STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.
Plaintiffs-Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.
Defendants-Appellants/Cross-Appellees

ON APPEAL FROM KENNEBEC COUNTY SUPERIOR COURT
BUSINESS AND CONSUMER DOCKET

BRIEF OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES BUREAU OF PARKS AND LANDS and ANDY CUTKO, DIRECTOR OF THE BUREAU OF PARKS AND LANDS

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INTRODUCTION

This appeal arises from the Bureau of Parks and Lands' decision, pursuant to 12 M.R.S. § 1852(4)(A) (2021), to lease for twenty-five years a 32.39 acre tract of the Johnson Mountain Township and West Forks Plantation public reserved lands to Central Maine Power Company (CMP) for 0.9 miles of its 145.3-mile New England Clean Energy Connect (NECEC) transmission corridor. The appeal presents two issues of first impression.

First, the Bureau of Parks and Lands (the Bureau) asks this Court to rule that leases issued by the Bureau pursuant to 12 M.R.S. § 1852(4)(A) do not require 2/3 legislative approval pursuant to Article IX, Section 23 of the Maine Constitution and 12 M.R.S. § 598-A (2021). Because the Legislature has determined that leases issued pursuant to 12 M.R.S. § 1852(4)(A) do not reduce or substantially alter the uses of public reserved lands, this Court should affirm the Bureau's decision to issue the lease to CMP without seeking or obtaining or 2/3 legislative approval, and vacate the trial court's judgment reversing the Bureau's decision to issue the lease.

Second, the Bureau asks this Court to rule that, contrary to the trial court's decision, a public administrative process requirement does not "arise[] by implication from Article IX, Section 23." Thus, administrative agencies which manage designated lands are not required to provide a public administrative

process before taking action as authorized by the Legislature regarding designated lands. Since Maine's Constitution was amended by Article IX, Section 23 in 1993, neither the Bureau nor other state agencies holding designated lands have afforded the process announced by the trial court. It is therefore critical—for the Bureau, for other agencies holding designated lands, for entities with property or contract interests in designated lands (e.g., leases and licenses), and for the public—that this Court address this issue. Contrary to the trial court's holding, Article IX, Section 23 creates no implicit public administrative process requirement. Additionally, no member of the public has a protected property interest in the public reserved lands. As such, and because no statute obligates the Bureau to provide any public administrative process specific to a section 1852(4)(A) lease, this Court should affirm the Bureau's decision to issue the lease to CMP without providing such process.

Further, the Bureau asks this Court to confirm the applicability of certain fundamental principles of administrative law and hold that the trial court erred by not properly applying them here. Namely, the Bureau's lease to CMP is final agency action that is subject to review only pursuant to the Maine Administrative Procedure Act (the exclusivity rule) and not pursuant to both the Maine Administrative Procedure Act and the Declaratory Judgments Act (DJA). In addition, sovereign immunity separately bars Count I of the complaint

(declaratory judgment). Finally, the trial court erred by not allowing the Bureau to include in the record its legal conclusions and factual findings that the lease does not require 2/3 legislative approval as part of its judicial review of the lease.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Because the Bureau did not prepare contemporaneous written factual findings with respect to the 2020 lease to CMP, the factual background is drawn "from the undisputed facts and the procedural record." *See Narowetz v. Bd. of Dental Practice*, 2021 ME 46, n.1, __A.3d__; *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 11 & n.3, 252 A.3d 504.

A. The Bureau of Parks and Lands

The Bureau "[h]as jurisdiction, custody and control over and responsibility for managing" different categories of public lands, including public reserved lands, nonreserved public lands, state parks and historic sites, and submerged lands. 12 M.R.S. § 1803 (2021); *see* 12 M.R.S. § 1802 (2021). The Director classifies all Bureau-jurisdiction lands into one of those categories and manages each category of lands pursuant to the applicable subchapter of Title 12, Chapter 220 of the Maine Revised Statutes. 12 M.R.S. § 1804(2) (2021). The Director may restrict public access to Bureau-jurisdiction lands to protect

"public health, safety or welfare, or the economic interests or natural resources of the State." 12 M.R.S. §§ 1804(6), 1846(1) (2021).

B. Public Reserved Lands

"Public reserved lands" originate from the public reserved lots and include the public reserved lots remaining in the unincorporated parts of Maine. 12 M.R.S. § 1801(8)(A) (2021); *see Opinion of the Justices*, 308 A.2d 253, 268-71 (Me. 1973) (explaining the origins of the public reserved lots); *see also Cushing v. State (Cushing II)*, 434 A.2d 486, 489-90 & n.6 (Me. 1981) (referring to *Opinion of the Justices*, 308 A.2d 253, for a history of the public reserved lots). During the settlement of Maine, the sovereign reserved from the public domain certain real property—the public reserved lots—to hold and preserve for intended beneficial uses. *Cushing II*, 434 A.2d at 489; *Opinion of the Justices*, 308 A.2d at 269-71, 272-73. Beneficial uses are those "'public uses' generally reflected by the usage of Massachusetts" examples of which include the ministry and education. *Opinion of the Justices*, 308 A.2d at 269-71 (citing *Union Parish Soc'y v. Upton*, 74 Me. 545, 546-48 (1883)). The State holds title, as trustee, to public reserved lands in its sovereign capacity. *Cushing v. Cohen (Cushing I)*, 420 A.2d 919, 923 (Me. 1980). Public reserved lots and other public

reserved lands are subject to the Articles of Separation.[1] *See Opinion of the Justices*, 308 A.2d at 268-69, 272-73.

As of March 2020, the Bureau managed 629,604 acres of public reserved lands using a multiple use mandate designed to "enhance the timber, wildlife, recreation, economic and other values of the land." 12 M.R.S. § 1847(2) (2021); *see* 12 M.R.S. §§ 1845, 1848 (2021). (Administrative Record (A.R.) VIII0048, 63; *see* A.R. VIII0104.) The Bureau implements its multiple use mandate through a comprehensive plan—the Bureau's Integrated Resource Policy (A.R. II0016, 18; A.R. VIII0059)—and through specific action plans known as management plans. 12 M.R.S. § 1847(2) (2021). (A.R. VIII0059-61.) The Bureau develops those plans with input from the public and other state agencies. 12 M.R.S. § 1847(2) (2021). (A.R. II0016-18, 0129-52; A.R. VIII059.)

Those plans impose a seven-category hierarchal resource allocation system. (A.R. II0018-19.) This system ranks resources from "scarce and/or most sensitive to management" to "less sensitive [to management]," aggregates the resource attributes into allocations, and tailors the Bureau's management to the allocation. (A.R. II0018-19, 219-24.) The allocations are as follows:

[1] Section 5, Item Seventh of the Articles of Separation requires that "in all grants hereafter to be made, by either State, of unlocated land within the said District, the same reservations shall be made for the benefit of Schools, and of the Ministry, as have heretofore been usual, in grants made by this Commonwealth." Me. Const. art. X, § 5.

Special Protection Areas, which includes Ecological Reserves and Significant Natural Areas; Backcountry Recreation Areas, non-mechanized, motorized, or both; Wildlife Dominant Areas, including essential wildlife habitat, significant habitats, and specialized habitat areas and features including rare natural communities; Remote Recreation Areas; Visual Protection Areas; Developed Recreation Areas; and Timber Management Areas. (A.R. II00019, 219-24.) The regional management plans include resource allocation maps for each unit of public reserved lands. (*E.g.*, A. 492; A.R. II0050-51, 70-71, 83, 111-121.)

"The director may take actions on the public reserved lands consistent with the management plans for those lands and upon any terms and conditions and for any consideration the director considers reasonable." 12 M.R.S. § 1847(3) (2021). Such actions include leasing public reserved lands for prescribed terms of years to specified entities or for specified purposes, including for electric power transmission. 12 M.R.S. § 1852, 1852(4)(A) (2021). As of 2020, there were approximately 355 leases and licenses of public reserved lands and nonreserved public lands in effect (A.R. VIII0089-90) for which the Bureau did not seek or obtain 2/3 legislative approval, nor provide a public administrative process that was specific to each lease or license.[2]

[2] The statutes governing nonreserved public lands mirror those governing public reserved lands. *Compare* 12 M.R.S. §§ 1831-1841 (2021) *with* 12 M.R.S. §§ 1845-1859 (2021). As with public reserved lands, the Bureau manages nonreserved public lands pursuant to a multiple

C. Designated Lands

Like most Bureau-jurisdiction lands, public reserved lands are "designated lands" subject to Article IX, Section 23 of the Maine Constitution and its implementing Designated Lands Act, 12 M.R.S. §§ 598 to 598-B (2021). 12 M.R.S. § 598-A(2-A)(D) (2021). Designated lands "may not be reduced or its uses substantially altered except on the vote of 2/3 of all members elected to House." Me. Const. art. IX, § 23; 12 M.R.S. § 598-A (2021). "'Reduced' means a reduction in the acreage of an individual parcel or lot of designated land under section 598-A." 12 M.R.S. § 598(4) (2021). As discussed in section I(A)(2)(ii), *infra*, "substantially altered" is measured against the essential purposes for which the state holds each type of designated lands. 12 M.R.S. § 598(5) (2021).

D. Johnson Mountain Township & West Forks Plantation Public Reserved Lands

The Johnson Mountain Township and West Forks Plantation public reserved lands (the Lots) are original public reserved lots totaling 1241 acres. (A. 489; A.R. II0014; A.R. IV0029-38.) The Lots are part of the Bureau's Upper Kennebec Region. (A.R. II0012-13.)

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use mandate, may lease nonreserved public lands including for electric power transmission, and may issues licenses to use these lands. 12 M.R.S. §§ 1834(2), 1838 (2021).

The Lots have limited waterbodies, wetlands, recreational facilities and use, and no special status or unique wildlife or Maine Natural Areas Program sites. (A. 249, 260, 489-90.) As such, the Lots do not contain Special Protection Areas such as ecological reserves. (*Compare* A.R. II0018-19 & 219, *with* A. 260, 489-92.) *See* 12 M.R.S. § 1805 (2021) (authorizing ecological reserves and limiting the uses of same). Due to the absence of such features and facilities on most of the Lots, the dominant resource allocation for much of the Lots is timber management. (A. 489-92; *see* A.R. II0223-24.) The Lots are on a twenty-year harvest schedule, were harvested in 1986-87 and 2006-07, and are scheduled to be harvested again in 2026-27. (A. 259, 489; *e.g.*, A. 262-69, 271-80.) There is an existing transmission line on the Lots. (A. 250, 259, 489-90; A.R. II00235-38.)

E. The Lease to CMP for 0.9 Miles of the NECEC Transmission Corridor

In 2014, CMP asked the Bureau whether it could site on the Lots an approximately 1-mile stretch of a transmission corridor. The Bureau identified two options: a permanent easement issued pursuant to 12 M.R.S. § 1851 (2021), which would require 2/3 legislative approval, or a twenty-five-year lease issued pursuant to 12 M.R.S. § 1852(4), which the Bureau understood and contends would not require 2/3 legislative approval. (A. 494; A.R. III0001, 03, 06.) CMP requested a lease. (A.R. III0009.)

Before evaluating the leased premises proposed by CMP, the Bureau considered whether the existing transmission line corridor across the Lots would be a better location for the proposed lease. (A. 494.) The Bureau determined it was not preferable because of potential impacts to Cold Stream from the proposed leased premises. (A. 494.)

As to the route proposed by CMP, the Bureau determined that additional analysis was needed. (A. 494.) The Bureau conducted field surveys and obtained input from the Maine Natural Areas Program and the Department of Inland Fisheries and Wildlife. (A. 497, 501-08.) The Bureau then negotiated with CMP to eliminate the proposed crossing of Tomhegan Stream and the outlet stream from Wilson Hill Pond and reduce the acreage of proposed corridor on the Lots. (A. 459, 497, 499-508; A.R. III0181-82.)

On December 15, 2014, pursuant to 12 M.R.S. § 1852(4) (2021),[3] the Bureau executed a non-exclusive lease with CMP for electric power transmission on the Lots (the 2014 lease). (A. 447-72.) The Bureau and CMP amended the lease in 2015 following an appraisal. (A. 473; A.R. IV0018-0119.) In 2020, the Bureau renegotiated the lease to increase the rent. (A.R. IV0120-257; A.R. V0001-293.) On June 23, 2020, the Bureau and CMP executed an

[3] Title 12 M.R.S. § 1852 was last amended in 2013. *But see infra* note 8.

amended and restated lease (the Restated Lease) that increased the annual rent from $3,680 to $65,000 (A. 414, 473) and superseded and terminated the 2014 lease. (A. 413-46.) On June 25, 2020, the Bureau recorded the Restated Lease in the Somerset County Registry of Deeds, Book 5562, Page 75. (A. 413.) The Bureau did not hold a public administrative process specific to the Restated Lease and made no contemporaneous written findings regarding the lease.

The leased premises total 32.39 acres, which is 2.6% of the total acreage of the Lots. (*Compare* A. 413, *with* A. 489.) The section of the NECEC transmission corridor (the NECEC line) on the Lots will be approximately 0.9 miles in length.[4] (A. 425.) The Restated Lease obligates CMP to obtain and comply with required federal and state permits for the NECEC line. (A. 418.) The Restated Lease also contains provisions protecting forest resources, streams, and vernal pools and limiting road building that are separate from Department of Environmental Protection permitting requirements. (A. 416-18.) In January 2021, CMP assigned the lease to NECEC Transmission LLC (NECEC LLC). (CMP's & NECEC LLC's Mot. to Substitute Parties ¶ 3, Ex. A; *see* A. 420.)

[4] The Maine Public Utilities Commission has determined that construction of the NECEC line is in the public interest. *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶¶ 1, 10, 227 A.3d 1117. The section of the NECEC line on the Lots is 0.6% of the 145.3-mile NECEC line. *See id.* ¶ 1.

F. The Trial Court Action

1. The Scope of the Action & the Administrative Record

On June 23, 2020, Senator Black and others (Senator Black) filed a three-count complaint in Superior Court challenging as ultra vires the terminated 2014 lease. (A. 110, 123-29.) The complaint pleaded two counts for declaratory judgment (Counts I and II) and one count for injunctive relief (Count III). (A. 123-29.) On July 17, 2020, Senator Black filed an amended three-count complaint for declaratory judgment (Count I), injunctive relief (Count II), and, in the alternative, judicial review pursuant to the Maine Administrative Procedure Act (MAPA) and M.R. Civ. P. 80C (Count III). (A. 154, 168-74.) The amended complaint challenges the Restated Lease as ultra vires and asks the court to vacate the Restated Lease. (A. 154, 171, 173-74.) On August 25, 2020, the case was transferred to the Business and Consumer Docket. (A. 9.)

Because the Restated Lease is final agency action and reviewable pursuant to only 5 M.R.S. §§ 11001-11008 of MAPA, the Bureau and CMP moved to dismiss Counts I and II as duplicative of Count III. (A. 367, 374-76, 382-83, 390-93.) CMP also moved to dismiss the complaint based on plaintiffs' lack of

standing.[5] (A. 393-401.) Senator Black opposed the motion to dismiss Counts I and II because, he contended, there was no final agency action such that MAPA review does not lie. (Pls.' Opp. to Defs.' Mot. to Dismiss 1, 9-12.)

The court ordered the Bureau to file the administrative record and reserved ruling on the motions to dismiss Counts I and II as duplicative of Count III until after the Bureau filed the administrative record. (A. 90, 109.) The Bureau filed the administrative record on November 18, 2020 (A. 91), and included a memorandum dated September 24, 2020, that memorializes the Bureau's determination that the Restated Lease would not reduce or substantially alter the uses of the Lots (the Findings Memo).[6] (A. 474-83.)

In its order dated December 21, 2020, the court denied the Bureau's and CMP's motions to dismiss. (A. 100.) The court permitted both Count I (declaratory judgment) and Count III (MAPA/Rule 80C) to proceed simultaneously. (A. 98-100.) The court articulated the scope of Count I as: whether the 2014 lease is void for a lack of a certificate of public convenience and necessity; whether "a constitutional violation occurred before any

[5] Because Senator Black's amended complaint does not seek relief as to the superseded and terminated 2014 lease (A. 173-74), the Bureau and CMP did not move to dismiss the amended complaint as to the 2014 lease. (*See* A. 370.)

[6] The Bureau's Memorandum dated September 24, 2020 (the Findings Memo), post-dates the Restated Lease. (*Compare* A. 424, *with* A. 474.) The Bureau included the Findings Memo in the administrative record to facilitate judicial review. (Bureau's Supp. to 1st Mot. to Dismiss 4-5 (Dec. 9, 2020).)

administrative process was available to potentially aggrieved parties"; whether as to both the 2014 lease and the 2020 lease the Bureau was required to but did not provide a meaningful public administrative process; and whether legislative approval of both the 2014 lease and the 2020 was constitutionally required. (A. 98-99.)

The Bureau and CMP each answered the amended complaint. (A. 13.) Among other defenses, the Bureau pleaded sovereign immunity as an affirmative defense. (Bureau's Ans. 16.)

Senator Black moved to strike the Findings Memo. (A. 349-50.) The Bureau moved to remand the case to the Bureau if the court struck the Findings Memo from the administrative record. (Bureau's Opp. to Pls.' Mot. re Record & Mot. to Remand 2-3, 12, 18, 23-24.)

2. The Order on Article IX, Section 23

Before ruling on Senator Black's motion regarding the record and the Bureau's motion to remand, the trial court ordered the parties to brief "whether utility leases, pursuant to 12 M.R.S. § 1842(4) are exempt from Article IX, section 23." (Order for Briefing 1 (Jan. 19, 2021).) The Bureau and CMP argued that, as a matter of law, section 1852(4) leases do not reduce or substantially alter the uses of public reserved lands and thus do not require 2/3 legislative approval. (Bureau's Memo of Law re 1852(4) leases 1-2, 10-16; CMP's Memo

re art. IX, § 23 12-19.) The trial court held that section 1852(4) leases of public reserved lands are not categorically exempt from application of Article IX, Section 23. (A. 47, 89.) The court further held that whether a lease issued pursuant to 12 M.R.S. § 1852(4) reduces or substantially alters the uses of public reserved lands is a fact-based determination that the Bureau must make before executing a lease. (A. 75, 81-82, 88-89.)

3. The Order Resolving the Administrative Record: Striking the Findings Memo without Remanding to the Bureau

The court next ordered the parties to supplement their pending filings on the administrative record. (*See* A. 58.) To ensure the administrative record contained written findings sufficient to facilitate judicial review, the Bureau again moved to remand the case to the Bureau if the court struck the Findings Memo. (A. 229.) In the event of remand, the Bureau committed to issuing public notice and accepting written comment. (A. 229-30.)

The court struck the Findings Memo, denied the Bureau's motion to remand, issued a briefing schedule for Count I (Declaratory Judgment) and Count III (MAPA/Rule 80C review), and reiterated its view regarding the scope of Count I. (A. 69, 71-72; *see* A. 98-99.) The Bureau and CMP and NECEC LLC

(collectively NECEC LLC) appealed from the court's April 21 order. This Court dismissed those appeals as interlocutory by order dated June 8, 2021. (A. 19.)

4. The Final Judgment

The parties filed competing motions for judgment on Count I and Rule 80C briefs. (A. 20-23, 181-227.) The Bureau moved to dismiss Count I because the Bureau is not required to provide any public administrative process before issuing a lease pursuant to 12 M.R.S. § 1852(4) and because the Legislature has determined that leases issued pursuant to 12 M.R.S. § 1852(4) do not require 2/3 legislative approval.[7] (A. 181, 190-94.) Because the court struck the Findings Memo from the administrative record, the Bureau also renewed its motion to remand so it could prepare written findings sufficient to facilitate judicial review. (A. 183 n.3; Bureau's Rule 80C Br. 32-33.) In the absence of the Findings Memo or a remand, the Bureau argued that the court could infer from the administrative record that the Bureau determined the Restated Lease does not reduce or substantially alter the uses of the Lots. (Bureau's Rule 80C Br. 14-27, 32-33.)

[7] Because the court had held that Count I encompasses challenges to the superseded and terminated 2014 lease, *see supra* note 5, the Bureau also moved to dismiss Count I as to the 2014 lease for lack of jurisdiction and mootness. (A. 185-89.)

The court granted Senator Black's motion for judgment on Count I, dismissed Count II as waived, and reversed the Bureau's decision to lease 32.39 acres of the Lots to CMP. (A. 55-56.) The court held that the Bureau was required to but did not make a separate fact-based determination that the Restated Lease (and the terminated 2014 lease) do not reduce or substantially alter the uses of the Lots. (A. 38, 42-44, 50-52.) The court concluded that plaintiffs' claims regarding the terminated 2014 lease were justiciable despite the fact that the 2014 lease was void. (A. 38-41, 49.)

The court further held that the Bureau must provide a public administrative process before making a substantial alteration determination and publicly declare its determination before executing a lease pursuant to 12 M.R.S. § 1852(4) so as to allow anyone with standing to obtain judicial review of any decision finding no reduction or substantial alteration. (A. 44-49.) The court explained its view that these process requirements are "axiomatic," "arise by implication from Article IX, Section 23," and are required because public reserved lands are trust lands. (A. 44-47.)

The Bureau appealed from the judgment and all prior orders. NECEC LLC appealed from the same. *See* M.R. App. P. 2A & 2B. Senator Black cross-appealed from the judgment and prior orders.[8] *See* M.R. App. P. 2C(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether as a matter of law leases issued by the Bureau pursuant to 12 M.R.S. § 1852(4) do not reduce or substantially alter the uses of public reserved lands and thus do not require 2/3 legislative approval.

II. Whether the trial court erred by ruling that the Bureau is required to hold a public administrative process before executing a lease pursuant to 12 M.R.S. § 1852.

III. Whether the trial court erred by not dismissing Count I and by striking the Findings Memo without remanding to the Bureau.

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[8] On November 2, 2021, the people enacted L.D. 1295 (IB 1) (130th Legis. 2021) "An Act to Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" (IB 1). On November 3, 2021, NECEC Transmission LLC and Avangrid Networks, Inc., filed a verified complaint in Cumberland County Superior Court, challenging the constitutionality of IB 1 based on their claims that IB 1 impairs NECEC's vested rights, violates the Contracts Clause of the Maine and United States Constitutions, and violates the separation of powers provision in Maine's Constitution. NECEC LLC also filed a motion for preliminary injunction. That action—*NECEC Transmission LLC v. Bureau of Parks and Lands*, BCD-CIV-2021-00058—has been transferred to the Business and Consumer Docket. The outcome of that litigation likely will turn in part on the validity of the Restated Lease. As such, and for other reasons (e.g., the trial court's conclusion that a public administrative process requirement arises by implication from Article IX, Section 23, and thus attaches to all actions related to designated lands whether taken by administrative agencies or the Legislature), enactment of IB 1 does not moot this appeal. *See Mainers for Fair Bear Hunting v. Dep't of Inland Fisheries & Wildlife*, 2016 ME 57, ¶ 7, 136 A.3d 714 (listing exceptions to the mootness doctrine).

If the Superior Court does not preliminarily enjoin the enforcement of IB 1, the effective date of IB 1 will occur after this brief is filed. *See* Me. Const. art. IV, pt. 3, § 19. This brief analyzes 12 M.R.S. § 1852(4) as of the date of the Restated Lease and the date of filing this brief.

SUMMARY OF ARGUMENT

Unlike leases of other types of designated lands, the Legislature has determined that leases issued pursuant to 12 M.R.S. § 1852(4) do not reduce or substantially alter the uses of public reserved lands, and do not require approval by 2/3 of all members of each house of the Legislature. In fact, and unlike other leases of public reserved lands, the Legislature has determined that section 1852(4) leases do not even require the consent of the Commissioner of the Department of Agriculture, Conservation and Forestry (the DACF) or the Governor.

As with all Bureau actions regarding public reserved lands, the Bureau may not issue a lease pursuant to 12 M.R.S. § 1852(4) unless that lease is consistent with the Bureau's management plans. 12 M.R.S. § 1847(3). The Bureau is required to provide, and did provide, public process before adopting its management plans. 12 M.R.S. § 1847(2). But, and unlike other actions as to Bureau jurisdiction lands, the Legislature has determined that the Bureau need not provide any public administrative process when issuing a lease pursuant to 12 M.R.S. § 1852(4).

Additionally, no public administrative process requirement inheres in Article IX, Section 23 because the State as sovereign holds these lands. Further, because the public does not have a protectable property interest in public

reserved lands, the Bureau is also not required as a matter of due process to hold a public administrative process before issuing a section 1852(4) lease.

The trial court erred by not dismissing Count I (declaratory judgment). The State holds public reserved lands in its capacity as sovereign. The Bureau is the agent of the State responsible for managing public reserved lands. For a person to sue the Bureau for leasing public reserved lands pursuant to 12 M.R.S. § 1852(4) therefore, the Legislature must first waive the State's sovereign immunity. Leases issued pursuant to 12 M.R.S. § 1852(4) are final agency action that may be appealed pursuant to the MAPA. But section 1852(4) leases may not be challenged by a non-party to the lease through a declaratory judgment action because the DJA does not waive sovereign immunity. Further, a declaratory judgment action does not lie where, as here, a plaintiff seeks relief available pursuant to section 11007(4)(C) of the MAPA.

Finally, if this Court concludes, as did the trial court, that the Bureau must conduct a fact-based analysis to determine whether a section 1852(4) lease reduces or substantially alters the uses of public reserved lands, it is imperative that judicial review of the Bureau's decision to issue the Restated Lease be based on the Bureau's reasoning either as articulated in the Findings Memo or in findings to be prepared by the Bureau on remand.

ARGUMENT

When the trial court "acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, [this Court] review[s] the administrative agency's decision directly for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Palian v. Dep't of Health & Human Servs.*, 2020 ME 131, ¶ 10, 242 A.3d 164 (quotation marks omitted). This Court reviews questions of law de novo. *Id*. It "do[es] not substitute [its] judgment for that of the agency" and "will vacate an agency's factual findings only if there is no competent evidence in the record to support the findings." *AngleZ Behavioral Health Servs*. *v. Dep't of Health & Human Servs.*, 2020 ME 26, ¶ 12, 226 A.3d 762 (quotation marks omitted). As the party seeking to vacate the Restated Lease, Senator Black bears the burden of persuasion on appeal. *Somerset Cty. v. Dep't of Corr.*, 2016 ME 33, ¶ 14, 133 A.3d 1006; *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74.

The Bureau did not commit any errors of law nor abuse its discretion nor exceed its statutory authority by issuing the Restated Lease. Nor is the Restated Lease the result of unlawful procedure. The Legislature has authorized the Bureau to lease for a term of twenty-five years public reserved lands for electric power transmission without obtaining legislative approval or holding a public process for each lease. 12 M.R.S. § 1852(4). As with the many other leases and

license of public reserved and nonreserved public lands in effect, the Bureau exercised its statutory authority and issued the Restated Lease upon terms and conditions and for consideration it considers reasonable. *See* 12 M.R.S § 1847(3).

I. As a matter of law, leases issued by the Bureau pursuant to 12 M.R.S. § 1852(4) do not reduce or substantially alter the uses of public reserved lands and thus do not require 2/3 legislative approval.

Whether as a matter of law leases issued by the Bureau pursuant to 12 M.R.S. § 1852(4) do not reduce or substantially alter the uses of public reserved lands is a question this Court reviews de novo. *See Palian*, 2020 ME 131, ¶ 10, 242 A.3d 164. This question implicates the Bureau's land management statutes, Article IX, Section 23, and the Designated Lands Act. This Court construes constitutional provisions and statutory language pursuant to the same principles. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 14, 237 A.3d 882. It first examines the plain language of the provisions to determine their meaning if it "can do so while avoiding absurd, illogical, or inconsistent results." *Fair Elections Portland, Inc.*, 2021 ME 32, ¶ 22, 252 A.3d 504 (quotation marks omitted). This Court considers "the specific language in the context of the whole statutory scheme and examine[s] the entirety of the statute, giving due weight to design, structure, and purpose as well as to aggregate language." *Id.* (alteration omitted) (quotation marks omitted)

(citations omitted). When a statute administered by an agency is susceptible to more than one meaning, this Court considers legislative history and other indicia of legislative intent and, if that does not elucidate legislative intent, defers to the agency's reasonable construction of that statute. *Narowetz*, 2021 ME 46, ¶ 33 n.12, __A.3d__.

The Bureau's leasing authority for public reserved lands is set forth in 12 M.R.S. § 1852. A review of 12 M.R.S. § 1852(4) in the context of the Bureau's land management statutes, Article IX, Section 23, and the Designated Lands Act, demonstrates that as a matter of law section 1852(4) leases do not reduce or substantially alter the uses of public reserved lands. A section 1852(4) lease does not reduce the acreage of public reserved lands because it does not change the acreage of an individual lot. A section 1852(4) lease also does not substantially alter the uses of public reserved lands because the Legislature has determined that such leases are compatible with the Bureau's multiple use management mandate for public reserved lands.

A. Plain Language Review

1. The Bureau's Leasing Authority for Public Reserved Lands

Because the Bureau may not lease public reserved lands absent legislative authorization, this plain language review begins with the Bureau's leasing authorization: 12 M.R.S. § 1852. *See State v. Fin & Feather Club*, 316 A.2d

351, 355 (Me. 1974) ("Public bodies may exercise only that power which is conferred upon them by law. The source of that authority must be found in the empowering statute . . . .") Title 12 M.R.S § 1852 is broad, but not unfettered.

Section 1852 establishes to whom and for what purposes the Bureau may lease public reserved lands, for how long, and the approvals needed to do so. Relevant to the Restated Lease, 12 M.R.S. § 1852(4)(A) provides: "The bureau may lease the right, for a term not exceeding 25 years, to . . . [s]et and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips."[9] It authorizes the Bureau to lease public reserved lands for electric power transmission without obtaining additional approval(s).

As with twenty-five-year leases for specified public utilities and public infrastructure, 12 M.R.S. § 1852(2) and (5) do not require the Bureau to obtain any additional approval to grant the right to construct and maintain public roads and issue five-year leases for certain private structures. In contrast, ten-year leases for certain primarily water-related industrial and commercial

[9] Senator Black has not argued that 12 M.R.S. § 1852(4) is unconstitutional. Even if he had, 12 M.R.S. § 1852(4) is constitutional. *See League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771–72 (Me. 1996) ("Before legislation may be declared in violation of the Constitution, that fact must be established to such a degree as to leave no room for reasonable doubt.") (quoting *Orono–Veazie Water Dist. v. Penobscot County Water Co.,* 348 A.2d 249, 253 (Me. 1975)).

purposes require the Governor's and the DACF Commissioner's consent. 12 M.R.S. § 1852(6). The consent of the Governor and the DACF Commissioner is also required to lease public reserved lands to state agencies, political subdivisions of the State, and private nonprofit organizations for "purposes of protecting, enhancing or developing the natural, scenic or wilderness qualities or recreational, scientific or educational uses" and to transfer management responsibility to another state agency. 12 M.R.S. § 1852(1), (3), (8), (9). Notably, the Bureau must obtain legislative approval, in addition to the Governor's and the DACF Commissioner's consent, to lease public reserved lands to the federal government. 12 M.R.S. § 1852(7). Legislative approval would also be required for leases of public reserved lands that are not authorized by 12 M.R.S. § 1852, such as a thirty-year lease for a ski resort or solar farm.[10] *See Fin & Feather Club*, 316 A.2d at 355.

The different approvals required to lease public reserved lands for specified purposes—including legislative approval for certain leases—are

[10] Because legislative approval is needed for leases of public reserved lands not authorized by 12 M.R.S. § 1852, the Legislature is the proper forum for deciding whether legislation authorizing such a lease (e.g., through a resolve) must be approved by a majority vote or by 2/3 of all members of each House. In such scenarios, the process announced by the trial court would (if affirmed) presumably also apply to reduction and substantial alteration determinations made by the Legislature because that process arises "by implication from Article IX, Section 23." (*See* A. 46-47.) This result underscores the errors in the trial court's holding, discussed in *supra* Section II.

intentional distinctions. *See Aydelott v. City of Portland*, 2010 ME 25, ¶ 12, 990 A.2d 1024 (contrast suggests intentional distinctions). Title 12 M.R.S. § 1852 thus embodies a legislative determination that, unlike other leases of public reserved lands, twenty-five-year leases for electric power transmission do not warrant executive scrutiny beyond the Bureau, much less legislative approval, let alone 2/3 legislative approval. Considered in the context of the public reserved lots, this policy determination is unsurprising: The public reserved lots were reserved for beneficial uses and intended to facilitate settlement in Maine. *Opinion of the Justices*, 308 A.2d at 262-63, 272-73; Schepps, *Maine's Public Lots: The Emergence of a Public Trust*, 26 Me. L. Rev. 217, 217, 219 (1974) (providing historical context for land settlement following the Revolutionary War). Allowable beneficial uses of public reserved lands have never been limited to recreation and conservation.

2. The Designated Lands Overlay

Although 12 M.R.S. § 1852(4) does not require legislative approval of twenty-five-year leases of public reserved lands for electric power transmission, public reserved lands are designated lands subject to Article IX, Section 23 and the Designated Lands Act. Me. Const. art. IX, § 23; 12 M.R.S. § 598-A(2-A)(D). As such, a plain language analysis must consider how Article

IX, Section 23 and the Designated Lands Act relate to 12 M.R.S. § 1852(4). *See Fair Elections Portland, Inc.*, 2021 ME 32, ¶ 22, 252 A.3d 504.

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

Article IX, Section 23 prohibits the Legislature from delegating to administrative agencies the authority to reduce or substantially alter the uses of designated lands; requires that a supermajority of the Legislature approve reductions and substantial alterations; and leaves room for the Legislature to define reduced and substantially altered, which it did through the Designated Lands Act.[11] *See* Me. Const. art. IX, § 23; *see also* Me. Const. art. IV, pt. 3, § 1 (Legislature may make all reasonable laws not repugnant to the state or federal constitution); *Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993) (same); *Baxter v. Waterville Sewerage Dist.*, 146 Me. 211, 215, 79 A.2d 585 (1951) (same). As such, this Court must next determine whether a section 1852(4)

[11] Senator Black has not argued that the Designated Lands Act's definitions of "reduced" and "substantially altered" are unconstitutional. Even if he had, those definitions are constitutional. *See League of Women Voters*, 683 A.2d at 771–72.

lease reduces or substantially alters the uses of public reserved lands. The answer: Not as those terms are defined by the Designated Lands Act.

i. Section 1852(4) leases do not "reduce" public reserved lands.

As defined by the Designated Lands Act:

> 'Reduced' means a reduction in the acreage of an individual parcel or lot of designated land under section 598-A. 'Reduced' does not mean a reduction in the value of the property. 'Reduced' does not mean the conveyance of an access right by easement in accordance with section 1814-A.

12 M.R.S. § 598(4). The first sentence of the definition encompasses fee title conveyances by sale or by exchange (i.e., land swap) because each reduces the acreage of an individual parcel or lot of designated lands. In contrast, granting an easement, issuing a lease, issuing a license, and transferring management responsibility to another state agency, as a matter of law, do not reduce the acreage of an individual parcel or lot of designated lands; the acreage of the individual parcel or lot remains unchanged by each action.

Although easements do not reduce the acreage of an individual parcel of designated land, easements are encompassed by the "reduced" definition. If "reduced" did not include easements, there would be no need to specify that easements granted pursuant to 12 M.R.S. § 1814-A are not reductions. Treating most easements as reducing designated lands is logical: Unlike a lease, management transfer, or license, an appurtenant easement over state property

typically is conveyed via deed, runs with the land, and cannot be unilaterally terminated by the owner of the servient estate (the State). *See Testa's, Inc. v. Coopersmith*, 2014 ME 137, ¶¶ 12, 14, 105 A.3d 1037. As defined in the Designated Lands Act, then, "reduced" includes fee conveyances by sale or exchange and easements other than section 1814-A access easements but does not include section 1814-A access easements, leases, management transfers, or licenses.[12]

The distinction that fee conveyances and easements reduce public reserved lands, but section 1852 leases, section 1852(1) management transfers, and section 1848(2) licenses do not, is underscored by the Bureau's funds. Consistent with Article IX, Section 23, "[a]ll income or proceeds received by the Bureau from the sale, exchange or relocation of any public reserved lands" is credited to the Public Reserved Lands Acquisition Fund and may be expended only to "purchase and assemble quantities of lands of sizes and locations that the director determines best fulfill the purposes of this subchapter." 12 M.R.S. § 1850(2), (3) (2021); *see* Me. Const. art. IX, § 23 (requiring that the proceeds from the sale of designated lands "be used to

[12] Title 12 M.R.S. § 1814-A, which is part of subchapter II of chapter 220, is a state parks statute; it does not pertain to public reserved lands. *See* 12 M.R.S. § 1804(2) (2021) (explaining that subchapter II applies "specifically to lands classified as state parks or historic sites" and subchapter IV applies specifically to public reserved lands).

purchase additional real estate in the same county for the same purpose"). (*See* A.R. VIII0093, 100.)

In contrast, income received from section 1852 leases, section 1852(1) management transfers, and section 1848 licenses accrue to the Public Reserved Lands Management Fund, allocations from which fund the Bureau's management of the public reserved lands. 12 M.R.S. § 1849(1), (2), (4). (A.R. VIII0090-91, 96.) Timber harvesting and rental income from section 1852 leases are significant income streams for the Public Reserved Lands Management Fund. (A.R. VIII0091.)

ii. Section 1852(4) leases do not "substantially alter" the uses of public reserved lands.

As defined by the Designated Lands Act:

> 'Substantially altered,' in the use of designated lands, means changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which the land is held by the State . . . The essential purposes of public reserved and nonreserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847.

12 M.R.S. § 598(5). To substantially alter public reserved lands, it is not enough to significantly alter the physical characteristics of the unit of public reserved

lands; according to the Legislature, the alteration must "frustrate[] the essential purposes for which the land is held."[13] *Id.*

As the definition of substantially altered acknowledges, 12 M.R.S. § 1847 imposes upon the Bureau a multiple-use mandate for public reserved lands. *See* 12 M.R.S. § 1845 (defining "multiple use" and "sustained yield"); *Opinion of the Justices*, 308 A.2d at 256-57, 261-62, 272-73 (opining that managing public reserved lands pursuant to the multiple use mandate set forth in section 15 of L.D. 1812 (106th Legis. 1973) would not violate the Articles of Separation). Although the multiple-use mandate does not include electric power transmission, 12 M.R.S. § 1852(4)(A) expressly authorizes the Bureau to allow other entities to use public reserved lands for electric power transmission. Title 12 M.R.S. § 1852 thus reflects a legislative policy determination that its leasing authorization is compatible with the Bureau's multiple-use mandate. *See* 2B Singer & Singer, *Sutherland Statutory Construction* § 56.2 (7th ed. Nov. 2021 update) ("Constitutional legislation cannot violate public policy because it is public policy."). A use that it is compatible with the Bureau's multiple-use

[13] The definition of "substantially altered" acknowledges that the different types of designated lands are managed for different purposes. 12 M.R.S. § 598(5). The essential purposes of public reserved lands and nonreserved public lands are broader than the essential purposes of other designated lands such as state parks or state-owned wildlife management areas and game farms. *See id*. As compared with other designated lands then, public reserved lands and nonreserved public lands may be put to a wider array of permissible uses without substantially altering the uses of those lands. *See id*.

mandate cannot frustrate that multiple-use mandate. In short, section 1852(4) leases do not substantially alter the uses of public reserved lands.[14]

That section 1852(4)(A) leases are compatible with the Bureau's multiple use mandate does not mean that the Bureau may lease any public reserved lands for electric power transmission. The Bureau's actions as to public reserved lands must be consistent with the Bureau's comprehensive management plan—the Integrated Resource Policy—and, once adopted, specific action plans (i.e., regional management plans such as the Upper Kennebec Region Management Plan). 12 M.R.S. §§ 1847(2), (3) ("Management of the public reserved lands before the action plans are completed must be in accordance with all other provisions of this section.").

Those plans impose a seven-category hierarchical resource allocation system. (A.R. II0018-19, 219-24.) A lease for electric power transmission is not likely to be compatible with certain allocations, such as special protection

[14] Contrary to the trial court's order, Article IX, Section 23 does not establish that "conservation and/or recreation are as a fundamental matter the essential purposes" of the original public reserved lots and the resulting system of public reserved lands. (*Cf.* A. 42-44.) The essential purposes of the public reserved lots are, pursuant to Article X, beneficial uses. *Opinion of the Justices*, 308 A.2d at 271, 273. Although those beneficial uses include the conservation and recreation components of the Bureau's multiple-use mandate, they are not limited to conservation and recreation. 12 M.R.S. §§ 1845, 1847; *cf.* 12 M.R.S. § 598(5) (describing the essential purposes of state parks as "the protection, management and improvement of these properties for public recreation, conservation, scenic values, nature appreciation, historic preservation and interpretation, public access and related purposes"); Schepps, *Maine's Public Lots: The Emergence of a Public Trust*, 26 Me. L. Rev. 217, 217 (1974) (noting that the public reserved lots are available for a "broad range of activities").

areas, backcountry recreation areas, and visual areas. (*Cf.* A.R. II0219-20, 222.) The Bureau's actions regarding public reserved lands may also be further limited by deed restrictions, by statute, and by funding sources. *E.g.*, 12 M.R.S. § 1805 (constraining uses of ecological reserves); *see also* 16 U.S.C.A. § 2103c (2003, current through PL 117-52) (directing creation of the Forest Legacy Program). (*See* A.R. VIII0094-101 (discussing the Bureau's Forest Legacy Fund).)

iii. The Bureau's Statutory Cross-References to the Designated Lands Act.

To recap, fee conveyances and most easements reduce designated lands, but section 1814-A easements, leases, licenses, and management transfers do not. As to public reserved lands, section 1852 leases, section 1852(1) management transfers, and section 1848(2) licenses also do not substantially alter the uses of public reserved lands. In contrast, a lease, management transfer, or license may (or may not) substantially alter the uses of state parks. *See* 12 M.R.S. §§ 1814, 1815, 1816 (2021). Depicted in the table below, the cross-references to section 598-A in the Bureau's land management statutes reinforce these conclusions.

	Category of Bureau-Jurisdiction Designated Lands		
	State Parks 12 M.R.S. § 598-A(2-A)(A)	Nonreserved Public Lands 12 M.R.S. § 598-A(2-A)(E)	Public Reserved Lands 12 M.R.S. § 598-A(2-A)(D)
Fee Title (Sale or Exchange)	12 M.R.S. § 1814: consistent with section 598-A	12 M.R.S. § 1836: subject to the provisions of section 598-A	12 M.R.S. § 1851: subject to the provisions of section 598-A
Easements (aside from section 1814-A easements)	12 M.R.S. § 1814: subject to the provisions of section 598-A	12 M.R.S. § 1836: subject to the provisions of section 598-A	12 M.R.S. § 1851: subject to the provisions of section 598-A
Lease	12 M.R.S. § 1814: subject to the provisions of section 598-A	12 M.R.S. § 1838(2)-(9): no cross-reference	12 M.R.S. § 1852(2)-(9): no cross-reference
Management Transfer	12 M.R.S. § 1815: consistent with section 598-A	12 M.R.S. § 1838(1): no cross-reference	12 M.R.S. § 1852(1): no cross-reference
Revocable License	12 M.R.S. § 1816: consistent with section 598-A	12 M.R.S. § 1834(2): no cross-reference	12 M.R.S. § 1848(2): no cross-reference

If the Legislature regarded section 1852 leases, section 1852(1) management transfers, or section 1848(2) licenses 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." *Aydelott*, 2010 ME 25, ¶ 12, 990 A.2d 1024 (citations omitted); *see Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but it omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion.") (alteration omitted); 2B Singer & Singer, *Sutherlands Statutory Construction* § 51.2 (7th ed. Nov. 2021 update) ("[W]here a legislature inserts a provision in only one of two statutes that deal with a closely related subject, courts construe the omission as deliberate rather than inadvertent."). Section 1852 does not cross-reference section 598-A because the Legislature has determined that section 1852 leases do not reduce or substantially alter the uses of public reserved lands and do not require 2/3 legislative approval. *See Bragg v. Burleigh*, 61 Me. 444, 451 (Me. 1871) ("The legislature have said what they mean, and it is not for the court to say that they mean something different from what they have said."). The Restated Lease is valid under current law.

B. Legislative History

"Although it is unnecessary to look at the legislative history because the plain language elucidates the Legislature's intent," the legislative history "supports the intent stated in the plain language." *Narowetz*, 2021 ME 46, ¶ 26, __A.3d__ (quotation marks omitted).

Since no later than 1951, the Legislature has delegated to the executive branch authority to lease public reserved lands for utility purposes without requiring any public process. P.L. 1951, ch. 146, § 11; P.L. 1965, ch. 226, § 13; P.L. 1973, ch. 628, § 14; P.L. 1987, ch. 737 (enacting 12 M.R.S. ch. 202-B, §§ 581-590). That leasing authorization was part of the Bureau's statutes when Article

IX, Section 23 and the Designated Lands Act took effect in 1993. 12 M.R.S. § 585(4), *repealed by* P.L. 1997, ch. 678, § 5.

In 1995, the Bureau of Parks and Recreation and the Bureau of Parks and Lands merged without any substantive changes to the governing mandates for Bureau jurisdiction lands. P.L. 1995, ch. 502, § E-29 ("It is also the intent of the Legislature to make only those statutory changes needed to combine the 2 bureaus at this time and that a comprehensive review of all statutes be completed by the Department of Conservation by December 31, 1996."). P.L. 1995, ch. 502, §§ E-16 and E-17 also amended the Designated Lands Act to reflect the merger of the two bureaus. In 1997, the Legislature repealed the two bureaus' statutes, enacted a new statutory framework governing the Bureau (Title 12, Chapter 220), and amended the Designated Lands Act. P.L. 1997, ch. 678. That act also added cross-references to 12 M.R.S. § 598-A in the following Bureau statutes: 12 M.R.S. §§ 1814, 1815, 1816, 1837, 1851. P.L. 1997, ch. 678, § 13. It added no such cross-reference to 12 M.R.S. § 1852, or to 12 M.R.S. § 1848.

In 1999, the Legislature decided it wanted to approve section 1852(7) leases of public reserved lands to the federal government. P.L. 1999, ch. 240. The bill summary for L.D. 383 (119th Legis. 1999) explains:

> Under current law, the Legislature must approve by a 2/3 majority all sales of public land to the Federal Government. This bill extends that requirement to leasing of public land to the Federal Government, which now requires only the consent of the Governor and the Commissioner of Conservation.

The bill summary for L.D. 2092 (119th Legis. 1999) likewise acknowledges that section 1852(7) leases require the consent of the Governor and the Commissioner, but do not require legislative approval. These bill summaries reflect the Legislature's intent that section 1852 leases of public reserved lands did not require 2/3 legislative approval. (Ultimately, the Legislature amended 12 M.R.S. § 1852(7) to require legislature approval of leases of public reserved lands to the federal government, but by a simple majority rather than by 2/3 of all members of each chamber. P.L. 1999, ch. 240.)

C. Legislative Acquiescence

If this Court determines that 12 M.R.S. § 1852(4)(A) and the Designated Lands Act are ambiguous as to whether such leases could reduce or substantially alter the uses of public reserved lands, this Court should defer to the Bureau's interpretation of its statutes not only because it is reasonable and consistent with the legislative history, but also because the Legislature has acquiesced to it. *See Narowetz*, 2021 ME 46, ¶ 33 n.12, __A.3d__ (acknowledging in a MAPA case that, where legislative intent is not clear, this Court "defer[s] to

a reasonable construction of a statute offered by the agency administering the statute").

This Court has described legislative acquiescence as follows:

> It is a well accepted principle of statutory construction that when an administrative body has carried out a reasonable and practicable interpretation of a statute and this has been called to the attention of the Legislature, the Legislature's failure to act to change the interpretation is evidence that the Legislature has acquiesced in the interpretation.

Thompson v. Shaw' s Supermarkets, Inc., 2004 ME 63, ¶ 7, 847 A.2d 406. In 2007, the Bureau testified to its committee of jurisdiction that, as to public reserved lands "[t]he statutes allow a 25-year utility lease with no legislative review or approval" but, "due to [Land Use Planning Commission] subdivision restrictions on 'leases' . . . a legislatively authorized utility <u>easement</u> is sometimes necessary." *Testimony in Support of L.D. 1913 Resolve, Authorizing Dep't of Conservation, Bureau of Parks & Lands to Convey Certain Lands: Hearing on L.D. 1913 Before J. Standing Committee on Agriculture, Conservation & Forestry*, 123d Legis. 2 (2007) (testimony of Alan Stearns, Deputy Director of the Bureau of Parks & Lands) (emphasis in original). *Compare* 12 M.R.S. § 1852(4)(A), *with* 12 M.R.S. § 1851(A).

Additionally, the Bureau identifies in its public annual report to the Legislature how many leases and licenses of public reserved and nonreserved

lands are in effect. (*E.g.*, A.R. VI0132-33, 177, 226; A.R. VII0027, 70-71, 113, 156-58, 209, 260-61.) *See* 12 M.R.S. §§ 1839, 1853 (2021) (requiring annual reports). As of March 2020, there were approximately 355 leases and licenses in effect for a variety of purposes. (A.R. VIII0029, 89-90.) The Bureau has not sought legislative approval of the approximately 355 leases and licenses of public reserved and nonreserved lands except in limited circumstances, such as a section 1852(7) lease to the federal government and to amend a statutory lease of public reserved lands.[15] *E.g.*, P.L. 2017, ch. 362, § 7 (authorizing amendment of a statutory lease—P. & S.L. 1927, ch. 27, § 13—to allow a sublease); Resolves 2013, ch. 56, § 1 (authorizing the Bureau to lease public reserved lands to the federal government).

The Legislature has not amended 12 M.R.S. §§ 1848 or 1852 in response to the Bureau's 2007 testimony or its longstanding practice of seeking legislative approval for fee conveyances, easements, and section 1852(7) leases to the federal government, but not for section 1852 leases or section 1848(2) licenses. *Cf. supra* note 8. Rather, it acquiesced to the Bureau's interpretation that section 1852 leases other than to the federal government, section 1852(1)

[15] The Legislature sometimes directs the Bureau to lease public reserved lands to a specific entity. *E.g.*, Resolves 2005, ch. 173 (directing the Bureau lease to the Town of Allagash specified public reserved lands to the Town of Allagash pursuant to 12 M.R.S. § 1852(8)).

management transfers, and section 1848(2) licenses do not require legislative approval. *See Thompson*, 2004 ME 63, ¶ 7, 847 A.2d 406.

II. The Bureau is not required to hold a public administrative process before executing a lease pursuant to 12 M.R.S. § 1852.

Whether the Bureau is required to hold a public administrative process before executing a lease pursuant to 12 M.R.S. § 1852(4) is a question of law this Court reviews de novo. *See Palian*, 2020 ME 131, ¶ 10, 242 A.3d 164. As of March 2020, there were approximately 355 leases and licenses of public reserved and nonreserved public lands in effect (A.R. VIII0089-90) that the Bureau issued pursuant to 12 M.R.S. §§ 1834, 1838, 1848 and 1852 without first holding a public administrative process aside from the public process for the management plans. (*See* A.R. II0016-18, 129-52.) Contrary to the trial court's holding, the Bureau did not err in doing so because no constitutional provision or statute requires the Bureau to provide a public administrative process before exercising its discretion to execute such licenses or leases. (*Cf.* A. 44-48.)

A. The Bureau's statutes require no public process for section 1852 leases.

Unlike other Bureau statutes governing its designated lands, 12 M.R.S. § 1852 is silent as to a public administrative process. *Cf.* 12 M.R.S. § 1805 (requiring an opportunity for public review and comment before designating additional ecological reserves); 12 M.R.S. § 1814-A(1), (4) (requiring notice to

interested parties, including Legislators, before conveying an access easement across a rail trail); 12 M.R.S. § 1837(2) (requiring public notice and a public hearing, if requested, before conveying nonreserved public lands); 12 M.R.S. § 1847(2) (requiring an opportunity for public review and comment before adopting a specific action plan); 12 M.R.S. § 1851(3), (4) (requiring written findings and a public hearing, if requested, before conveying parcels of public reserved lands not exceeding 1/4 acre). These contrasting process requirements are intentional distinctions. *Aydelott*, 2010 ME 25, ¶ 12, 990 A.2d 1024 (citations omitted); *see Gozlon-Peretz*, 498 U.S. at 404. The Bureau's statutes do not require any public administrative process for section 1852 leases.

B. Article IX, Section 23 and The Designated Lands Act require no public process.

Neither Article IX, Section 23 nor the Designated Lands Act expressly requires agencies to provide a public administrative process. And, contrary to the trial court's holding, Article IX, Section 23 also does not implicitly require agencies (or the Legislature, *see supra* note 10) to provide a public administrative process. (*Cf.* A. 44-48.)

Article IX, section 23 requires a 2/3 vote of all members of each legislative chamber to reduce or substantially alter the uses of designated lands. That

requirement is akin to a procedural requirement, but "there is no protectable property interest in a process." *See Doe v. Bd. of Osteopathic Licensure*, 2020 ME 134, ¶ 17, 242 A.3d 182; *Munjoy Sporting & Athletic Club v. Dow*, 2000 ME 141, ¶ 10, 755 A.2d 531 ("Though the Constitution protects property interests, it does not create such interests nor does the Constitution protect those interests that are nothing more than a unilateral expectation of a future benefit."). And because Article IX, Section 23 requires legislation to reduce or substantially alter the uses of designated lands, public process will occur before the legislative committee of jurisdiction. *See* Joint Rules of the 130th Maine Legislature, Rules 304 & 305 (discussing public hearings and work sessions).

As shown below, the MAPA and the due process clause of the state and federal constitutions likewise do not require a public process.

C. The MAPA does not require a public process for section 1852 leases.

The MAPA also does not require the Bureau to hold a public administrative process before issuing a section 1852 lease. The MAPA imposes procedural requirements for rulemakings and adjudicatory proceedings. 5 M.R.S. §§ 8052(1), 8053, 9051-A (2021). Section 1852 leases involve neither.

The MAPA's rulemaking requirements do not apply to section 1852 leases because a lease is not a rule. A lease issued pursuant to 12 M.R.S. § 1852 is a temporal, less-than-fee interest in real property. Leases do not "interpret

or make[ ] specific the law administered by the agency, or describe[] the procedures or practices of the agency." 5 M.R.S. § 8002(9) (2021) (defining "rule").

Nor is the Bureau required to hold an adjudicatory proceeding before issuing a section 1852 lease. An "'adjudicatory proceeding' means any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing." 5 M.R.S. § 8002(1) (2021). As discussed above, neither the Bureau's statutes, nor Article IX, Section 23, nor the Designated Lands Act require that the Bureau hold a hearing before issuing a lease pursuant to 12 M.R.S. § 1852. Thus, if the Bureau was required to a hold a hearing or provide notice and an opportunity to comment before issuing a section 1852 lease, it could only be as a matter of procedural due process.

D. Senator Black has no protectable property interest in the Lots.

"[A] protectable property interest under the due process clause is defined by state law." *Doe*, 2020 ME 134, ¶ 17, 242 A.3d 182. Title 12 M.R.S. § 1846(1) (2021) confers upon the public a privilege of accessing and making reasonable use of public reserved lands.

This privilege is not without limitation, however. The Bureau may restrict public access "to ensure the optimum value of such lands as a public

trust." 12 M.R.S. § 1846(1). As with other Bureau lands, the Bureau may also restrict public access to public reserved lands "when the restrictions reasonably relate to protecting public health, safety or welfare or the economic interests or natural resources of the State." 12 M.R.S. § 1804(6). Thus, land management roads and sections of public reserved lands may be closed to accommodate timber harvesting. Portions of public reserved lands may also be temporarily off limits to the public to avoid interfering with leases and licenses of such lands that further the economic interests of the State. Further, and from a practical standpoint, some public reserved lands are difficult to access or simply not reachable by public road. (*See* A. 251, 259-60; A.R. VIII0052, 85-86, 87.) *See generally* Me. Op. Att'y Gen. 80-108 ("There is no general public right to cross the property of a private party to gain access to the public lots.")

Where, as here, the privilege conferred by 12 M.R.S. § 1846(1) is subject to the Legislature's and the Bureau's authority to restrict access and use of public reserved lands, it does not establish in every Maine citizen a protectable property interest in all such lands. *See Opinion of the Justices*, 308 A.2d at 272-73 (opining that section 15 of L.D. 1812 (106th Legis. 1973), which authorized electric power transmission leases without requiring a public administrative process, would not violate the Articles of Separation, the distribution of power provisions, or the due process clauses of the federal or state constitutions);

Armuchee All. v. King, 922 F. Supp. 1541, 1548-49 (N.D. Ga. 1996) (concluding that "Plaintiff's members have no liberty/property interest in using or occupying" a national forest for recreation); *see also Munjoy Sporting & Athletic Club*, 2000 ME 141, ¶ 11, 755 A.2d 531 ("Generally, licenses do not create a protected property interest when broad discretion is vested in a state official or agency to deny or approve the application."). In short, Senator Black lacks a protectable property interest in the leased lands.

Absent a protectable property interest under state law, the Bureau is not required to afford any public administrative process, including notice and an opportunity for public comment, before issuing a section 1852 lease. Thus, the MAPA's notice provisions for adjudicatory proceedings, 5 M.R.S. § 9051-A, also do not apply to the Bureau's exercise of its section 1852 leasing authority.

Whether the Bureau should provide notice and an opportunity for comment before issuing a section 1852 lease is a matter for the Legislature and the executive. *See Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, ¶ 27, 895 A.2d 309 ("[L]egislative policy arguments are more appropriately left to the executive and the Legislature to resolve."). The Bureau did not err by issuing the Restated Lease, or any of the other approximately 354 leases and license of public reserved and nonreserved lands that existed as of 2020, without first providing a public administrative process.

III. The trial court erred by not dismissing Count I and by striking the Findings Memo without remanding to the Bureau.

Senator Black's first amended complaint challenges as ultra vires the Restated Lease. Although it seeks review of final agency action—the Restated Lease—it pleaded MAPA review in the alternative only. The trial court agreed that the Restated Lease is final agency action. (A. 66.) Rather than apply the exclusivity rule, the court exceeded its discretion by allowing both Counts I and III to proceed. (A. 71-72 & n.9.) The trial court also allowed Count III to proceed without the Bureau's written conclusions and findings. (A. 69, 71-72.) This was error.

A. The exclusivity rule required dismissal of Count I.

Application of the exclusivity rule is a question of law this Court reviews de novo. *See Antler's Inn & Rest. v. Dep't of Pub. Safety*, 2012 ME 143, ¶¶ 14-15, 60 A.3d 1248; *but see Cape Shore Homeowners Ass'n v. Town of Cape Elizabeth,* 2019 ME 86, ¶ 9, 209 A.3d 102 (applying abuse-of-discretion standard when reviewing dismissal of independent claim as duplicative of Rule 80B claim).

Unlike the DJA, the MAPA expressly authorizes suit against governmental agencies: "Except where a statute provides for direct review . . . or where judicial review is specifically precluded or the issues therein limited by statute, any person who is aggrieved by final agency action shall be entitled to judicial

review thereof in the Superior Court" as provided by 5 M.R.S. §§ 11001-11007. 5 M.R.S. § 11001. When a decision of an executive branch agency is reviewable pursuant to the MAPA, the MAPA and Rule 80C provide the "exclusive process for judicial review unless it is inadequate." *Antler's Inn & Rest.*, 2012 ME 143, ¶ 14, 60 A.3d 1248 (quotation marks omitted). As articulated by the trial court, the legal issues comprising Count I—whether the Bureau was required to provide a public administrative process specific to the Restated Lease and obtain 2/3 legislative approval of the Restated Lease—are reviewable pursuant to 5 M.R.S. § 11007(4)(C).[16] (*Cf.* A. 71-72.) As such, the court exceeded its discretion by not dismissing Count I as duplicative of Count III and by reviewing the Restated Lease pursuant to the DJA. *See Narowetz*, 2021 ME 46, ¶ 22 n.9, __A.3d__ (independent claims properly dismissed as duplicative); *Fair Elections Portland, Inc.*, 2021 ME 32, ¶ 21 n.7, 252 A.3d 504 (same); *Cape Shore Homeowners Ass'n*, 2019 ME 86, ¶ 9, 209 A.3d 102 (same).

[16] Contrary to the trial court's holding (A. 38-41), the court lacks jurisdiction over the terminated 2014 lease because Senator Black did not timely appeal that lease: Senator Black filed his complaint in June 2020, over five years after the Bureau issued the 2014 lease. 5 M.R.S. § 11002. (*Compare* A. 129, *with* A. 457.) Senator Black has no protected property interest in the 2014 lease or the Lots that would enable him to avoid application of MAPA's jurisdictional filing deadlines. *Cf. Martin v. Dep't of Corr.*, 2018 ME 103, ¶¶ 17-18, 190 A.3d 237. Even if the trial court had jurisdiction over the 2014 lease, Senator Black's complaint was moot because the parties to the 2014 lease had terminated it. *See Competitive Energy Servs. LLC v. Public Utils. Comm'n*, 2003 ME 12, ¶ 24, 818 A.2d 1039. Further, Senator Black's first amended complaint seeks no relief as to the terminated 2014 lease. (A. 173-74).

B. Sovereign immunity bars Count I.

Whether sovereign immunity bars Count I is a question of law this Court reviews de novo. *See Drake v. Smith*, 390 A.2d 541, 542-44 (Me. 1978).

Even if Count I were not duplicative of Count III, Count I is barred by sovereign immunity. "[G]enerally, a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantle of immunity." *Cushing I*, 420 A.2d at 923. "Sovereign immunity is the rule and not the exception." *Knowlton v. Attorney General*, 2009 ME 79, ¶ 15, 976 A.2d 973.

There is no question that the State holds title, as trustee, to the public reserved lands in its sovereign capacity. *Cushing I*, 420 A.2d at 923. "It was in that sovereign status as trustee" that the Legislature enacted 12 M.R.S. § 1852(4) and that the Bureau, as the agent of the State responsible for managing the public reserved lands, issued the Restated Lease. *See id.* Thus, Count I is viable only if the Legislature has waived sovereign immunity. It has not.

Unlike the MAPA and the Maine Tort Claims Act, 14 M.R.S. §§ 8101-8118 (2021), the DJA, 14 M.R.S. §§ 5951-5963 (2021), does not waive sovereign immunity. *Bouchard v. Frost*, 2004 ME 9, ¶ 10, 840 A.2d 109 ("[S]overeign immunity is not confined to actions that seek damages from the State; it can also apply to declaratory judgment actions. . . ."). The MAPA and the MTCA

contain express authorizations to sue the State; the DJA contains no such express authorization. *Compare* 14 M.R.S. §§ 5951-5963 (2021) *with* 5 M.R.S. §§ 8002(2), 11001 (2021) & 14 M.R.S. § 8102(2), 8104-A (2021). Absent an express authorization to sue the State, the DJA cannot override sovereign immunity. *See Bell v. Town of Wells*, 510 A.2d 509, 515, 518-19 (Me. 1986); *Drake*, 390 A.2d at 544. Count I is barred by sovereign immunity.

C. Count III required the trial court to review the Bureau's legal conclusions and factual findings regarding the Restated Lease.

Whether the trial court erred by reviewing the Restated Lease without agency findings, which the court concluded were required, is a question of law this Court reviews de novo. *See Fair Elections Portland, Inc.*, 2021 ME 32, ¶¶ 34-38 & n.11, 252 A.3d 504. Although the trial court held that the Bureau must make a fact-based determination as to whether the Restated Lease requires 2/3 legislative approval, it erred by striking the Findings Memo without remanding the matter to the Bureau. (*See* A. 69, 71-72, 74-75, 88-89.)

The grounds upon which the trial court may judge the propriety of the Bureau's decision to issue the Restated Lease without seeking 2/3 legislative approval are those invoked by the Bureau. *See Palian*, 2020 ME 131, ¶ 41, 242 A.3d 164. Thus, for the administrative record to be sufficient to facilitate judicial review, it must contain the Bureau's written findings.

As this Court recently explained:

> It is black letter law that meaningful judicial review of a decision requires that the decision contain findings of fact sufficient to apprise the reviewing court of the decision's basis and that those findings be based on substantial evidence in the record.

LaMarre v. Town of China, 2021 ME 45, ¶ 6, __A.3d__.

Absent such a decision, "there is a danger of judicial usurpation of administrative functions." *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 169 A.3d 396 (quotation marks omitted). To avoid that danger, the preferred remedy in such situations is a remand to the agency. *Narowetz*, 2021 ME 46, ¶ 22, __A.3d__; *Chapel Road Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶ 13, 787 A.2d 137; *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918-19 (Me. 1984).

Although the Findings Memo post-dates the Restated Lease, *see supra* note 6, the court could have accepted the Findings Memo as part of the administrative record because it is anchored by an internal 2014 document (A. 494) and synthesizes the information in the record involving the Bureau's actions and management plan for the Lots (*e.g.*, A. 489-92, 497-508). *See Rhea Lana, Inc. v. U.S. Dep't of Labor*, 925 F.3d 521, 523-25 (D.C. Cir. 2019); *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 463-64 (D.C. Cir. 2016). Instead, the court struck the Findings Memo, denied the Bureau's motions to remand to prepare

written findings, ordered the parties to file Rule 80C briefs despite the resulting absence of Bureau findings in the record, and then, following Rule 80C briefing, reversed the Bureau's decision to issue the Restated Lease. (A. 29-30, 65-66 & n.7, 69, 71-72.) This was error. *Narowetz*, 2021 ME 46, ¶ 22, __A.3d__; *LaMarre*, 2021 ME 45, ¶ 10, __A.3d__. If this Court concludes that the Bureau must make 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.

CONCLUSION

The Bureau respectfully requests that this Court vacate the trial court's judgment and remand for entry of judgment affirming the Bureau's decision to issue the Restated Lease.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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