STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.,

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.,

Appellants/Cross-Appellees

On Appeal from the Business and Consumer Court
Docket No: BCDWB-CV-2020-00029

BRIEF OF APPELLEES/CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 2

The Bureau's Responsibility as Trustee of Public Lands 3

Constitutional Protection of Public Lands 3

Post-1993 Transmission Line Projects 6

The 2014 Lease 7

Development of a Management Plan 10

Consideration of an Alternative 11

Legislative Response to the 2014 Lease 12

The 2020 Lease 13

Litigation History 15

STATEMENT OF THE ISSUES FOR REVIEW 17

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

I. Standard of Review 19

II. Article IX Section 23 Contains No Exemption For Leases of Transmission Lines And The Legislature Could Not and Did Not Create One 20

A. The Legislature Does Not Have the Authority to Exempt Transmission Line Leases from Article IX, Section 23 20

B. Nothing in the Legislative History Suggests a Legislative Attempt to Exempt Leases from Article IX, Section 23 23

C. The Legislature Has Not Acquiesced But Rather Rejected the Bureau's Interpretation 34

III. The Bureau's Failure to Determine Whether the Lease Reduced or Substantially Altered the Public Lands Requires Vacating the Lease 39

IV. Article IX, Section 23 of the Maine Constitution Requires the Bureau to Hold a Public Administrative Process Before Executing a Major Transmission Line Lease 46

V. The Court Erred in Not Deciding the Constitutional Questions Itself......... 50
VI. Count I Is Not Barred by the Doctrine of Sovereign Immunity................... 53
VII. Plaintiffs Have Standing to Bring Their Constitutional Claims to Protect Maine's Public Lands.. 55
CONCLUSION 60

TABLE OF AUTHORITIES

Cases

Alden v. Maine, 527 U.S. 706 (1999) 54, 55

Alpharma, Inc. v. Leavitt, 460 F.3d 1 (D.C. Cir. 2006)..41

Ark. Dev. Fin. Auth. v. Wiley, 2020 Ark. 395 S.W.3d 493 (2020) 54, 55

AquAlliance v. U.S. Bureau of Reclamation, 312 F. Supp. 3d 878
(E.D. Cal. 2018)...44

Avangrid Networks, Inc. v. Sec'y of State, 2020 ME 109, 237 A.3d 882................55

Blue Sky W., LLC v. Maine Revenue Servs., 2019 ME 137,
215 A.3d 812 ....19, 53

Burns v. United States, 501 U.S. 129 (1991)...26

Carpenter v. United States, 138 S.Ct. 2206 (2018)..30

Claremont Sch. Dist. v. Governor, 761 A.2d 389 (N.H. 1999)..............................54

Coleman v. Miller, 307 U.S. 433 (1939) 59

Columbia Air Servs., Inc. v. Dep't of Transp., 977 A.2d 636 (Conn. 2009)...........55

Conservation Law Found. v. Town of Lincolnville, No. AP-00-3,
2001 WL 1736584 (Me. Super. Ct. Feb 28, 2001).......................................58

Conway v. N.H. Water Res. Bd., 199 A. 83 (N.H. 1938)..55

Ctr. for Biological Diversity v. U.S. Forest Serv., No. 2:17-CV-372,
2021 WL 855938 (S.D. Ohio Mar. 8, 2021) 43

Cushing v. Cohen, 420 A.2d 919 (Me. 1980)...53

Cushing v. State, 434 A.2d 486 (Me.1981) 2, 47

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020) 41

Dillon v. U.S., 560 U.S. 817 (2010) 26

Doe Dancer I v. La Fuente, Inc., 481 P.3d 860 (2021) 22

Farris ex rel. Dorsky v. Goss, 143 Me. 227, 60 A.2d 908 (1948). 23

Field v. Mans, 516 U.S. 59 (1995) 26

Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978) 56, 57, 58

Girouard v. United States, 328 U.S. 61 (1946) 25, 26

Grinnell v. State, 121 N.H. 823 (N.H. 1981) 54

Holland v. Sebunya, 2000 ME 160, 759 A.2d 205 40

In re Wai'ola O Moloka'i, 83 P.3d 664 (Haw. 2004) 47

In re Water Use Permit Applications (Waiāhole), 9 P.3d 409 (Haw. 2000) 47

Jones v. Sec'y of State, 2020 ME 113, 238 A.3d 982 ....19, 52

Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc.,
671 P.2d 1085 (Idaho 1983) 48

Kroeger v. Dep't of Env't Prot., 2005 ME 5, 870 A.2d 566 43

LaFleur ex rel. Anderson v. Frost, 146 Me. 270, 280, 80 A.2d 407 (1951) 20, 22

LeBlanc v. United Engineers & Constructors Inc.,
584 A.2d 675 (Me. 1991) 19, 52

Lincoln v. Burbank, 2016 ME 138, 147 A.3d 1165 39

MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization & Assessment,
471 N.W.2d 734 (Neb. 1991) 21

Matter of Am. Waste & Pollution Control Co., 93-3163 (La. 9/15/94), 642 So. 2d 1258. 49

McCaffrey v. Gartley, 377 A.2d 1367 (Me. 1977) 60

Me. State Hous. Auth. v. Depositors Trust Co., 278 A.2d 699 (Me. 1971) 24

Melhorn v. Derby, 2006 ME 110 A.2d 290 40

Michigan v. EPA, 576 U.S. 743 (2015) 41

Mulready v. Bd. of Real Estate Appraisers, 2009 ME 135, 984 A.2d 1285 52

Murphy v. Bd. of Env't Prot., 615 A.2d 255 (Me. 1992) 40

Nergaard v. Town of Westport, 2009 ME 56, 973 A.2d 735 (2009) 57, 58

New Eng. Tel. & Tel. Co. v. Pub. Utilities Comm'n, 148 Me. 374, 94 A.2d 801 (1953) 19

New Orleans Tanker Corp. v. DOT, 1999 ME 67, 728 A.2d 673 29

Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12 (1st Cir. 2020) 41

Olfene v. The Bd of Trustees, No. CV-08-155, 2008 WL 6742635 (Me. Super. Dec. 4, 2008) 55

Olivares v. Transp. Sec. Admin., 819 F.3d 454 (D.C. Cir. 2016) 41

Opinion of the Justices, 308 A.2d 252 (Me. 1973) 2, 47

Opinion of the Justices, 2015 ME 107, 123 A.3d 494 .....24, 26

Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) 54

Phelps v. United States, 274 U.S. 341, 344 (1927) 21

Pub. Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988) 52

Raines v. Byrd, 521 U.S. 811 (1997) 59

Realco Services, Inc., v. Halperin, 355 A.2d 743 (Me. 1976)................................24

Rhea Lana, Inc. v. U.S., 925 F.3d 521 (D.C. Cir. 2019)...41

Roop v. City of Belfast, 2007 ME 32, ¶ 7, 915 A.2d 966 59

Save Ourselves, Inc. v. La. Env't Control Comm'n,
452 So. 2d 1152 (La. 1984) 49

Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912)...26

Seider v. Bd. of Examiners of Psychologists, 2000 ME 206, 762 A.2d 551 52

Silver v. Pataki, 96 N.Y.2d 532, 755 N.E.2d 842 (2001) 60

Somerset Cty. v. Dep't of Corrections, 2016 ME 33, 133 A.3d 1006 ....43, 52

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,
985 F.3d 1032 (D.C. Cir. 2021)...44

Stanwitz v. Reagan, 429 P.3d 1138 (Ariz. 2018)..22

State v. Bachelder, 403 A.2d 754 (Me. 1979) 21

State ex rel. Stenberg v. Omaha Exposition & Racing, Inc.,
644 N.W.2d 563 (Neb. 2002) 21

Sugar Cane Growers Co-op. of Fla. v. Veneman,
289 F.3d 89 (D.C. Cir. 2002)..45

Superintendent of Ins. v. Att'y Gen., 558 A.2d 1197 (Me. 1989) 23

Thomas v. Nev. Yellow Cab Corp., 327 P.3d 518 (Nev. 2014) 21

Thompson v. Shaw's Supermarkets, Inc., 2004 ME 63, 847 A.2d 406 38

Trump v. Vance, 941 F.3d 631 (2d Cir.), *cert. granted*, 140 S. Ct. 659 (2019),

and aff'd and remanded, 140 S. Ct. 2412 (2020) 52

United States Forest Serv. v. Cowpasture River Preservation Ass'n, 140 S. Ct. 1837 (2020) 32

United Steel v. Mine Safety & Health Administration, 925 F.3d 1279 (D.C. Cir. 2019) 44

Voorhees v. Sagadahoc Cty., 2006 ME 79, 900 A.2d 733 19

W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042 (D. Idaho 2020) 43

Welch v. State, 2004 ME 84, 853 A.2d 214 .... 53. 54

Wescott v. Allstate Ins., 397 A.2d 156 (Me. 1979) 29

Young v. Wells Fargo Bank, N.A., 717 F.3d 224 (1st Cir.2013) 39, 40

Zegel v. Bd. of Soc. Worker Licensure, 2004 ME 31, 843 A.2d 18 .... 45, 46

Zuber v. Allen, 396 U.S. 168 (1969) 25

Constitutional Provisions

Haw. Const. art. XI, § 1 47

La. Const. Ann. art. IX, § 1 .... 48, 49

Mass. Const. amend. art. 97 22

Me. Const. art. I, § 6-A 46

Me. Const. art. IX, § 23 .... *passim*

Statutes and Public Laws

2 M.R.S. § 9 51

5 M.R.S. § 9052 48

5 M.R.S. § 9054 48

5 M.R.S. § 11006 .....50, 53

12 M.R.S. § 553 27

12 M.R.S. § 585 .....3, 24

12 M.R.S. § 590 27

12 M.R.S. § 598 .....4, 28, 29, 32, 34

12 M.R.S. § 598-A 4, 12, 25, 27, 38

12 M.R.S. § 598-B 4, 27

12 M.R.S. § 602 .....27, 28

12 M.R.S. § 1803 50

12 M.R.S. § 1814 .....27, 38

12 M.R.S. § 1814-A 32

12 M.R.S. § 1836 27

12 M.R.S. § 1845 .....28, 29, 30

12 M.R.S. § 1846 .....5, 46

12 M.R.S. § 1847 .....5, 28, 29, 30, 47

12 M.R.S. § 1852 .....*passim*

30 M.R.S. § 4162 3

35-A M.R.S § 3132 ....7, 13, 15, 35, 51

39 M.R.S. § 4162 3

L.D. 1295, I.B. 1 (Dec. 19, 2021)
(codified as amended at 12 M.R.S. § 1852(4)) 28

P.L. 1965, ch. 226, § 65 3

P.L. 1975, c. 339, § 6 27

P.L. 1975, c. 771, § 126 27

P.L. 1987, c. 737, § 2 ....3, 27

P.L. 1995, c. 502, § E-19 ....27, 28

P.L. 1997, c. 678, § 13 ....27, 28

P.L. 1999, c. 240, §1 38

Legislative Materials

Commission to Study the Public Reserved Lands Management Fund, 127th Legislature (Dec. 2015), *available at* http://lldc.mainelegislature.org/Open/Rpts/hd243_m2c66_2015.pdf.......................5

L.D. 471 (130th Legis. 2021) (An Act To Require Legislative Approval for Certain Leases of Public Lands)..36

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L.D. 2538, Statement of Fact, (113th Legis. 1988) 3

Maine State Legislature, *Amendments to the Maine Constitution, 1820 – Present*, https://legislature.maine.gov/legis/lawlib/lldl/constitutionalamendments/index.html (last visited December 30, 2021) 4

Resolves 2007, Ch. 91 34

Resolves 2009, Ch. 209 .... 7, 34

Resolves 2013, Ch. 56 38

S.P. 594 (130th Legis. 2021) 36

Agency Rules and Regulations

01-670 C.M.R. ch. 53, § 1.7(A)-(C), ... 50

09-137 C.M.R. ch. 1, amended by filing 2021-217 (effective June 23, 2014) 11

Court Rules

M.R. Civ. P. 80C 40, 50, 52

Other Authority

82 C.J.S. Statutes § 377 24

Nix, Steve, "What Is Multiple-Use Management?," ThoughtCo, Oct. 29, 2020, *available at* https://www.thoughtco.com/multiple-use-1341734 29

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INTRODUCTION

This case arises from the remarkable story of the State's recapture of its public lands, the constitutional and statutory provisions that govern them, and the failure of the Bureau of Parks and Lands to fulfill its responsibilities as trustee of those lands. Despite the overwhelming popular vote in 1993 to adopt Article IX, Section 23 of the Constitution, the Bureau makes the extraordinary claim that its pre-Amendment leasing authority is a loophole that skirts Section 23's requirement of two-thirds legislative approval for any reduction to or substantial alteration of these lands, allowing it to issue a lease to Central Maine Power ("CMP") for a high-impact transmission line without first obtaining legislative approval.[1] It further argues that the public—for whom the Bureau manages the public lands—has no right to any process when the Bureau considers leasing public lands for such a purpose. Rather, the Bureau asserts it can lease public reserved lands in the dark of night for numerous industrial and commercial purposes without notice to the public or the Legislature.

Contrary to the Bureau's claims, the Legislature never attempted to exempt leases from these constitutional protections, nor would it have authority to do so. Indeed, the Legislature has affirmatively and definitively rejected that view, and the Constitutional text is plain in any case. The Bureau's attempt to avoid any public scrutiny for its lease authorizing a high-impact transmission corridor on these lands

[1] This brief responds to the arguments of both the Bureau and CMP but in light of the overlap in arguments, it refers primarily to the Bureau and those references should be deemed to include responses to CMP.

flies in the face of its public trust responsibilities. The Superior Court was right to vacate the lease, and its decision should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

As detailed in the Amended Complaint and the news articles attached thereto, reporter Bob Cummings, in a series of articles in the early 1970s, brought to light Maine's disastrous administration of its public lots dating back to the 1800s. Prior to 1890, Maine sold or gave away all but 400,000 acres out of the original roughly 7 million acres it had obtained from Massachusetts. These remaining acres were leased at virtually no cost to camp owners, paper companies, and timber companies. Mr. Cummings documented the importance of the public lots reserved by the State of Maine under the Articles of Separation, their original intended purposes, and their highest and best uses going forward. (A119; 131-145).[2] That reporting led to a campaign in the Legislature and in the courts spanning more than a decade to recapture, consolidate, and protect the public lots. *See generally Opinion of the Justices*, 308 A.2d 253 (Me. 1973); *Cushing v. State*, 434 A.2d 486 (Me. 1981).[3]

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[2] This brief uses the following citation conventions: citations to the Appendix begin with an "A" followed by the page number, *i.e.*, (A100); citations to the original Administrative Record filed by the Bureau begin with "AR" followed by the relevant volume and page number, *i.e.*., (AR I0100); citations to the Addendum, which contains the material added to the record by the Court begin with the abbreviation "Add." followed by the page number, *i.e.*, (Add. 100).

[3] For a concise overview of the story, *see* Richard Barringer, Lee Schepps, Thomas Urquhart, & Martin Wilk, *Maine's Public Reserved Lands: A Tale of Loss and Recovery*, 29 ME. POL'Y REV., no. 2, 2020, at 65-79, https://digitalcommons.library.umaine.edu/mpr/vol29/iss2/9.

The Bureau's Responsibility as Trustee of Public Lands

On the heels of this reclamation, the Legislature in 1987 enacted 12 M.R.S § 585 (P.L. 1987, ch. 737, § 2). It declared that "[i]t is in the public interest and for the general benefit of the people" of Maine that title and management responsibility be established in an agent of the State, "acting on behalf of all of the people of the State," and that these "public reserved lands be managed under the principles of multiple use to produce a sustained yield of products and services." *Id.* It defined "multiple use" as 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." *Id.*[4] Importantly, section 585(3) required the commissioner to adopt management plans to achieve the multiple use objectives set out in the statute, and section 585(4) required that any actions the Director took—including leases—be consistent with the management plans. *Id.*

Constitutional Protection of Public Lands

Recognizing the need for even greater protection of the public lots and other state-owned lands, in 1993 the Legislature proposed and the people overwhelmingly

[4] Section 585 also changed the language for the Director's leasing authority from the "right to set poles and maintain utility service lines," *e.g.*, P.L. 1965, ch. 226, § 65, *codified at* 30 M.R.S. § 4162(2), *repealed by* P.L. 1987, ch. 737, § 2), to "electric power transmission and telecommunication transmission facilities," P.L. 1987, ch. 737, § 2. The bill's Statement of Fact made clear this did not change existing law. L.D. 2538, Statement of Fact, at 758-59 (113th Legis. 1988). Thus, it did not and was not intended to vastly expand the universe of leases for service lines to include high-impact transmission lines 300 feet wide.

adopted Article IX, Section 23 of the Maine Constitution.[5] 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."

The same Legislature then enacted 12 M.R.S. §§ 598 to 598-B to implement Section 23 by designating various public lands for this constitutional protection. Because the West Forks Plantation and Johnson Mountain Township parcels being leased by CMP are public reserved lands, they are designated lands under 12 M.R.S. § 598-A(2-A)(D). Once designated, "it is the intent of the Legislature that designated lands remain subject to the provisions of [Section 598-A] 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." *Id.* § 598-A. The Legislature also defined "reduced" and "substantially altered" with a focus on the physical characteristics of the land, not on the legal vehicle (lease or easement) that might authorize changes to those physical characteristics. *See id.* § 598(4) ("reduction in the acreage"); *id.* § 598(5) ("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").

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[5] Votes: Yes-169,485; No-63,056. Maine State Legislature, *Amendments to the Maine Constitution, 1820 – Present*, https://legislature.maine.gov/legis/lawlib/lldl/constitutionalamendments/index.html (last visited December 30, 2021).

In 1997, the Legislature reinforced the public trust nature of the State's ownership and management of the public reserved lands by declaring that "it is the policy of the State to keep the public reserved lands as a public trust," *id.* § 1846(1), and reiterating that "it is in the public interest and for the general benefit of the people of the 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," *id.* § 1847(1).

The public trust nature of these lands has consistently been reaffirmed by the Legislature and Executive Branch officials. *See*, *e.g.*, Commission to Study the Public Reserved Lands Management Fund, 127th Legislature (Dec. 2015), *available at* http://lldc.mainelegislature.org/Open/Rpts/hd243_m2c66_2015.pdf. As stated by then-Attorney General Mills to the Commission: "The Legislature's foremost obligation as trustee of the Public Reserved Lands is to 'hold and preserve' them for future public use," and "[w]hile Art. IX sec. 23 may not relate to the specific proposals under consideration by your Commission, it provides a useful backdrop regarding the intent of the Legislature and of the Maine people regarding the preservation of these unique public lands and their current uses." *Id.*, Appendix E, Attorney General Mills' Letter to Commission (Oct. 26, 2015), at 2.

Five former Commissioners of the Department of Conservation similarly emphasized in a letter to the Commission dated September 23, 2015, that "[a]s 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." Richard E. Barringer, et al., *Recommendations Concerning Administration of the Public Reserved Lands Management Fund and Timber Harvest Practices on Public Lands*, IRLAND GRP. COLLECTION, Sept. 23, 2015, at 1, *available at* https://digitalmaine.com/irland_group/1 (emphasis added).

Post-1993 Transmission Line Projects

This history provides important context for evaluating the Bureau's decision to lease public lands for CMP's high-impact transmission corridor. So too do the Bureau's post-constitutional amendment decisions to seek legislative approval for similar and even smaller transmission lines. Prior to the CMP Corridor at issue here (also called the NECEC), the Legislature considered and approved by a supermajority vote three significant transmission lines: (1) The Bangor Hydro Northeast Reliability Interconnect, an 85-mile, 170 foot wide 345-kV line running from New Brunswick to Orrington along the Stud Mill Road (AR VI0031-32, VI0020-29); (2) a 125-foot-wide TransCanada transmission line running along the existing Boralex Corridor, (AR VI0030-31, VI0098-104); and (3) another Bangor Hydro transmission line through four strips of land 130 feet wide in the Donnell

Pond lot, (AR VI0049-62), running generally "proximate to and parallel to the existing railroad corridor and existing transmission corridor . . . ," Resolves 2009, ch. 209; *see also* (AR VI0191.)[6]

In other words, the record reflects that, after passage of the constitutional amendment in 1993, the Bureau sought and obtained legislative approval for every significant transmission line crossing public lands, except for the NECEC.[7]

The 2014 Lease

CMP approached the Governor's office in the summer of 2014 to discuss its proposed transmission line crossing the West Forks Plantation and Johnson Mountain Township public lots. (AR III0001.) The Director of the Governor's Energy Office, Patrick Woodcock, asked Commissioner Walt Whitcomb, to "work to accommodate this request." *Id*. After a meeting in his office with the Commissioner and CMP, (AR III0004-6), CMP began working with the Bureau "regarding a proposed transmission line crossing of the Public Lots," (AR III0008).

Kathy Eickenberg was assigned by the Bureau to work with CMP on the line. (AR III0009.) On August 14, 2014, in a call with Ms. Eickenberg, Ken Freye of CMP explained that CMP was seeking a 300-foot-wide corridor through the two

[6] The 2009 Resolve also reiterated the requirement later ignored by the Bureau in 2014 that "any conveyance of state land for electric transmission is governed by Title 35-A, section 3132, subsection 13," Resolves 2009, ch. 209, which prohibits any conveyance unless the grantee "has received" a certificate of public convenience and necessity ("CPCN") from the Public Utilities Commission, 35-A M.R.S. § 3132(13).

[7] The only other transmission line in the record is a 30-foot-wide by 532-foot-long utility service line connecting some lake front camps. (AR VI0063-68.)

public lots, with roughly half of it for a high voltage line bringing power down from Canada and the remainder to be used for smaller lines for wind projects. (Add. 0356-357.) The relation to the existing Jackman Tie Line was also discussed. (Add. 0357.) Mr. Freye made clear that the towers would be 85-100 feet tall and proposed a 25 year lease. (Add. 0356-57.)

During the fall, the parties exchanged drafts of the proposed lease. CMP insisted throughout that it needed assurances that "it will have use of the entire [300 foot] corridor that it is leasing." (AR III0020.) As the negotiations moved towards conclusion, David Rodrigues, who apparently had become the chief negotiator for the Bureau, sent Director Morrison an email identifying two outstanding issues. (A499-500.) The first concerned the originally proposed route and a new route to the West proposed by CMP. The second involved the existing utility line on the West Forks parcel. The Bureau had requested that CMP commit to moving the existing corridor on to the new corridor but CMP was "opposed to committing to doing this." Mr. Rodrigues identified "the positive results for the Bureau from co-location" as:

- Reducing the amount of transmission line corridor on the public lands by approximately 9,900 feet long and 100 feet wide.
- Having an additional 23 acres of public lands for timber production.
- Reducing the fragmentation of the forest on the public lands[.]

(*Id.*) Mr. Rodrigues' concerns were echoed by Kathy Eickenberg on a draft identified as "AAG Lease Draft," noting that the failure to co-locate a line will result in

increased "fragmentation of habitat, multiple crossings of Cold Stream, and interference with the Bureau use." (A517.)[8]

The 2014 Lease was signed in December (A447, 457), five years before issuance of a CPCN (Add. 0018). Notwithstanding the Bureau's duty as trustee to manage the public lands for the benefit of the people of Maine, the long battle to restore and protect the public lots, and the Bureau's past treatment of similar transmission lines, at no time during the entire period from late June 2014 until execution of the lease was there any discussion within the Bureau, with the Governor's Energy Office, or with CMP about whether the corridor would reduce or substantially alter the uses of the Johnson Mountain Township or West Forks Plantation public lots. No findings of fact were made on these issues.

Indeed, the only comments in the contemporaneous record that even remotely touch on these issues are Mr. Rodrigues' recognition that the effects of two power lines crossing each other perpendicularly meant increasing the cleared corridor by an area measuring 9,900' by 100', reducing the land available for timber production by 23 acres, and increasing forest fragmentation, and Ms. Eickenberg's comment that a failure to co-locate would increase fragmentation and interfere with Bureau use. Mr. Rodrigues' recognition in and of itself establishes that the CMP corridor

[8] The note is by Commenter EK, who the Bureau identifies as Kathy Eickenberg in the stipulated glossary of names and roles that appear in the administrative record. (A23.)

would reduce the acreage available for timber production and substantially alter the timber, recreational, and wildlife uses of these lots. *Compare* AR IV0065-70 (pictures from 2015 appraisal showing existing conditions) *with* AR IV0064 (picture of existing Jackman Tie Line on West Forks lot; CMP lease 3-times the width of this line with significantly higher poles).

And Exhibit B to the 2014 Lease dramatically illustrates exactly how much wider the CMP NECEC corridor is, and more important, how crossing the existing line perpendicularly fragments the public lots into four quadrants. (A459 (showing CMP NECEC corridor in pink and existing line in yellow)). The consequence of creating these quadrants is far greater fragmentation, twice as many barriers for wildlife, and much more significant impacts on fishing, hunting, bird watching, and canoeing in the area, just as Mr. Rodrigues and Ms. Eickenberg identified. Yet apart from that discussion, there is no consideration of these impacts anywhere in the record relating to the 2014 Lease, and no consideration of Article IX, Section 23.

Development of a Management Plan

Beginning in 2016, the Bureau began reviewing resources on the public reserved lands in the Upper Kennebec Region as part of the process of developing a management plan for the region. With respect to West Forks Plantation and Johnson Mountain Township, the Upper Kennebec Region Management Plan adopted on June 25, 2019 (the "Management Plan") identifies timber management as the

dominant use allocation for most of the lots, with wildlife management the dominant use allocation along the riparian buffers associated with the streams and ponds on the lots, and developed recreation class I the dominant use allocation along management roads. (A485, 489-90, 492.) Contrary to the Bureau's claim, (Bureau Blue Br. 8), the two public lots involved contain several high value streams and two ponds listed on the Maine Department of Inland Fisheries & Wildlife's list of State Heritage Fish Waters. (*Id*.); 09-137 C.M.R. ch. 1, amended by filing 2021-217 (effective June 23, 2014). Remote recreation is a secondary use throughout the lots and wildlife management is a secondary use on all the timber management acres. (A491.) Although the Management Plan references the existence of the Jackman Tie Line and the 2014 Lease, (A489), nowhere does it suggest that transmission lines are among the multiple uses for which the lots are managed, or evaluate the impacts of these lines on the uses for which it does manage the lands.

Consideration of an Alternative

While the Management Plan was being developed, an issue arose about a possible CMP utility line lease across newly-acquired Cold Stream Forest, presumably as part of finalizing the NECEC route. Tom Desjardin, then the Director of the Bureau, asked Assistant Attorney General Parker for an opinion about the need for legislative approval for such a lease. (A509.)

AAG Parker responded in a memorandum to Director Desjardin (hereinafter

the “Parker Memorandum”) 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.” (A509.) She went on to say that “[t]he 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. 12 M.R.S.A. § 598-A.” (A514.) Concluding that “there is no question that a transmission line will alter the physical characteristics of Cold Stream Forest,” she listed factors the Bureau was required to evaluate in making the substantial alteration determination: “the impacts a transmission line will have on wild brook trout habitat, deer wintering habitat, other wildlife and habitat resources, recreational values, and timber harvesting.” (A514.)

Legislative Response to the 2014 Lease

In December 2019, Senator Russell Black and several co-sponsors introduced 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 addressed fair market value for leases of public reserved lands. (A528-30.) On January 21, 2020, the Agriculture, Conservation and Forestry (“ACF”) Committee held a hearing on L.D. 1893 at which a CMP representative and Director Cutko testified.[9] At the subsequent work session, Director Cutko told the Committee

[9] At the hearing, Director Cutko acknowledged that the Bureau needed to be “much more clear about developing criteria internally for what constitutes a substantial alteration based on acreage, alteration in wildlife habitat, alteration in forestry use.” (Add. 0142). He further responded to Representative Skofield that he would bring that policy back to the Committee for its review and approval. (Add. 0142-143.)

that the Bureau had not sought legislative approval for the 2014 Lease because it believed it had authority to enter into the lease under 12 M.R.S. §1852 and further that they had not been aware of the statutory requirement for a CPCN in 35-A M.R.S. § 3132(13). (A542-43; Add. 0157.) David Rodrigues, the Bureau planner who had worked on the lease, testified that he did not remember any discussions about whether or not the Legislature needed to approve the lease and that any such decisions would have been made at the Director/Commissioner level. (A540.)

After consideration of the testimony and the Parker Memorandum, then-House-Chair Hickman drafted Committee Amendment A, which addressed the Committee's concerns directly—it required the Bureau to terminate the 2014 Lease with CMP, and expressly found that a lease for the NECEC corridor constitutes a substantial alteration of the use of the public land and that any such renegotiated lease required 2/3 legislative approval. (A531-33.) On February 18, 2020, the ACF Committee voted unanimously to recommend to the Legislature that L.D. 1893 as amended ought to pass. (A534-35.) Because COVID-19 forced the Legislature to adjourn on March 17, 2020, however, L.D. 1893 did not get a vote in either chamber.

The 2020 Lease

Eight days after adjournment of the Legislature, attorneys for CMP sent Thomas Abello, the Governor's Senior Policy Advisor, an email with a draft of a "new BPL lease related to NECEC." (AR IV0122.) It was also sent to lawyers at

Verrill, who had apparently been retained by the Governor to advise her office on NECEC issues but had not historically represented the Bureau.[10] CMP's draft retained the same caption as the 2014 Lease—"Transmission Line Lease"—and made only minor changes. (AR IV0122-136.) Although David Rodrigues again appears to have been the primary Bureau contact, as the record makes clear, decision-making was in the Governor's office. *See, e.g.*, (AR IV0237; AR V0037 ("we are on hold until we get some information from Governor's and AG office"); AR V0099, 108, 218; Add. 0266, 275-276, 288 ("I wouldn't do anything until the Governor's Office advises")).

Over a month's worth of back and forth on lease language between the Verrill lawyers and CMP's lawyers led to the only notable change in the lease that bears on the Bureau's consideration of the issues of reduction or substantial alteration: at one point, "with input from Andy Cutko," the caption was changed from "Transmission Line Lease" to "Amended and Restated Transmission Line Lease." (A516.) 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." (A516.) Thus, by the legerdemain of changing the caption, the Bureau and its outside lawyers hoped both

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[10] Presumably use of unauthorized outside counsel to negotiate the lease, (Add. 0008-9), was one of the reasons "[t]he Governor want[ed] to keep [Verrill's] role as quiet as possible…." (Add. 0303.)

to cure the illegality of executing a lease prior to issuance of a CPCN and, notwithstanding the Parker Memorandum and the Committee's strongly held view, to avoid the need for legislative approval by treating the lease as only a paper exercise that could not be considered a substantial alteration.

Astonishingly, even after the Parker Memorandum and the legislative hearing and unanimous Committee vote asserting that the NECEC corridor did substantially alter the uses of the public lots, in the over 400 pages in the record relating to the 2020 Lease from March 25 to the end of May, this April 20, 2020, email is the lone reference to any possible consideration of the substantial alteration issue.

Litigation History

On June 23, 2020, Plaintiffs filed suit, challenging the 2014 Lease because it was executed prior to issuance of a CPCN in violation of 35-A M.R.S. § 3132(13) and in violation of Article IX, Section 23 of the Maine Constitution. The 2020 Lease was signed that same day. On June 30, Assistant Attorney General Parker forwarded the 2020 Lease to Plaintiffs' attorneys. Plaintiffs then filed an amended complaint challenging both the 2014 and 2020 Leases in two counts under the Declaratory Judgments Act and one alternative count under the Maine Administrative Procedure Act ("MAPA"). The Bureau and CMP both moved to dismiss the Declaratory Judgment Act counts on the ground that MAPA provided the exclusive cause of action. CMP also moved to dismiss for lack of standing. The Court denied both

motions, although it narrowed the scope of the Declaratory Judgment count. It then ordered the Bureau to produce the record so that it could evaluate how to proceed.

Before reaching any conclusion with respect to the record, the court requested that the parties brief the principal legal argument raised by the Bureau—that utility leases entered into pursuant to 12 M.R.S. § 1852(4) were "categorically exempt" from Article IX, Section 23 of the Constitution. On March 17, 2021, the trial court concluded that section 1852(4) utility leases could not trump the Constitution and were not exempt from Article IX, Section 23. After various submissions, the court finalized the record, including several additions proposed by the parties, and excluding a Bureau memorandum written over three months after the lawsuit began that purported to set out the agency's findings and conclusions, noting that it "appears to be a post hoc justification of the Bureau's actions in 2014 and 2020." (A68.) CMP and the Bureau then filed an interlocutory appeal, which this Court dismissed.

The parties then moved for judgment on the DJ action and filed Rule 80C briefs on the merits. The Bureau renewed its position that the DJ action was duplicative and did not assert sovereign immunity. The court entered judgment for Plaintiffs, concluding that a public process was an essential element of the Bureau's trust responsibility. The court did not address Plaintiffs' claim that the 2014 Lease was invalid for lack of a CPCN. The court then vacated the 2020 Lease for the

Bureau's failure to make a determination as to whether the Lease would effectuate a reduction or substantial alteration to the leased premises and thus require 2/3 legislative approval under the Constitution. This appeal followed.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether Article IX, Section 23's prohibition against reducing or substantially altering the uses of public reserved lands without first obtaining the approval of two-thirds of the members of each House applies to transmission line leases where that prohibition contains no exceptions and the Legislature has repeatedly confirmed its applicability?

2. Whether the court below properly vacated CMP's transmission line lease where the Bureau failed to make any findings with respect to the constitutional issue of reduction or substantial alteration?

3. Whether management of the public reserved lands in trust for the benefit of the people of Maine requires a public process before the Bureau can enter into a major transmission line lease?

4. Whether the court below erred in not deciding the constitutional reduction or substantial alteration question itself where it owes no deference to the agency and the Bureau made no findings and afforded the public no process?

5. Whether Plaintiffs' claims under the Declaratory Judgments Act are barred by sovereign immunity where those claims allege a constitutional violation against an individual state officer?

6. Whether Plaintiffs who use the public lands being leased and the surrounding areas and claim a loss of use and enjoyment of these lands as a result of the lease to CMP and the Legislator Plaintiffs who allege they have been deprived of their right to vote on any conveyance of public lands that reduces or substantially alter those lands have standing?

SUMMARY OF THE ARGUMENT

The Bureau's statutory leasing authority in 12 M.R.S. § 1852 cannot be

unmoored from the Constitution. The public lots are designated—both by the Constitution and by the implementing statutes—as lands subject to Article IX Section 23. Thus, any lease that reduces or substantially alters the uses of those lots is invalid unless it first receives supermajority legislative approval. Nothing in the statutes supports the Bureau's argument that the Legislature categorically exempted such leases from the Constitution and the Legislature would lack authority to do so, even if it so intended. The Legislature did not acquiesce to any Bureau interpretation that high-impact transmission line leases are exempt from the Constitution. Indeed, there is no evidence of any such interpretation or any legislative acquiescence—to the contrary there was vehement legislative repudiation. In any case, the Constitution cannot be amended by executive interpretation or legislative acquiescence.

The Bureau concedes there is no evidence that it determined that this lease did not reduce or substantially alter these lots other than the post-litigation rationalization the Bureau prepared to justify the lease. The Superior Court properly excluded that post-hoc memorandum and properly vacated the lease. It is immaterial that it did not issue a remand: the Bureau is free to take further action without being so ordered. Rather than simply vacate the lease, the Superior Court should have, as requested by Plaintiffs, affirmatively declared that this lease reduces and substantially alters these lands within the meaning of Article IX, Section 23.

The Bureau's decision to lease public lands for transmission line corridors

must be made publicly, as are its submerged lands decisions, and it has no sovereign immunity for violations of Article IX, Section 23.

Finally, Plaintiffs have standing to bring and maintain this action seeking to vindicate their constitutional rights.

ARGUMENT

I. Standard of Review

An agency is limited both by its statutory grant of authority, and by the State and Federal Constitutions. *New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 148 Me. 374, 379, 94 A.2d 801, 804 (1953). Because agencies have no expertise in constitutional interpretation, the Court, without deference, conducts "an independent review of the jurisdictional requirements imposed by the United States Constitution" or the Maine Constitution. *See LeBlanc v. United Eng'rs & Constructors Inc.*, 584 A.2d 675, 677 (Me. 1991); *see also Jones v. Sec'y of State*, 2020 ME 113, ¶¶ 11-12, 238 A.3d 982; *Voorhees* v. *Sagadahoc Cty.*, 2006 ME 79, ¶¶ 5-6, 900 A.2d 733. When there is no adjudicatory hearing and the administrative record contains no factual findings on the constitutional issue, the Superior Court can, as it did here, make its decision "based on a stand-alone record created within the judicial proceeding." *Blue Sky W., LLC v. Me. Revenue Servs.*, 2019 ME 137, ¶ 21, 215 A.3d 812; *see generally id.* ¶¶ 20-21 & n.12. Accordingly, even under MAPA this Court reviews for clear error the Superior Court's factual findings, including those it

inferred from the paper record, and it reviews legal conclusions *de novo*. *Id.* ¶ 22.

II. Article IX Section 23 Contains No Exemption For Leases of Transmission Lines And The Legislature Could Not and Did Not Create One

By its plain language, Article IX, Section 23 of the Maine Constitution applies to all public reserved lands and all uses of such lands, including leases for electric transmission lines under 12 M.R.S. § 1852(4). The Bureau, however, argues that the Legislature made a policy decision to exempt transmission line leases—and all other leases under section 1852—from the constitutional amendment. (Bureau Blue Br. 30.)[11] In making this argument, the Bureau focuses solely on the statute, unmooring it from the constitutional amendment: according to the Bureau, a "plain language review begins with the Bureau's leasing authorization: 12 M.R.S. §1852." (Bureau Blue Br. 22.) To the contrary, a plain language review begins with the Constitution.

A. The Legislature Does Not Have the Authority to Exempt Transmission Line Leases from Article IX, Section 23

The Constitution is the supreme law of the State. *LaFleur ex rel. Anderson v. Frost*, 146 Me. 270, 280, 80 A.2d 407, 412 (1951). As the trial court correctly explained, "[t]he starting point for this analysis must be the constitutional provision itself." (A75). Article IX, Section 23 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

[11] Under the Bureau's theory, neither the constitutional amendment nor the implementing legislation had any impact whatsoever on the Bureau's authority to lease public reserved lands for electric transmission lines, or any other use in section 1852 (*e.g.* roads, bridges, landing strips, pipelines, railroad tracks, mill privileges, commercial purposes, dam sites, or dump sites). This would be an absurd result.

> 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.

Furthermore, when enacting legislation to facilitate a constitutional provision, any implementing legislation "may not in any way impair" the constitutional protections "as the Legislature also is bound by the organic law of the State." *State v. Bachelder*, 403 A.2d 754, 759 (Me. 1979).

Because of the supremacy of the Constitution, the Legislature cannot and did not do what the Bureau and CMP claim—exempt all leases of public lands from Article IX, Section 23 no matter their impact. Simply put, "[s]tatutes are construed to accord with constitutions, not vice versa." *Thomas v. Nev. Yellow Cab Corp.*, 327 P.3d 518, 521 (Nev. 2014). Thus, "the Legislature's power to define terms is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded." *State ex rel. Stenberg v. Omaha Exposition & Racing, Inc.*, 644 N.W.2d 563, 570 (Neb. 2002) (alterations and quotations omitted) (quoting *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization & Assessment*, 471 N.W.2d 734, 739 (Neb. 1991)). As the trial court recognized, statutes "are to be construed in harmony with and not to thwart the purpose of the Constitution." (A88 (quoting *Phelps v. United States*, 274 U.S. 341, 344 (1927))).

The argument pressed by the Bureau and CMP that *all* leases issued under Section 1852(4), no matter what impact the leasehold activity may have, are

categorically exempt from Article IX, Section 23 consequently cannot withstand scrutiny. Not all leases are the same or have the same impacts, as the Parker Memorandum recognizes in describing the constitutional necessity of making a case by case determination.[12] (A514.) Setting aside the complete absence of any legislative statement that section 1852(4) leases are categorically exempt, the Legislature simply cannot by statute create an exemption from the protection afforded the public reserved lands for all leases regardless of their impacts. *LaFleur*, 146 Me. at 280, 80 A.2d at 412. Any attempt to do so would unquestionably be outside the Legislature's power. *See Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860, 872-73 (Nev. 2021); *Stanwitz v. Reagan*, 429 P.3d 1138, 1142 (Ariz. 2018). Moreover, exempting all leases from application of Section 23 fails to harmonize the statute with the Constitution, while making individual leases subject to a case by case assessment of the impact of the activity for which the land is being leased does, as the Attorney General's Office previously advised the Bureau.

A plain reading of the Constitution, and the duty to harmonize statutes with it, thus requires reading section 1852 to allow leases of public lands for transmission

[12] Applying Article IX, Section 23 to these leases also comports with the approach of other jurisdictions. For example, the Massachusetts Constitution similarly requires public lots held by the State for conservation "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. art. XLIX. The Attorney General opined that this included "long-term and short-term leases of whatever length." Robert H. Quinn, *Opinion of the Attorney General Regarding the Disposition of Public Lands Under the "Clean Environment" Amendment to the Constitution of Massachusetts*, 3 B.C. Envtl. Aff. L. Rev. 495, 500 (1974), http://lawdigitalcommons.bc.edu/ealr/vol3/iss3/6.

lines without legislative approval only if those transmission lines do not reduce or substantially alter the uses of those lands, exactly as the Parker Memorandum advised.[13]

B. Nothing in the Legislative History Suggests a Legislative Attempt to Exempt Leases from Article IX, Section 23

As both the Bureau and CMP point out, section 1852's leasing authority predates the constitutional amendment by decades. From that they argue that Article IX, Section 23 did nothing to affect that authority.

That contention badly misses the mark. As a constitutional amendment, Article IX, Section 23 "made a fundamental change" in the management of designated lands. *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 230, 60 A.2d 908, 910 (1948). Without an express exception in the constitutional amendment, there is no basis to conclude that the Legislature, in proposing the amendment by a two-thirds supermajority, and the people in overwhelmingly adopting it, intended to exempt transmission line leases from the requirement that reductions or substantial alterations of designated lands must receive legislative approval. Instead, the constitutional amendment must be understood for what it was—a limitation on any

[13] In a trial court filing, Assistant Attorney General Parker suggested that "[t]o the extent the memo offers an AAG's views or advice contrary to the Bureau's long-standing position that section 1852(4) leases do not require 2/3 legislative approval, *the Bureau was free to reject it*." Director's and Bureau's Rebuttal, 19, Feb. 5, 2021 (emphasis added). That position astonishingly undermines years of hard-won gains preserving and protecting the authority of the Attorney General and underscores the extent to which the Bureau's position is flawed. *See, e.g. Superintendent of Ins. v. Att'y Gen.*, 558 A.2d 1197, 1199-1200 (Me. 1989) (discussing power and autonomy of Attorney General).

reduction or substantial alteration in designated lands. Were there any doubt, it would be resolved by the "context, historical origins, tradition, and precedent" that gave rise to the Amendment. *Opinion of the Justices*, 2015 ME 107, ¶ 39, 123 A.3d 494. For that context and history, *see supra* pp. 2-6.

Section 1852(4) was in effect when the constitutional amendment passed in 1993; at the time, it was codified as 585(4)(C). The argument that the Legislature proposed—and the people of Maine approved—the broad language of the amendment requiring legislative approval for public lands to be reduced or changed but simultaneously included a silent exception for reductions or changes resulting from electric transmission line leases and other leases under then-section 585(4) strains credulity. The very purpose of the constitutional amendment—and the express addition of "public lots"—was to limit the existing authority over those lots, not to maintain the status quo. It must be presumed that the voters, and the legislators who drafted and passed the implementing legislation, were familiar with, and aware of, the concept of constitutional supremacy and would have created an explicit exemption for leases if they so intended. *See, e.g. Realco Services, Inc., v. Halperin*, 355 A.2d 743, 745-46 (Me. 1976); *Me. State Hous. Auth. v. Depositors Trust Co.*, 278 A.2d 699, 708 (Me. 1971); *see also* 82 C.J.S. Statutes § 377.

Because the Constitution does not include an express exemption for any particular type of conveyance, such as an easement or a lease, nor for particular uses,

such as an electric transmission line, where those conveyances or uses reduce or substantially alter the uses of the public lands, they fall within the constitutional protection and require the approval of two-thirds of the members of each House. Rather than attempting to exempt utility leases from the Constitution, moreover, the Legislature expressly stated its intent in the Designated Lands Act that uses of public reserved lands remain subject to the constitutional amendment unless the Legislature repeals the designation by a 2/3 vote. 12 M.R.S. § 598-A.

The Bureau tries to draw a negative inference from the absence of cross-references to section 598-A in section 1852(4). The Bureau argues that, "[i]f the Legislature regarded section 1852 leases . . . as substantially altering the uses of public reserved lands (either sometimes or categorically), those statutes would provide that such activities must be 'consistent with section 598-A' or are 'subject to the provisions of section 598-A.'" (Bureau Blue Br. 33.) While the constitutional amendment authorized the Legislature to designate lands subject to Article IX, Section 23, contrary to the Bureau's claim, it did not authorize the Legislature to amend the Constitution by negative implication.

As a general principle, courts caution against reading too much into a failure to enact or amend legislation. *See, e.g.*, *Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route."); *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous

to find in Congressional silence alone the adoption of a controlling rule of law."); *Field v. Mans*, 516 U.S. 59, 66-67 (1995) (rejecting argument that an express reference to reasonable reliance in one subsection of a statute, but not in the other subsection, meant that Congress did not intend to include reasonable reliance in the other subsection); *Burns v. United States*, 501 U.S. 129, 136 (1991), *abrogated on other grounds by Dillon v. U.S.*, 560 U.S. 817 (2010) ("As one court has aptly put it, 'not every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective." (citation and alteration omitted)).

Here, as the Superior Court found, the Legislature's express intent to keep public lands protected unless they are "undesignated" is a far more reliable indicator of intent than the so-called negative inferred intent the Bureau relies on. (A84 n.8.) Furthermore, in the limited circumstance where a court reads import into a legislature's failure to do something, it can only draw an inference by negative implication as to something within the legislature's authority. *See Opinion of the Justices*, 2015 ME 107, ¶ 25, 123 A.3d 494, 505 ("Th[e] express constitutional limitation on the power of the Houses to adjourn must be understood to control over any statutorily established adjournment date."); *Sawyer v. Gilmore*, 109 Me. 169, 83 A. 673, 678 (1912). Considering that the Legislature cannot subordinate the

Constitution to a statute expressly, it clearly cannot do so by negative implication.

An example of the unreliability of the use of inferences here are sections 1814, 1836, and 1851 relied on by the Bureau in its chart. (Bureau Blue Br. at 33.) Before adoption of Article IX, Section 23, the precursor to section 1851 contained a requirement that a sale be approved by the Legislature, *i.e.*, a majority, P.L. 1987, c. 737, § 2 (enacting 12 M.R.S. § 590). To conform that provision to the newly-enacted constitutional amendment requiring the approval of 2/3 of the Legislature, it was necessary to cross-reference the supermajority requirement in section 598-A. The identical analysis applies to section 1836, which had similar language. P.L. 1975, c. 339, § 6 (enacting 12 M.R.S. § 553(F)). As to section 1814, while sales and leases of park lands apparently required only consent of the Governor, see P.L. 1975, c. 771, § 126 (amending then-section 602 governing park lands), it makes sense that all three sections dealing with sales used the same language since any reduction of state park land, public lots or other designated lands requires the approval of two-thirds of the Legislature. P.L. 1997, c. 678, § 13 (enacting all three sections). Moreover, the cross-reference regarding "sales" in these sections makes sense given that proceeds of any sale must be used to purchase land in the same county for the same purposes. *See* Article IX, Section 23; 12 M.R.S. § 598-B.[14]

[14] The Bureau argues that the cross-reference to section 598-A in section 1814 is what makes leases of State parks subject to the Article IX, Section 23. Yet, for the years from 1993 until 1997, there was no such cross-reference (for either sales or leases) of any lands, *see e.g.* P.L. 1995, c. 502, § E-19 (amending then-section

Nor is there any support for the notion that the Legislature somehow made a policy decision that transmission line leases never substantially alter the uses of the public lands. To the contrary, even before such leases were expressly deemed to substantially alter those lands, *see* L.D. 1295, I.B. 1 (Dec. 19, 2021) (codified as amended at 12 M.R.S. § 1852(4)), in defining "substantially altered," the Designated Lands Act already limited the definition of "essential purposes" of public reserved lands to "the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S. § 598(5). Section 1847, in turn, discusses those objectives as management of the public reserved lands: "under the principles of multiple use to produce a sustained yield of products and services . . . 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. § 1847(1) (emphasis added). Section 1845 defines "multiple use" in part as "[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" and defines "sustained yield" as "the achievement and

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602), so under the Bureau's theory, the Constitution did not apply during these years—an untenable result. The disparate categorical treatment of leases now advanced by the Bureau through negative inference from various statutory cross-references, (Bureau Bl. Br. at 32-34), could only spring into existence in 1997 when the cross-references were first introduced by an omnibus recodification, *see* P.L. 1997, c. 678, § 13. This highlights the absurdity of performing Constitutional interpretation through negative inference of statutory references; the Legislature lacks authority to amend the Constitution by inference or otherwise.

maintenance in perpetuity of a high-level regular periodic output of the various *renewable resources* of the public reserved lands." 12 M.R.S. § 1845 (emphases added).

The Bureau concedes that transmission lines are not one of the multiple uses for which the Bureau can manage the public lots under section 1847. (Bureau Blue Br. 30.) This conclusion is necessary where transmission lines are not listed in the definition of multiple use. Under well-settled doctrines of statutory construction, the express mention of the specific uses that are included in the concept of "multiple use" excludes other uses not listed. *See Wescott v. Allstate Ins.*, 397 A.2d 156, 169 (Me. 1979) (stating that doctrine of "expressio unius est exclusio alterius is well recognized in Maine"). Moreover, the "other public purposes provision" is necessarily limited to purposes similar to those described for "forested and related types of lands." *See New Orleans Tanker Corp. v. DOT*, 1999 ME 67, ¶ 7, 728 A.2d 673 (applying doctrine of "ejusdem generis" to interpret Maine Tort Claims Act).

The common understanding of "multiple use" is as a sustainable method to help keep forestland forested and allow a greater number of stakeholders to receive forest benefits, which also stays true to the decades-long fight to recapture the public lands for the use of Maine people.[15] Accordingly, the private and non-forestland uses

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[15] *See, e.g.*, Nix, Steve, *What Is Multiple-Use Management?*, THOUGHTCO (Oct. 29, 2020), https://www.thoughtco.com/multiple-use-1341734. Its use in 12 M.R.S. § 598(5), by statutory definition and common usage refers to forest management that prevents conversion to non-forest uses by satisfying

authorized for lease in 12 M.R.S. § 1852, when not in furtherance of, or accessory to, one of the objectives enumerated in sections 1847 and 1845, require a determination of whether they frustrate one of the "essential purposes" of the public lots for "outdoor recreation, timber, watershed, fish and wildlife" and similar public purposes, as the Parker Memorandum previously advised.

The Bureau's contention that 12 M.R.S. § 1852(4)(A) "reflects a legislative policy determination that its leasing authorization is compatible with the Bureau's multiple-use mandate" is far too broad. (Bureau Blue Br. 30.) Just because an action may be compatible with a use in *some* situations, it does not follow that an *action* is compatible with a *use* in *all* situations.[16] And just because an action may be legislatively-authorized, it does not follow that it necessarily in all cases comports with the Constitution. *See, e.g.*, *Carpenter v. United States,* 138 S. Ct. 2206, 2221 (2018) (even though Stored Communications Act authorized Government's acquisition of cell-site records, that acquisition nonetheless violated Fourth Amendment).

Treating section 1852 leases as unaffected by the constitutional amendment, moreover, leads to absurd results. The Director's authority under 12 M.R.S. § 1852 includes a broad swath of activities: to construct public roads, § 1852(2); to set and

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the demands of multiple stakeholders as a way of adding more value to forests as forests.

[16] CMP and the Bureau incorrectly conflate these concepts in their discussion of the legislative history as the Superior Court pointed out. (A84-87.)

maintain electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips, pipelines, railroad tracks, or other rights of way, § 1852(4); residential leaseholds, private campsites, garages, depots, warehouses and other structures, § 1852(5); industrial and commercial purposes, dam sites, dump sites, ditches, tunnels, conduits, flumes and other rights of value, § 1852(6). If each of those actions were categorically exempt from Article IX, Section 23—the unavoidable result of the Court accepting the Bureau's litigation position as the Bureau concedes—then the hard-fought constitutional provision that protects the public trust in public lots becomes a nullity.

Perhaps in recognition of the absurdity of this outcome, the Bureau attempts to identify some restriction on its ability to enter into a section 1852(4) lease. The Bureau asserts that any such lease "must be consistent with the Bureau's comprehensive management plan—the Integrated Resource Policy—and, once adopted, specific action plans." (Bureau Blue Br. 31.) In doing so, the Bureau acknowledges that a transmission line lease "is not likely to be compatible with certain allocations, such as special protection areas, backcountry recreations areas, and visual areas." (Bureau Blue Br. 31-32.) Thus by the Bureau's own admission, there is at least the possibility that an electric transmission line lease may frustrate the essential purposes for which land is held and thus require 2/3 legislative approval, which necessarily means that such leases cannot be categorically exempt.

Finally, the Bureau argues that the amendment of section 598(4) to exclude certain rail-trail access easements from the definition of "reduction" means that the Legislature intentionally distinguished easements from leases for all of Article IX, Section 23, with all easements requiring legislative approval but not leases. (Bureau Blue Br. 28.) The Bureau attempted below to justify this disparate treatment on the ground that easements require legislative approval because they are permanent, while 25-year renewable leases do not because they are somehow "temporary." Bureau's Rule 80C Brief at 30 (July 2, 2021). Apparently recognizing the absurdity of this argument, the Bureau now claims that the Legislature has determined that easements *as a category* are "reductions." (Bureau Blue Br. 27-28.)

The Bureau concedes that neither a lease nor an easement conveys any land and therefore the acreage in both cases remains the same, as it must. *See, e.g.*, *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1844-45 (2020) ("Thus, it was, and is, elementary that the grantor of [an] easement retains ownership over 'the land itself' . . . Stated more plainly, *easements are not land*, they merely burden land that continues to be owned by another.") (internal citations omitted) (emphasis added). To avoid that commonality of easements and leases, the Bureau argues that the inclusion of an exception for easements granted pursuant to 12 M.R.S. §1814-A to the definition of reduction means that "reduced" must otherwise encompass easements, else that exclusion would be unnecessary. *Id.*

It is hard to imagine a more strained interpretation. First, if a rail-trail access easement but for the exclusion is a "reduction," it is hard to see how a 300 foot wide transmission line corridor for which there is no exclusion is not. Nor does the Bureau even attempt to explain the identical exclusion of rail-trail easements from the definition of "substantially altered." 12 M.R.S. § 1852(5). Second, and more important, these exclusions make clear that it is not the form of conveyance that is being excluded, but the nature of what is being conveyed—an access right to a rail trail. It is nonsensical for the Bureau to say that it can authorize a private company to build a transmission line on public lands if it uses a lease but that it cannot authorize the same activity if it uses an easement. The relevant constitutional question is the impact of the transmission line, not the form of the conveyancing instrument used to grant the right to build it.[17]

The Bureau also claims that the allegedly different treatment of the proceeds from easements and leases support its claim. The Bureau argues that proceeds from easements are governed by Article IX, Section 23, which directs proceeds from any "sale, exchange or relocation of public reserved lands" to a Public Reserved Lands Acquisition Fund, while proceeds from leases go to the Public Reserved Lands Management Fund. (Bureau Blue Br. 28-29.) Apart from there being no evidence in

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[17] Ironically, CMP takes the opposite position—it asserts that easements are not reductions, (CMP Blue Br. 5 n.2), confirming the lack of logic to the Bureau's argument.

the record as to where the proceeds from easements like the three major transmission lines discussed above went, the plain language of Section 23 refutes the Bureau's arguments—it applies to sales or swaps, neither of which is an easement. Since an easement, no more than a lease, is a sale, this argument also fails. *See also* 12 M.R.S. § 598(2) ("Proceeds" means money "from the sale of designated lands . . . .").

C. The Legislature Has Not Acquiesced But Rather Rejected the Bureau's Interpretation

The Bureau's argument that the Legislature "acquiesced to the Bureau's interpretation of section 1852 leases" flies in the face of both the law and the facts. Apart from the Legislature's lack of power to "acquiesce" to an unconstitutional interpretation of a statute, the Bureau fails to make any showing of either a long-standing coherent agency interpretation or an intentional acquiescence by the Legislature to that interpretation.

As an initial matter, since the passage of the constitutional amendment, every major transmission line crossing public lands, other than NECEC, has gone to the Legislature for approval: Bangor Hydro Northeast Reliability Interconnect (Resolves 2007, Ch. 91), TransCanada (Resolves 2007, Ch. 91), and Bangor Hydro Donnell Pond (Resolves 2009, Ch. 209)).

Moreover, the Bureau's assertion that the Legislature was on notice of its lease with CMP but failed to act is misleading. The Bureau first entered into the lease with CMP in 2014. The Bureau and CMP cite to the Bureau's 2015 fiscal year report,

published on March 1, 2016, (AR VII0128), to suggest that the Legislature was informed of the 2014 Lease. While that report references the lease, nothing in the report put the Legislature on notice that the lease was for a high-impact transmission line that would reduce or substantially alter the public lots. (AR VII0158 ("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. 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….")).[18] Indeed, in a January 2020 ACF Committee hearing, 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. (A545.)

After the Legislature learned that the Bureau had leased public lands for a high-impact transmission line that would require a CPCN, it took a series of actions that demonstrate that, far from acquiescing, the Legislature actively disputed the Bureau's interpretation. In December 2019, Senator Russell Black introduced L.D. 1893, which was referred to the ACF Committee, which has oversight responsibility for the Bureau. (A528.) After a hearing, the Committee amended the bill to make

[18] Nor would it have been reasonable for the Legislature to have guessed that it was a lease for a high-impact transmission line, as that would have been in express violation of 35-A M.R.S. § 3132(13).

clear that the NECEC constitutes a substantial alternation of the public lands, requires 2/3 legislative approval, and canceled the unlawful lease. (A531.) On February 18, 2020, the ACF Committee voted unanimously to recommend to the Legislature that L.D. 1893 as amended ought to pass. (A535.) But for the Legislature being forced to adjourn because of Covid-19, L.D. 1893 as amended likely would have been enacted.

The Legislature continued to express its belief that a high-impact transmission line like the NECEC substantially altered the uses of public lands and required 2/3 legislative approval. *See* L.D. 471 (130th Legis. 2021) (An Act To Require Legislative Approval for Certain Leases of Public Lands). During a hearing on L.D. 471, Director Cutko opposed the legislation and maintained his position that the lease was not subject to the Maine Constitution despite the trial court's decision in this case to the contrary. (Add. 0237-254.) As a result of Director Cutko's testimony, the ACF Committee voted 12-1 to send a letter to him and the Commissioner reiterating the Committee's well established view that the lease with CMP required legislative approval. (A534.) The Legislature reaffirmed its position on July 19, 2021, when it adopted the "Joint Resolution, Expressing the Sense of the Legislature Regarding the use of Public Land Lease by State," which passed in the Senate 28-6, and once again expressed the Legislature's view that CMP's public lands lease requires 2/3 legislative approval. S.P. 594 (130th Legis. 2021).

The Bureau ignores all of these legislative actions and instead relies on a single sentence of legislative testimony by a former Deputy Director of the Bureau from 2007.[19] (Bureau Blue Br. 37.) This places far more weight on a single bulleted sentence than that thin reed can bear. The sentence merely states that the Bureau may grant leases under section 1852 without legislative approval. It is at most an off-hand remark made in the context of seeking 2/3 legislative approval for the Bangor Hydro and TransCanada transmission lines which hardly supports the weight the Bureau tries to attach to it. In fact, all that it would show at most is that the Bureau has historically misread section 1852, just as it does now.[20] And in any case the Legislature's direct statements on the Bureau's leasing authority roundly reject any notion of legislative acquiescence based on this single remark.

CMP argues that a 1999 amendment regarding majority legislative approval of all leases to the federal government supports its view of legislative acquiescence. (CMP Blue Br. 9-10.) But that contention too ignores subsequent much more direct actions and statements by the Legislature: the Legislature's approval by a 2/3 vote on two occasions, one in 2007 and one in 2010, of the only three major transmission lines utilizing public lands, and its vigorous objection to the NECEC lease when it

[19] This testimony was apparently discovered long after briefing the section 1852(4) exemption issue as part of the Bureau's slow response to Plaintiffs' FOAA requests, which it now belatedly tries to claim supports its "longstanding" interpretation that the Constitution does not apply to substantial alterations by lease.

[20] Until 2014, the Bureau never attempted to grant a lease for a high-impact transmission line without 2/3 legislative approval, and thus any prior reading by the Bureau was entirely theoretical.

was fully informed about it, both far more recent and definitive expressions of the Legislature's view than the 1999 amendment.

To the extent CMP relies on rulings of the presiding officers in connection with the 1999 amendment based on advice from the Revisor's Office that the Legislature lacked the authority to require a supermajority vote, that advice merely restates the truism that a supermajority vote can only be imposed by the Constitution, a fact the Legislature had already recognized in 1997 in section 1814—"subject to the provisions of section 598-A, the bureau may convey interests in lands *or lease* the same." P.L. 1999, c. 240, §1, *codified at* 12 M.R.S. § 1814 (emphasis added). As noted above, section 598-A requires two-thirds legislative approval.[21]

Finally, a comparison between the facts the Bureau and CMP point to and the facts in *Thompson v. Shaw's Supermarkets, Inc.*, 2004 ME 63, 847 A.2d 406, relied on by the Bureau, dramatically illustrates the weakness of their argument. Unlike the meager and indirect inferences of legislative acquiescence here, there, although the Legislature between 1966 and 2001 "amended section 664 thirty-one times, with twelve of those amendments dealing specifically with the overtime provision, not once in that thirty-five-year-period did the Legislature amend the statute to change the interpretation that the Department had given it." *Id*. ¶ 7. In addition, the record

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[21] Indeed, the Bureau itself identifies a lease of public reserved lands to the federal government for "existing public safety communications facilities" that was approved by "the vote of 2/3 of all members elected to each House" under Me. Const. art. IX, § 23. *See* (Bureau Blue Br. 38 (citing Resolves 2013, ch. 56, § 1)).

in that case included written correspondence between state representatives and both the Commissioner and the Director of the Department of Labor expressly calling their attention to the Department's position. *Id*. In contrast, here, the Bureau's purported "interpretation" was not even public enough to be known by the Assistant Attorney General who had represented the Bureau for several years at the time she advised the Bureau about the need for legislative approval for a lease that substantially altered the use of Cold Stream Forest.

III. The Bureau's Failure to Determine Whether the Lease Reduced or Substantially Altered the Public Lands Requires Vacating the Lease

Contrary to the litigation position Assistant Attorney General Parker now advances on behalf of the Bureau, the advice she previously gave the Bureau when there was no litigation threatened was and remains correct: where, as here, there is no question that a transmission line will significantly alter the physical characteristics of the public lands, a determination must be made whether that alteration frustrates the essential purposes for which the lands are managed. The Superior Court extensively reviewed the administrative record and concluded that there is "no competent evidence" supporting such a determination. (A51.)

On appeal, the Bureau does not argue that such evidence exists nor identify any such evidence in the record, thereby waiving that argument.[22] Instead, the

[22] This Court holds "with a regularity bordering on the monotonous, that arguments not raised in an opening brief are waived." *Lincoln v. Burbank*, 2016 ME 138, ¶ 41, 147 A.3d 1165 (quoting *Young v. Wells Fargo*

Bureau asks this Court to reverse a Rule 80C(f) determination of the Superior Court excluding from the agency record a Bureau memorandum dated September 24, 2020. (A67-69.) Specifically, the Bureau states that this Court should remand to the trial court with instructions to "accept the Findings Memo as part of the administrative record and conduct a substantial evidence review." (Bureau Blue Br. 50.)

The Bureau misstates the standard of review employed by this Court in reviewing the Superior Court's decision about the record: it is not *de novo*. (Bureau Blue Br. 48.) Instead this Court reviews the Superior Court's determination pursuant to Rule 80C(f) that the proposed record was "over-inclusive" and should not include the September 24, 2020 memo for "abuse of discretion." *Murphy v. Bd. of Env't Prot.*, 615 A.2d 255, 260 (Me. 1992).

Here, the Superior Court extensively considered this issue and did not abuse its discretion in refusing to admit this post-hoc memorandum, which "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" to explain legislative acquiescence. (A67-69.) "It is a 'foundational

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Bank, N.A., 717 F.3d 224, 239 (1st Cir. 2013)). "An issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all." *Melhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (citing *Holland v. Sebunya*, 2000 ME 160, ¶¶ 9 n.6, 759 A.2d 205). CMP's assertion that even excluding the September 24, 2020 memo, "the record evidence demonstrates BPL in fact engaged in such an analysis," (CMP Blue Br. 41), is cursory at best, and thus not sufficient to preserve the issue for judicial review. Moreover, the Superior Court amply disposed of this issue below. (A51.)

principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). "An agency must defend its actions based on the reasons it gave when it acted." *Id.* at 1909. Post hoc materials are properly barred when they present a new theory or when the contemporaneous agency record discloses no basis for the agency determination whatsoever. *Rhea Lana, Inc. v. U.S.*, 925 F.3d 521, 524 (D.C. Cir. 2019).[23]

The record in this case does not contain any contemporaneous rationale for the Bureau's supposed determination that the transmission line would not substantially alter the public lands. Moreover, the memorandum was prepared, in part, by Director Cutko, who was not the decisionmaker at all times relevant to the memorandum, and who testified during consideration of L.D. 1893 that he had personally searched the files and that "there's not a lot there," (Add. 0140), and that the Bureau could not find *any* information in its records documenting a finding concerning substantial alteration, (Add. 0144). *See also* (A523-25 (Committee request for documents and response); A538-42 (no documents found relating to

[23] The Bureau's reliance on *Olivares v. Transp. Sec. Admin.,* 819 F.3d 454 (D.C. Cir. 2016) is misplaced. Unlike the declaration in *Olivares*, the Bureau's post-hoc memorandum does not cite to any contemporaneous determinations nor does it explain anything in the contemporaneous record. (A474-483.) "[R]ationalizations offered for the first time in litigation affidavits and arguments of counsel" is improper. *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6-7 (D.C. Cir. 2006) (internal citation omitted.); *see also Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 27-28 (1st Cir. 2020).

substantial alteration determination)).

Even if the Bureau had not waived the argument, or CMP had somehow preserved it, the record shows that the Bureau never made a substantial alteration determination. First, their near-total reliance on the so-called "categorical exemption" purportedly contained in section 1852(4) would have been totally unnecessary if such a determination had in fact been made. Indeed, the entire logic of that argument is that the exemption does away with the need to make the determination, *e.g.*, (CMP Blue Br. 37-39), and the Bureau even asserts that it had a "longstanding practice" of never making such determinations for leases. (Bureau Blue Br. 38.) Second, neither CMP nor the Bureau point to any record evidence of a determination.[24] Indeed, the Bureau has conceded that there are no contemporaneous written findings or conclusions, and that, absent the post-hoc memorandum that purports to reflect the findings that it had a long-standing practice not to make, there is no judicially reviewable administrative record. (A230.)[25]

The Bureau argues that "[i]f this Court concludes that the Bureau must make

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[24] In fact, the only record documents that reveal any attempt to consider the impact on uses that the Parker Memorandum had advised the Bureau was necessary were prepared *after* the 2020 Lease was executed and this litigation had been initiated. (A526-27.)

[25] CMP asserts that because the Bureau asked it to move its line to a less offensive area of the public lots, that is somehow substantial evidence that the line would not "give rise to a substantial alteration in the uses of that land" because otherwise "none of BPL's efforts would have had any purpose." (CMP Blue Br. 41.) But, like any landlord, the Bureau would be expected to identify the least offensive location for any lease. Indeed, this very analysis by the Bureau shows that the high-impact transmission line will have negative impacts, which is why the Bureau rejected the original location. As the Superior Court correctly recognized, this is a completely different question than whether there was a substantial alteration in the uses (negative or positive) that required legislative approval, and cannot be used to infer the later. (A51-52.)

any factual findings for section 1852(4) leases, it should remand to the trial court with instructions to either accept the Findings Memo as part of the administrative record and conduct a substantial evidence review, or remand the matter to the Bureau to make such required written findings." (Bureau Blue Br. 50.) Since the "Findings Memo" was properly excluded from the record, this amounts to asking this Court to reverse the vacatur of the Lease and remand to the Bureau to make (up) findings that would support its issuance.

That invitation should be declined. Neither the Bureau nor CMP provide any explanation as to why this case is one of the rare circumstances when a remand should occur *without* vacatur.[26] Rather, this case fits the ordinary rule that a Court vacates an agency decision whenever it "violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record." *Kroeger v. Dep't of Env't Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566 (quoting MAPA).

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[26] The Bureau asserts that "[a]s the party seeking to vacate the Restated Lease, Senator Black bears the burden of persuasion on appeal." (Bureau Blue Br. 20 (citing, *e.g.*, *Somerset Cty. v. Dep't of Corr.*, 2016 ME 33, ¶ 14, 133 A.3d 1006)). *Somerset* merely states the rule that "[t]he party seeking to overturn the Board's decision bears the burden of persuasion on appeal," 2016 ME 33, ¶ 14, 133 A.3d 1006, but that rule does not apply once Plaintiffs carry their burden as they have here. Then, "the burden is on the party opposing vacatur 'to show that compelling equities demand anything less than vacatur.'" *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 2:17-CV-372, 2021 WL 855938, at *2 (S.D. Ohio Mar. 8, 2021) (quoting *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020)). "Thus, the Court places the burden on Defendants to prove that vacatur is an inappropriate remedy." *Id.*

Federal case law where an agency has skipped a fundamental determination analogous to the Bureau's failure here is instructive. "The ordinary practice . . . is to vacate unlawful agency action." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1050 (D.C. Cir. 2021) (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)).[27] The court there explained in detail that where the agency elected to forgo a major procedural step in its path to its ultimate action, vacatur is required:

> When an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step. Otherwise, our cases explaining that vacatur is the default response to a fundamental procedural failure would make little sense.

Id. at 1052; *accord AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 881-82 (E.D. Cal. 2018).

The *Standing Rock Sioux Tribe* court summarily dispensed with the argument made by the pipeline operator—the same argument here made by the Bureau and CMP—that the agency can "easily substantiate its easement decision on remand even if it must prepare an EIS," 985 F.3d at 1051, concluding that adopting that as a standard "would subvert NEPA's purpose by giving substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later[,]" *id.* at

[27] Despite lengthy discussion of *Standing Rock Sioux Tribe* by Plaintiffs and the trial court, neither the Bureau nor CMP address this case on appeal. Instead, both argue that a remand is the appropriate remedy but do not address whether it should be with or without vacatur. The Maine case law that the Bureau relies on establishes only that remand is an available remedy—the Bureau fails to identify a single case where that remand occurred without vacatur. *See* (Bureau Blue Br. 49.)

1052. The court noted that skipping the necessary procedural step meant that the court "should harbor substantial doubt that" the agency chose correctly regarding the "substantive action at issue—in this case, granting the easement." *Id.* at 1052-53 (internal citations omitted). All of those same concerns are present here.[28]

Finally, CMP mischaracterizes the cases it cites in support of its argument that the case should be remanded to the Bureau without more to make the reduction and substantial alteration determination. In support of the "ordinary remand rule" CMP cites *Sugar Cane Growers Co-op. of Fla. v. Veneman,* 289 F.3d 89, 97 (D.C. Cir. 2002) and selectively quotes in a parenthetical that "[n]ormally when an agency so clearly violates the APA we would … simply remand for the agency to start again". (CMP Blue Br. 43.) Yet the entire sentence from that case reads: "Normally when an agency so clearly violates the APA *we would vacate its action*—in this case its 'non-rule rule'—and simply remand for the agency to start again." *Id.* (emphasis added). Similarly, CMP's assertion that "[t]he clear thrust of authority in Maine demonstrates remand to be the appropriate remedy in such circumstances," (CMP Blue Br. 42), mischaracterizes *Zegel v. Bd. of Soc. Worker Licensure*, 2004 ME 31, 843 A.2d 18. There, the Court "vacated and remanded" to the Board of Social Work Licensure with instructions to "consider evidence" relevant to a determination the

[28] Vacatur absent remand respects the separation of powers because the agency is free to take whatever corrective steps it deems necessary. In contrast, "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 public process was required given this unique Constitutional Amendment and the enabling statute enacted by the Legislature." (A55.)

Board had failed to make. *Id.* ¶¶ 19, 24 (entry of judgment). Nowhere did the *Zegel* Court ever suggest that remand *without* vacatur was ever an appropriate remedy. Nor would it make any sense to remand with an order to consider additional evidence without vacating the old decision.

IV. Article IX, Section 23 of the Maine Constitution Requires the Bureau to Hold a Public Administrative Process Before Executing a Major Transmission Line Lease

As the Superior Court held, the Bureau must make a reduction/substantial alteration determination pursuant to a public administrative process before executing a transmission line lease under section 1852. (A44-45.) This requirement "arise[s] by implication from Article IX, Section 23." (A45.) The Bureau's arguments with respect to this issue focus on whether Plaintiffs have a "protectable property interest" in the public lands triggering the protections of the Due Process Clause, Me. Const. art. I, § 6-A, (Bureau Blue Br. 40-44), but Article IX, Section 23 is a coequal clause of the Maine Constitution and requires public process without resort to due process protections.

The Legislature has declared 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.

12 M.R.S. § 1846(1). The Legislature has assigned to the Bureau the role of trustee of those lands, providing "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." *Id.* § 1847(1). Indeed, even prior to Article IX, Section 23, this Court recognized 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." *Cushing*, 434 A.2d at 500 (emphasis added) (citing *Opinion of the Justices*, 308 A.2d at 271). The amendment adding Article IX, Section 23, therefore, can be understood as further refining the constraints of the trust beyond the constraints imposed by the Articles of Separation.

Thus, the Bureau, like agencies in other states that are vested with the responsibility to act as trustee of constitutionally protected public resources, has a duty to make decisions regarding public reserved lands using a process that reflects openness and its responsibility as trustee of the public lands. In holding that such a process is required, the Superior Court relied on the language of Article IX, Section 23 and the statutes quoted above that implement it. The Superior Court also drew upon case law from other states that similarly extend constitutional protection to natural resources for conservation and recreation purposes. (A44-48.)[29]

As the Superior Court recognized, important principles inherent in the

[29] For example, under Hawaii's Constitution "[a]ll public natural resources are held in trust by the State for the benefit of the people," Haw. Const. art. XI, § 1, and its Supreme Court held that "fundamental principles" of a public trust require that "the 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 under the laws of our state." *In re Wai'ola O Moloka'i, Inc.*, 83 P.3d 664, 693 (Haw. 2004) (quoting *In re Water Use Permit Applications (Waiāhole)*, 9 P.3d 409, 455 (Haw. 2000)).

Bureau's role as trustee and the requirements of Article IX, Section 23 support this rule. First, as trustee, the Bureau "is ultimately accountable to the citizens of Maine," and thus the public is entitled to notice of its actions. (A45); *see Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1091 (Idaho 1983) ("[P]ublic 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."). Second, requiring a public process "allow[s] the Legislature to exercise its constitutional prerogative to have the final say in cases where a reduction or substantial alteration is found." (A47.) Without a public process, Article IX, Section 23 would be rendered "a nullity" and the public trust "thwarted or undermined." (A48.) Third, engaging in a public administrative process also enables judicial review of decisions regarding public reserved lands, which provides important protection for public trust resources. (A48). Finally, "[i]t is axiomatic in Maine that administrative processes must be public processes, unless the Legislature provides otherwise." (A45); *see e.g.*, 5 M.R.S. §§ 9052, 9054.

In addition to Hawaii and Idaho, cited by the Superior Court, Louisiana has similarly recognized that public trust protections extend to its natural resources – even though Louisiana's Constitution, unlike Hawaii's, does not include the words "trust" or "trustee" – and that those protections require procedural protections and

create judicially enforceable duties. The Louisiana Constitution provides:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

La. Const. Ann. art. IX, § 1. The Louisiana Supreme Court held that this provision creates "[a] public trust for the protection, conservation and replenishment of all natural resources of the state." *Save Ourselves, Inc. v. La. Env't Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984); *see also Matter of Am. Waste & Pollution Control Co.*, 93-3163 (La. 9/15/94), 642 So. 2d 1258, 1262.

In *Save Ourselves, Inc.*, the Supreme Court of Louisiana considered the "[i]nterrelationship" between Article IX, Section 1 of the Louisiana Constitution and the statutory and regulatory framework implementing that provision. 452 So. 2d at 1156-58. The Court held that even though it delegated authority to a State agency, the "constitutional-statutory scheme implies several . . . important principles," *id.* at 1157, including the designation of the agency as the primary public trustee of the State's natural resources and the requirement that it actively protect the rights of the public. The Court further held that "[t]he regulatory scheme provided by constitution and statute mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." *Id.* at 1159. Maine's constitutional and statutory scheme mandate no less.

Furthermore, the Bureau's failure to adopt a transparent process for leases of

public reserved lands flouts the existing legislative command that the Bureau "shall adopt, amend, repeal and enforce reasonable rules necessary to carry out the duties assigned to it, including . . . rules . . . [f]or the protection and preservation of," among other lands, "submerged lands" and "public reserved lands" and "[f]or observance of the conditions and restrictions, expressed in deeds of trust or otherwise, of the . . . submerged lands" and "public reserved lands." 12 M.R.S. § 1803(6)(A), (C). Yet while 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 expressly set out a process for public participation, *see* 01-670 C.M.R. ch. 53, § 1.7(A)-(C), it has not adopted any rules whatsoever for the protection and preservation of public reserved lands. Article IX, Section 23 and its implementing statutes require more.

V. The Court Erred in Not Deciding the Constitutional Questions Itself

As the Superior Court correctly found, the Bureau here never engaged in the requisite constitutional analysis, and this alone was sufficient to vacate the 2020 Lease. Plaintiffs argued below that the Superior Court should itself take evidence and make judicial findings with respect to the constitutional question of whether the NECEC would effect a substantial alteration or reduction to the public reserved lands being leased, either in considering Plaintiffs' DJ claims, which Plaintiffs asserted were the proper vehicles for resolution of the matter rather than a Rule 80C appeal, or under 5 M.R.S. § 11006(1)(B)(D) if the matter were resolved under MAPA. The

Superior Court, however, declined to take up the constitutional question. It likewise declined to issue a declaration that the 2014 Lease violated 35-A M.R.S. § 3132(13).

Both were error. A transmission line that needs a CPCN is subject to 35-A M.R.S. § 3132(13) and is far more likely to cause a substantial alteration than a small lease for poles and lines that do not require a CPCN. The Bureau's violation of that statute was a primary reason no one (including the Legislature) knew of the existence or purpose of the 2014 Lease until many years after it was signed, despite the legislative directive that an "energy infrastructure corridor" like the CMP corridor should "[a]void[] wherever possible the use of lands subject to the provisions of the Constitution of Maine, Article IX, Section 23," 2 M.R.S. § 9(4)(B). That policy directive appears to have been inexplicably ignored here.

Despite the Bureau's illegal actions in 2014, and its furtive execution of the 2020 Lease to thwart legislative supervision, the Bureau and CMP take the extraordinary position that Plaintiffs' constitutional claim should—indeed must—be decided exclusively on a factual record created by the Bureau alone, without the ability of Plaintiffs to ever submit evidence relevant to the reduction and substantial alterations the Bureau must decide. But that position does not comport with principles of due process, nor with the standard of review applied by this Court in reviewing an agency's decisions for compliance with the Constitution.

This Court does not defer to an agency's findings or conclusions on

constitutional limitations because agencies have no expertise in constitutional interpretation. *LeBlanc*, 584 A.2d at 677; *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. This principle is not unique to Maine, but is an uncontroversial aspect of our country's constitutional structure: The Judiciary does not "owe deference to the Executive Branch's interpretation of the Constitution." *Trump v. Vance*, 941 F.3d 631, 644 n.16 (2d Cir.), *cert. granted*, 140 S. Ct. 659 (2019), *and aff'd and remanded*, 140 S. Ct. 2412 (2020) (quoting *Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988)).

Both because it is the Court's duty to determine the meaning of the constitutional provisions and because the Bureau did not create a meaningful record or provide notice to the public so that a timely challenge could be brought under MAPA, Plaintiffs contend that the proper vehicle for resolution of this case is the Declaratory Judgments Act, not Rule 80C. But even under a MAPA/Rule 80C analysis, crucially, because the Superior Court correctly found that the Bureau did not create a factual record with regard to the analysis required by Me. Const. art IX, § 23 and the implementing statutes, MAPA expressly authorized the Superior Court to make its own factual findings from the evidence that is now in the record.[30] *Blue*

[30] The deferential standard of review of agency fact-finding might arguably apply outside of facts necessary for a constitutional decision or when an agency has made an express finding of fact after weighing competing evidence. *See Mulready v. Bd. of Real Estate Appraisers,* 2009 ME 135, ¶¶ 15-16, 984 A.2d

Sky, 2019 ME 137, ¶ 21 n.12, 215 A.3d 812 (quoting 5 M.R.S. § 11006(1)(D)). In other words, under the standard of review set by MAPA, "the court [may act] as a trial court," as it is "entitled to do" and conduct a *de novo* review of a paper record or take additional evidence. *Id.*[31] As Plaintiffs argued below, the Superior Court could and should have made reduction and substantial alteration findings based on the record, or conducted an evidentiary hearing to enable it to make the requisite findings. It also should have ruled on Plaintiffs' claim about the invalidity of the 2014 Lease for lack of a CPCN. The court's decision not to do either was error.

VI. Count I Is Not Barred by the Doctrine of Sovereign Immunity

The Bureau argues that Plaintiffs' declaratory judgment claim (Count I) is barred by sovereign immunity. (Bureau Blue Br. 47-48.) Apart from not raising it in its motion papers below, the Bureau relies primarily on the Law Court's decision in *Cushing v. Cohen*, 420 A.2d 919 (Me. 1980), that "the State holds title, as trustee, to the public reserved lands in its sovereign capacity." (Bureau Blue Br. 47.) As the Law Court clarified in *Welch v. State*, however, the *Cushing* decision does not stand

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1285; *Somerset Cty,* 2016 ME 33, ¶¶ 36-37, 133 A.3d 1006; *Seider v. Bd. of Examiners of Psychologists,* 2000 ME 206, ¶¶ 12-16, 762 A.2d 551. That did not occur here. Indeed, never in any proceeding at any level were Plaintiffs allowed to submit evidence, other than through existing public documents.

[31] The *Blue Sky* factors are all present here: the agency did not conduct an adjudicatory hearing, the administrative record was devoid of any factual findings, and the "decision" was just execution of the lease without explanation of the Article IX, Section 23 issues. *See id.* at ¶ 21. There, as here, "the court was entitled to accept additional evidence and adjudicate the matter de novo." *Id.* This analysis applies not only to the creation of the record, but also to the *de novo* standard of review properly conducted by the Superior Court. The Superior Court made its own factual findings that the Bureau never made an Article IX, Section 23 determination and this Court reviews that finding for clear error. *See id.* at ¶ 22.

"for the proposition that the doctrine of sovereign immunity operates as an absolute bar to lawsuits involving land to which the State holds title in its sovereign capacity." 2004 ME 84, ¶ 3, 853 A.2d 214; *see also id.* ¶ 5.

Moreover, sovereign immunity does not apply to constitutional challenges. After all, "the State is bound by the obligations and restraints imposed by the Constitution." *Welch*, 2004 ME 84, ¶ 8, 853 A.2d 214. "As the Supreme Court [has] said, 'sovereign immunity . . . does not confer upon the State a concomitant right to disregard the Constitution.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 754-55 (1999)); *see also Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 391 (N.H. 1999) (observing that sovereign immunity does not bar declaratory judgment actions challenging "the constitutionality of actions by our government or its branches") (quoting *Grinnell v. State*, 121 N.H. 823, 825 (1981))).[32]

Here, Plaintiffs sought a declaratory judgment that signing the 2014 and 2020 Leases without first obtaining a two-thirds vote of each House violated Article IX, Section 23 and was therefore *ultra vires*. (A168-172.) Article IX, Section 23 "would lose considerable meaning," *Welch*, 2004 ME 84, ¶ 9, if sovereign immunity barred declarations that the Bureau exceeded its constitutional authority in executing a lease of public reserved lands. *See Claremont Sch. Dist.*, 761 A.2d at 391 (sovereign

[32] Indeed, other States have held that the trust relationship over constitutionally protected public lands *precludes* a finding that sovereign immunity bars suits seeking to declare purported conveyances of public lands. *Pele Def. Fund v. Paty*, 73 Haw. 578, 601-11, 837 P.2d 1247 (1992).

immunity doesn't bar a suit asserting "that the official actions taken by the defendants were unconstitutional"); *see also*, *e.g.*, *Ark. Dev. Fin. Auth. v. Wiley*, 2020 Ark. 395, 4, 611 S.W.3d 493, 498 (2020); *Columbia Air Servs., Inc. v. Dep't of Transp.*, 977 A.2d 636, 645 (Conn. 2009). Indeed, this Court has entertained a constitutionally-based declaratory judgment claim against the Secretary of State regarding this same transmission line. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 7, 237 A.3d 882. The Declaratory Judgment Act can be used to remedy constitutional harm, and sovereign immunity does not bar such claims.

Additionally, sovereign immunity does not bar actions against state officers for declaratory relief. *See Alden*, 527 U.S. at 757; *Olfene v. The Bd of Trustees,* No. CV-08-155, 2008 WL 6742635 (Me. Super. Dec. 4, 2008); *Conway v. N.H. Water Res. Bd.*, 199 A. 83, 86 (N.H. 1938) ("What is forbidden by the Constitution is outside the field of state activity; restraint of forbidden action is not imposed by the courts upon the state, but upon those asserting the right to take the action as though it were the state's and as though binding upon it.").

VII. Plaintiffs Have Standing to Bring Their Constitutional Claims to Protect Maine's Public Lands

CMP asserts that Plaintiffs lack standing because no plaintiff alleges a property interest in the leased property or lands abutting those lands. (CMP Blue Br. 25.) It further asserts, notwithstanding the allegations in the Amended Complaint, that none of the individual plaintiffs alleges any use of the leased lands or the public

lots they are part of. (CMP Blue Br. 27.) CMP's arguments reflect a profound misunderstanding of both the nature of the public lots and the law of standing, arguments tellingly the Bureau has declined to join.

Although CMP attempts to twist it beyond recognition, the Law Court's holding in *Fitzgerald v. Baxter State Park Authority* (hereinafter "*Baxter*"), 385 A.2d 189 (Me. 1978), establishes that Plaintiffs have standing: "Any citizen of Maine who shows himself to have suffered 'particularized injury' as a result of action of the Baxter State Park Authority has standing to obtain judicial review and to seek injunctive relief against that proposed action." *Id.* at 196-97. Here, the Amended Complaint alleges that Edwin Buzzell, Greg Caruso, and Todd Towle have all used the public reserved lands that are the subject of the 2014 and 2020 Leases. (A159-160, 162.) Mr. Buzzell has worked as a hunting guide on and around the leased lands and has harvested more than a dozen bucks in the area, and he has articulated how the leases will harm him personally and professionally. (A159.) Mr. Caruso has likewise worked as a guide for snowmobiling and other pursuits in the leased area. (A159-160.) Mr. Towle is a fishing guide, and has articulated how the lease will negatively affect him by warming the streams surrounding the leased lands and altering the vistas that visitors come to Maine to enjoy. (A162.)

No more is needed to show that these Plaintiffs have used, and will continue to use, these lands, and will suffer injury if CMP constructs its planned transmission

line on those lands. *See Baxter*, 385 A.2d at 197. Others such as Mr. Smith, Mr. Joseph, and Ms. Cummings asserted that they use and will continue to use the public lands for scientific and journalistic purposes. (A160-161.)

CMP's quibbles with these and the other individual Plaintiffs' alleged lack of injury demonstrate the problems with its thinking. In CMP's view, the only interest that gives rise to standing is a direct property interest, such as being a competitor for the lease or owning property directly adjacent to the leased land. But the Bureau itself underscored the public ownership of these lands in its 2019 annual report to the Legislature: "While the Bureau manages Maine's Public Lands, *these lands are owned and treasured by all Mainers*." (AR VIII0048, 102) (emphasis added).

Not only does CMP's crabbed view ignore the reasons for enactment of the constitutional amendment, but it also assumes that these lands exist in a vacuum. That is simply not true. The 2020 Lease may not exclude Plaintiffs from the leased land or limit their access to it, but the construction of a transmission line thereon will have the same effect. Plaintiffs have used and plan to use the public reserved lands—both those that are the subject of the lease and those that surround the leased area—for purposes (recreation, hunting, guide businesses) that the Corridor will thwart; *Baxter* confers standing on parties who use public lands in this manner and have articulated resulting harms. *Baxter*, 385 A.2d at 197.

CMP relies on *Nergaard v. Town of Westport*, 2009 ME 56, 973 A.2d 735

(2009), for the proposition that the individual Plaintiffs do not have standing, but that case actually supports the Plaintiffs. In *Nergaard*, the plaintiffs had not sufficiently stated a particularized injury where their claimed harm resulted from merely driving by a boat-launching site in which they otherwise had no interest. *Id.* at ¶¶ 14, 19-22. The *Nergaard* court distinguished the facts there from those in *Baxter*, noting that "five individuals demonstrated that the agency's actions would adversely and directly affect their personal rights to the use and enjoyment of Baxter State Park" and that "[u]nlike Nergaard and Stern, these plaintiffs were not merely members of the general public. They were 'actual users of the Park,' and thus suffered a particularized injury as a result of the agency's action in clearing timber from the Park, an injury that other Maine citizens could not claim." *Id.* at ¶ 21 (citing *Baxter*, 385 A.2d at 196-197). This case is *Baxter*, not *Nergaard.*[33]

Although one plaintiff's standing is sufficient for the action to proceed, CMP's contention that the Legislator Plaintiffs (current and former members of the Maine Legislature) lack standing because they have not suffered a particularized injury also fails. These plaintiffs have been injured not just as users of the public lands but in their role as legislators. Article IX, Section 23 of the Maine Constitution prohibits any reduction or substantial alteration of the public lands "*except on the*

[33] Where, as here, several plaintiff members of the Natural Resources Council of Maine ("NRCM"), have standing and the issues relate to NRCM's purpose, NRCM also has standing. *Conservation Law Found. v. Town of Lincolnville*, No. AP-00-3, 2001 WL 1736584 at *8 (Me. Super. Ct. Feb 28, 2001).

vote of 2/3 of all the members elected to each House" (emphasis added). By failing to seek the necessary legislative approval, the Bureau deprived the Legislator Plaintiffs of their right to vote on either or both the 2014 and 2020 Leases. This is not, as CMP casts it, an injury to the Legislature as a whole, but rather to the Legislator Plaintiffs themselves who have a right to cast individual votes on leases, such as the 2014 and 2020 Leases, that will reduce or substantially alter public land.

CMP's reliance on *Raines* is unavailing. There, legislators actually voted on a bill that passed; in holding that legislators on the losing side did not have standing to challenge the vote, the Court noted that their "votes were given full effect." *Raines v. Byrd*, 521 U.S. 811, 824 (1997).[34] Not so here: the Legislator Plaintiffs never had an opportunity to vote, let alone have their votes given "full effect."

Coleman v. Miller, 307 U.S. 433, 436 (1939), which addressed a situation where the Kansas legislature voted on a bill, with 20 votes for and 20 against, aligns more closely with the case at hand. In *Coleman,* the bill would have been defeated, but for the Lieutenant Governor, the presiding officer of the Senate, casting a vote in favor. *Id*. In holding that the legislators had standing to challenge the actions of the Lieutenant Governor, the Supreme Court held that they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438.

[34] *Raines* also involved Article III standing, which differs from Maine's standing analysis, which is prudential, not constitutional. *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966.

Even more so here. Not only are the legislators claiming a right and privilege under the Constitution of Maine to have their votes given effect, but also, and more important, they are claiming the right to *cast* their vote in the first place. *See Silver v. Pataki*, 96 N.Y.2d 532, 538, 755 N.E.2d 842 (2001) ("A legislator surely would have the capacity to sue if prevented from casting a meaningful vote on legislation at the outset…"); *see also McCaffrey v. Gartley*, 377 A.2d 1367, 1370 (Me. 1977) ("[T]he Supreme Court ha[s] acknowledged that a political interest, though shared with a large segment of the public, could serve in an otherwise appropriate case as a basis for standing.") Put simply, the Legislator Plaintiffs assert that NECEC causes a reduction and substantial alteration to the public lots and in that circumstance the Constitution gives them a right, indeed requires them, to vote. They have standing to pursue that claim.

CONCLUSION

For all these reasons, the Lease was properly vacated and the Superior Court's decision should be affirmed. Alternatively, the decision to vacate the Lease should be affirmed and the case remanded to the Superior Court to take evidence and make a determination as the whether the CMP transmission line corridor effects a reduction or substantial alteration to the uses of the West Forks Plantation and Johnson Mountain Township public lots.

Dated: January 3, 2022

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CERTIFICATE OF SERVICE

I, James T. Kilbreth, hereby certify that on this 3rd day of January, 2022, I caused two (2) copies of the foregoing Brief of Appellees to be served on counsel for Appellants by first-class mail, postage prepaid upon, and provided a courtesy copy by electronic mail to the following:

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