control of the parties hereto.

19. Eminent Domain. In the event that the Premises or any portion thereof shall be lawfully condemned or taken by any public authority, Lessor may, in its discretion, elect either: (a)

to terminate the Lease; or (b) to allow this Lease to continue in effect in accordance with its terms, provided, however, that a portion of the rent shall abate equal to the proportion of the Premises so condemned or taken. All condemnation proceeds shall be Lessor's sole property without any offset for Lessee's interests hereunder.

20. Holding Over. If Lessee holds over after the termination of this Lease, said hold over shall be deemed to be a trespass.

21. Lessor Protection. Lessor expressly retains and nothing contained herein shall be construed as a release or limitation by Lessor of any and all applicable liability protections under Maine law. Lessor specifically retains any and all protections provided under Maine law to owners of land, including but not limited to those provided under the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118.

22. Cumulative Remedies. The remedies provided Lessor by this Lease are not exclusive of other remedies available by current~~presently~~ or later existing laws.

23. Entire Agreement. This Lease sets forth all of the covenants, promises, agreements, conditions and understandings between Lessor and Lessee governing the Premises. There are no covenants, promises, agreements, conditions and understandings, either oral or written, between them other than those herein set forth. Except as herein provided, no subsequent alterations, amendments, changes or additions to this Lease shall be binding upon the Lessor or Lessee unless and until reduced to writing and signed by both parties.

24. Notices. All notice, demands and other **communications** required hereunder shall be in writing and shall be given by first class mail, postage prepaid, registered or certified mail, return receipt requested; if addressed to Lessor, to **State of Maine,** Department of Agriculture, Conservation and Forestry, Division of Parks and Public Lands, 22 State House Station, Augusta, ME 04333-0022, Attn: Director; and if to Lessee, to

_____

25. General Provisions:

a. Governing Law. This Lease shall be construed and interpreted in accordance with the laws of the State of Maine.

b. Savings Clause. The invalidity or unenforceability of any provision of this Lease shall not affect or impair the validity of any other provision. To the extent any provision herein is inconsistent with applicable state statute, the statute is deemed to govern.

c. Paragraph Headings. The paragraph titles herein are for convenience only and do not define, limit or construe the contents of such paragraph.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written. For purposes of this Lease, a facsimile signature shall be deemed an original.

Lessor:

STATE OF MAINE
Department of Agriculture, Conservation, and Forestry
Bureau~~Division~~ of Parks and ~~Public~~ Lands

By: _____
Thomas Morrison Acting~~Willard R. Harris, Jr.,~~
Director

Dated: _____, 201~~43~~

_____
Witness

Lessee:

BY: _____

Dated: _____

_____
Witness

Bureau of General Services
Professional Services Pre-qualification List

Dwyer Associates

Mailing Address
128 State Street, Suite 300

Location Address
128 State Street, Suite 300

City
Augusta

State *Zip Code*
ME 04330

Phone
207-623-2258

Email Address
dwyerassociates@midmaine.com

Fax
207-623-2258

Web Site Address

Contact
Daniel J. Dwyer

Professional Services for which this firm is pre-qualified

- ☐ Architectural
- ☐ Civil engineering
- ☐ Electrical engineering
- ☐ Environmental engineering
- ☐ Fire alarm system design
- ☐ HVAC design
- ☐ Landscape architectural
- ☐ Mechanical engineering
- ☐ Plumb engineering
- ☐ Sanitary engineering
- ☐ Sprinkler system design
- ☐ Structural engineering
- ☐ Acoustical engineering
- ☐ Commissioning
- ☐ Cost estimating
- ☐ Drafting
- ☐ Energy auditing
- ☐ Environmental site assessment
- ☐ Facilties master planning
- ☐ Geotechnical
- ☐ Hazmat/IAQ assessment
- ☐ Land surveying
- ☐ Licensing and permiting
- ☐ Owners representative
- ☑ Property appraisal
- ☐ Roof system design
- ☐ Security system design
- ☐ Space planing/programming
- ☐ Specifications writing
- ☐ Telecommunications design
- ☐ Traffic engineering

General Statement of Professional Experience (written by firm)

EXPERIENCE 1984 - Present Independently have appraised real estate, going concern, equipment and personal property throughout the State of Maine recognized expert witness. Appraisal work includes foreclosures, bankruptcies, estate settlements, condemnations, mortgages, risk analysis and consultations for marketability/feasability studies. Within last 12 months have appraised restaurants, light industrial, retail facilities, multi-tenant facilities, medical/professional office, automobile dealerships, shopping malls, dairy farms, campgrounds, lumber yards, and conservation easements.

CERTIFICATE OF SERVICE

I, Lauren E. Parker, hereby certify that I have on this day, November 15th, 2021, caused to be served a copy of Director Cutko's and the Bureau of Parks and Lands' Appendix 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 15th day of November, 2021.

Lauren E. Parker
Assistant Attorney General
Maine Bar No. 5073