STATE OF 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 AMICUS CURIAE H.Q. ENERGY SERVICES (U.S.) INC.

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INTRODUCTION AND STATEMENT OF INTEREST

Amicus Curiae H.Q. Energy Services (U.S.) Inc. ("HQUS") is an indirect wholly owned subsidiary of Hydro-Québec ("HQ"), a leading provider of clean renewable energy in North America.

In 2018, HQUS entered into power purchase agreements ("PPAs") with three Massachusetts electric distribution companies ("EDCs") following a competitive Request for Proposals bid process designed to reduce regional greenhouse gas ("GHG") emissions. In order to deliver clean renewable energy into the New England grid, HQUS partnered with Central Maine Power Company ("CMP") to construct and operate the New England Clean Energy Connect transmission line (the "Project"). The Project is crucial to enable HQUS to transmit 1,200 MW[1] of clean renewable hydropower into the regional New England electric market, reducing regional GHG emissions, reducing the region's reliance on expensive and price-volatile natural gas, and increasing grid stability.

Because the Project crosses a small portion of the public reserved lots located within Johnson Mountain Township and West Forks Plantation (sometimes

[1] CMP is obligated to provide transmission service to HQUS over the Project for a period of forty years by virtue of a series of transmission service agreements ("TSAs"). Under the PPAs, HQUS is required to use 1,090 MW of this transmission service capacity to provide clean energy to the EDCs for a term of twenty years. HQUS may use the remaining capacity (110 MW) during the initial twenty-year period to sell additional clean energy into the New England electric markets. Following the expiration of the initial twenty-year period, HQUS may use the entire 1,200 MW capacity of the Project for an additional twenty years to sell clean electricity into the New England electricity markets, including to Maine electricity customers.

referred to herein as the "Lots"), CMP sought approval from and execution of a lease with the Bureau of Parks and Lands ("BPL") pursuant to 12 M.R.S. § 1852(4)(A). This route was selected and permitted because it represents the best practicable route and provides the least impact to scenic, recreational, or natural resources. On June 23, 2020, after negotiations and consultations with other Maine administrative agencies, BPL and CMP entered into an amended and restated lease (the "Lease") granting CMP non-exclusive use of an area only comprising 2.6% of the total acreage of the Lots.[2] *Compare* A. 413, *with* A. 489.

The Lease was challenged by a group of current and former Maine Legislators, individual citizens, and an interest group—the Appellees/Cross-Appellants (collectively, the "Appellees"). None of these individuals or groups are parties to the Lease, have property interests in the lands at issue, or have any statutorily granted right to challenge actions of BPL taken on behalf of the State of Maine with respect to the Lease.

After extensive proceedings, on August 10, 2021, the trial court (B.C.D. Cumberland County) (Murphy, J.) issued a final decision summarily vacating the

[2] CMP initially approached BPL regarding the potential use of the Lots for a one-mile stretch of a transmission line in 2014. *See* A. 494; A.R. III0001, 03, 06. After discussions with BPL, CMP requested a twenty-five year lease for its proposed future use of the Lots. *See* A.R. III0009. The 2014 lease was superseded and terminated when BPL and CMP entered into the Lease in 2020. *See* A. 413-46. Although not discussed herein, HQUS agrees with the positions of BPL and CMP with respect to the Appellees'/Cross-Appellants' requested relief on the 2014 lease being moot and the trial court's decision related thereto being error. *See* BPL Brief at 46 n.16; CMP Brief at 46-47.

Lease. The trial court did not make a final determination of whether the Lease was actually a substantial alteration of use within the meaning of Article IX, Section 23 of the Maine Constitution, but instead determined the administrative record did not provide competent evidence to support a finding by BPL that no substantial alteration would occur. The remedy chosen by the trial court was to reverse the actions of BPL and vacate the Lease.

This ultimate remedy was the culmination of a series of errors explained in detail by BPL and CMP, but foundationally stemmed from the trial court's failure to provide a proper interpretation of the constitutional and statutory scheme at issue. In addition to this foundational error, the trial court failed to defer to BPL in its administration of the public reserved lands and its long-standing practices and procedures with respect to leasing decisions. It is these errors, and the results that flow therefrom, that provides the focus of HQUS' brief. By failing to provide BPL with the appropriate level of deference, the trial court has caused disruption to the administrative process and robust judicial precedents that businesses such as HQUS rely upon when deciding whether or not to do business or invest in the State of Maine.

STATEMENT OF THE FACTS

HQUS agrees with and adopts the statement of the facts and procedural posture of this matter as set forth in the briefs of BPL and CMP. *See* BPL Brief at 3-16; CMP Brief at 1-17.

STATEMENT OF THE ISSUES

I. Whether the trial court erred when it failed to construe BPL's long-standing statutory leasing authority as being consistent with Article IX, Section 23.

II. Whether the trial court erred when it found BPL failed to follow an undefined public administrative process when no such process exists by statute, rule, or practice regarding leases executed pursuant to 12 M.R.S. § 1852.

III. Whether the trial court erred when it failed to acknowledge that competent evidence in the record supports BPL's execution of the Lease.

IV. Whether the trial court erred when it failed to accord the findings and decisions of BPL with the appropriate level of deference.

ARGUMENT

Maine's administrative and judicial systems provide stability and predictability to those seeking to invest and do business in Maine. In reliance on this bulwark, CMP and NECEC Transmission, LLC[3] ("NECEC LLC") engaged in lengthy, costly and extensive permitting and administrative approval processes for the Project. By following the strictures of existing laws and established procedures, the Project obtained, among various other local municipal approvals and permits: (a) a certificate of public convenience and necessity ("CPCN") issued by the Maine Public Utilities Commission ("PUC");[4] (b) Site Location of Development Law and Natural Resources Protection Act permits issued by the Maine Department of Environmental Protection ("DEP"); (c) a Site Law Certification of Compliance from the Land Use Planning Commission; and (d) the

[3] The Maine Public Utilities Commission required CMP to transfer the Project and related contracts to NECEC LLC to protect Maine ratepayers from any risks associated with the Project. NECEC LLC is responsible for the construction and operation of the Project.

[4] As part of the PUC's review of the application and ultimate grant of the CPCN, a Stipulation was negotiated and executed providing significant benefits to the State of Maine in an aggregate amount of $244,505,000. *See Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation*, ME. PUB. UTILS. COMM'N, Docket No. 2017-00232, at 74-97 (May 3, 2019). In a related agreement, as approved in the Stipulation, HQUS agreed to pay $170 million of those benefits. *Id.* HQUS has also agreed to accelerate the schedule of payments for these benefits. *See Stipulation*, ME PUB. UTILS. COMM'N, Docket No. 2019-00179, at 30-33 (July 30, 2020). Further, in addition to the above, HQUS has committed to negotiate and enter into PPAs with Maine EDCs to provide 500,000 MWh of clean energy at discounted rates $4.00 below market. *See Commitment to Sell Power to Maine between Governor's Energy Office and H.Q. Energy Services (U.S.) Inc.* (July 9, 2020), available at https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/HQ%20-%20GEO%20Commitment_0.pdf (last visited December 1, 2021).

Lease executed by BPL.[5] Each of these permits and approvals were issued consistent with the laws and regulations of Maine and by administrative agencies with substantial expertise in their respective areas.[6]

HQUS has also expended substantial sums to advance and support the Project, and HQ has begun the concurrent construction of a companion transmission line in Canada to interconnect with the Project at Beattie Township, Maine, thereby allowing transmission of clean energy into New England. Like other businesses investing substantial sums in supporting the Project—and the multitude of others who also seek to invest in complex projects in Maine—HQUS relied on Maine's administrative and judicial systems to provide stability and predictability. That is, if an administrative agency acts in accordance with its existing statutory mandates, then Maine's courts will provide the agency and its actions with the appropriate level of deference owed to an executive branch agency acting within its area of expertise and delegated authority.

The trial court erred when it upended this predictability. The trial court disrupted BPL's long-standing leasing practices and authority (which, including its

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[5] The Project has also received federal permits, including permits from the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers & Harbors Act as well as a Presidential Permit from the U.S. Department of Energy.

[6] Many of the administrative processes were substantially delayed by the opposition of various groups funded by fossil fuel burning electricity generators and other entities that would likely lose revenue as a result of the Project. *Cf. NextEra Energy Resources LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117.

predecessor agencies, date back nearly a century), imposed a new unwritten and unexplained general public procedure, and refused to consider the substantial undertakings and reasoned explanation BPL provided for its leasing decision. Each of these errors in of themselves are damaging to the stability of Maine's administrative system, but the ultimate remedy imposed—summary vacation of the Lease—exemplifies the far-reaching effects of such errors. Indeed, following the Lease being vacated at Appellees' urging, opponents of the Project have used the trial court's erroneous decision as a launching point for attacks in multiple other venues. *See, e.g.,* Letter from James T. Kilbreth to Melanie Loyzim, Comm'nr of Dept. of Env't Prot. (Aug. 11, 2021)[7] (requesting stay on MDEP permit as a result of trial court decision).

This result contradicts essential notions of fairness that businesses rely upon when making the decision to invest and do business in the State of Maine. This Court should not allow the trial court's final decision (and the predicate rulings upon which it is based) to stand as precedent. Accordingly, HQUS respectfully requests that this Court reverse the decision of the trial court and affirm BPL's decision to execute the Lease.

[7] Available at https://www.maine.gov/dep/ftp/projects/necec/appeals/2021-08-11%20NRCM%20Stay%20Request.pdf (last visited Dec. 2, 2021).

I. The Bureau of Parks and Lands has discretionary statutory authority to enter into leases for third party uses of public reserved lands, which has occurred for over a century.

BPL (or its predecessor agencies) has had discretionary authority to enter into leases allowing third-party productive uses of public reserved lands for over 100 years and, in specific, leases allowing for the construction and operation of utility lines for over seventy years. *See* P.L. 1915, ch. 306, § 1 (leases for campsites); 12 M.R.S. § 1852 (current leasing authority); P.L. 1951, ch. 146 (original utility line leasing authority); 12 M.R.S. § 1852(4)(A) (current utility line leasing authority). For the almost 30 years since enactment of Article IX, Section 23 of the Maine Constitution in 1993, this leasing authority has remained nearly unchanged. *See* P.L. 1997, ch. 678, § 13; Cons. Res. 1993, ch. 1. Pursuant to this authority, BPL has issued hundreds leases. *See, e.g.,* A.R. VIII (annual reports listing leases).

From the beginning of proceedings in this matter, the trial court failed to construe this long-standing and deliberate statutory framework as consistent with Article IX, Section 23. *See, e.g., Ford Motor Co. v. Darlings*, 2014 ME 7, ¶ 33, 86 A.3d 35. Instead, the trial court effectively amended the statute to read in a new "consistent with the requirements of section 598-A" directive despite such language *expressly* appearing in other statutes enacted at the same time or later in time. *Compare* 12 M.R.S. § 1852 (omitting any "consistent with" or "subject to"

directives regarding section 598-A) *with* 12 M.R.S. § 1814 (expressly containing a "consistent with" section 598-A directive); *see also* 12 M.R.S § 1851 (expressly containing directives that actions are "subject to" section 598-A); *see also Ex Parte Davis*, 41 Me. 38, 53 (1856) ("The judiciary cannot restrict or enlarge the obvious meaning of any legislative act . . . ."). This was error.

Under the long-held statutory scheme for the management of public reserved lands, as administered by BPL, the decision of whether to issue a lease for third-party use of public reserved lands is based on whether the proposed lease (and the actions permitted thereunder) would be consistent with the multiple use management of those lands, "consistent with the management plans for those lands," and are otherwise upon "terms and conditions . . . the director considers reasonable."[8] 12 M.R.S. § 1847(1), (3). This discretionary authority to allow third party productive uses accords with the long-standing requirement that Maine utilize its public reserved lands for a broad (but not unlimited) spectrum of "beneficial public uses." *Opinion of the Justices*, 308 A.3d 253, 271, 272-73 (Me.

[8] As BPL and CMP discuss in more detail, the statute setting forth BPL's leasing authority plainly provides when additional approvals are required prior to BPL entering into a lease. Thus, for leases authorizing certain types of actions, BPL needs to obtain the approval of the Governor, the Commissioner of the Department of Agriculture, Conservation and Forestry or, in limited cases, the majority approval of the Legislature. *See* 12 M.R.S. § 1852(2), (6)-(9). For leases authorizing other actions—including those authorizing the construction and operation of transmission lines—no approval is required prior to BPL entering into such lease. *See* 12 M.R.S. § 1852(4), (5).

1973); *Cushing v. State*, 434 A.2d 486, 500 (Me. 1981); *see also State v. Mullen*, 97 Me. 331, 54 A. 841 (1903); *Shapleigh v. Pilsbury*, 1 Me. 271 (1821).

This long-standing authority is also consistent with Article IX, Section 23 and its implementing legislation, the Designated Lands Act, 12 M.R.S. §§ 598 to 598-B. Under Article IX, Section 23, two-thirds approval of the Legislature must be obtained if the "uses" of public reserved lands will be substantially altered. Me. Const. art. IX, § 23; 12 M.R.S. § 598(5). The Maine Legislature has provided an interpretation that the "uses" of public reserved lands are substantially altered when such land is "changed so as to significantly alter physical characteristics in a way that frustrates . . . the protection, management and improvement of these properties for the multiple use objectives established in [Title 12] section 1847." 12 M.R.S. § 585(5). By interpreting Article IX, Section 23 in this manner, the Legislature, by reference, provided that it does not consider a proposed use of public reserved lands to be a substantial alteration of use when that proposed use is consistent with BPL's multiple use objectives.[9]

[9] The reasonableness of this interpretation is supported by the plain text of Article IX, Section 23. As provided therein, a proposed use requires legislative approval only if it would substantial alter the existing uses of the land at issue. *See* Me. Const. art. IX, § 23. This necessarily means that there must be some pre-existing use of the land by which to judge the alteration. For the public reserved lands, this has long been held to mean multiple use management by BPL and productive uses by third parties. *See, e.g.,* P.L. 1973, ch. 628; 12 M.R.S. §§ 1845-1859; *Opinion of the Justices*, 308 A.2d at 271-73. The Legislature, in enacting the Designated Lands Act and 12 M.R.S. § 1852 recognized that the execution of leases authorizing third party productive uses was consistent with the pre-existing use of the public reserved lands and, therefore, is not an alteration, much less a substantial one.

This statutory scheme has remained unchanged through multiple reorganizations and recodifications of BPL's statutory authority. *See* P.L. 1997 ch. 678 § 13 (codified at 12 M.R.S. 1847); 1987 ch. 737, §§ B2, C106 (codified at 12 M.R.S. § 585, repealed by P.L. 1997, ch. 678, § 5); P.L. 1973, ch. 628, § 14 (repealing and replacing 30 M.R.S. § 4162); P.L. 1965, ch. 226, § 65 (codified at 30 M.R.S. § 4162). Thus, if BPL determines that a proposed third party use is consistent with the multiple use objectives for a certain parcel (often set forth in the management plan for the land at issue), then BPL may enter into a lease without supermajority legislative approval, provided that the lease is otherwise in accordance with 12 M.R.S. § 1852.

In executing the Lease, BPL acted within this long-standing and deliberate statutory scheme. As described later herein, BPL ensured that the Lease would be consistent with its multiple use management of the Lots at issue and upon reasonable terms. *See* 12 M.R.S. § 1847(3). After making this determination, BPL executed a lease for "a term not exceeding 25 years, to . . . "[s]et and maintain or use poles, electric power transmission . . . lines and facilities." 12 M.R.S. § 1852(4)(A). The trial court erred when it failed to recognize and acknowledge that these discretionary actions fell within the strictures of the constitutional and statutory framework governing the leases for use of public reserved lands. This

error, in itself, is sufficient for this Court to reverse the trial court's decision and affirm the decision of BPL to execute the Lease.

II. No public administrative process requirement appears in Article IX, Section 23, the Designated Lands Act, 12 M.R.S. § 1852, regulations, or agency practice.

Administrative agencies are expected to follow *established* procedures when taking action. Those procedures may arise from agency rules and practices, statutes, or constitutional considerations. *C.f. In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 744 (Me. 1973) ("It is a generally accepted principle of administrative law that administrative agencies, at least in the absence of specific legislative direction, should be free to fashion their own rules of procedure." (internal citations and quotation marks omitted)). An agency need not (and cannot be expected to) follow a procedure that does not exist.[10]

The trial court required BPL to do just that when it determined that an undefined public administrative process arises by implication from Article IX, Section 23. *See* A. 46. This was error. The trial court compounded this plain error when it further found that BPL failed to follow that unwritten and undefined public

[10] This situation is far removed from those in which, based on procedural due process requirements, courts are required to determine whether a given administrative process is constitutionally sufficient. *See, e.g., Doe v. Dep't of Health & Human Servs.*, 2018 ME 164, ¶¶ 15, 198 A.3d 782. In such cases, the first consideration is "whether the governmental action has resulted in a deprivation of life, liberty, or property." *Id.* ¶ 16. With respect to the Lease—and BPL's leasing procedures in general—the Appellees have no protected property interest to be deprived of. *See Opinion of the Justices*, 308 A.2d at 273; *see also* BPL Brief at 42-45. Thus, procedural due process concerns are not implicated.

process prior to executing the Lease. *Id.* at 46-47, 55. If allowed to stand, the trial court's decision threatens to allow and encourage litigants to request that courts impose new procedural requirements on administrative agencies where none previously existed. *Cf. Kuvaja v. Bethel Sav. Bank*, 495 A.2d 804, 806 (Me. 1985) ("[Courts] owe special respect to procedural rules adopted by executive agencies for the conduct of their own business and to their exercise of informed judgment and discretion in applying those rules."); *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982) (noting the "important social policy of continuity in law").

A plain language review of the governing constitutional and statutory framework makes clear no public administrative process is required before BPL enters into a lease pursuant to 12 M.R.S. § 1852. *See Payne v. Sec'y of State*, 2020 ME 110, ¶¶ 17-18, 237 A.3d 870 ("[The Court] appl[ies] the plain language of the constitutional provision if the language is unambiguous."); *Chadwick-BaRoss, Inc. v. City of Westbrook*, 2016 ME 62, ¶ 11, 137 A.3d 1020 ("When interpreting a statute, [the Court] give[s] effect to the intent of the Legislature by first looking at the plain meaning of the statutory language.").

The constitutional provision at issue here, Article IX, Section 23, states in full:

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

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

Me. Const. art. IX, § 23.

No requirement for a specific administrative process, much less a formal public process (*e.g.,* a public hearing), exists in the foregoing text. Instead, the only processes Article IX, Section 23 contemplates are that, if a proposed use will reduce or substantially alter the uses of designated lands, then the Legislature must approve the use, and that the unnamed actor (presumably BPL) who engages in the sale of designated lands must thereafter purchase additional property for the same purposes.

The trial court acknowledged the plain text of Article IX, Section 23 does not expressly require public process, but nonetheless announced it "arise[s] by implication." A. 46. To the extent *any* public process can "arise by implication" in these circumstances, however, such procedural requirements must be found in the "legislation implementing" the provision. Me. Const. art. IX, § 23. The "legislation implementing" Article IX, Section 23 is the Designated Lands Act, 12 M.R.S. §§ 598 to 598-B, but, like Article IX, Section 23, the Designated Lands Act

is devoid of reference to any procedural requirements, let alone the requirement that BPL undertake a broad public administrative process.[11] *See generally, id.*

This constitutional and statutory scheme has been in place for nearly thirty years. *See* P.L. 1993, ch. 639 (Designated Lands Act); Cons. Res. 1993, ch. 1 (Article IX, Section 23). During that period, the Legislature has received annual reports on the leasing activities of BPL. *See* P.L. 1997 ch. 678, § 13 (codified at 12 M.R.S. § 1853) (current statute requiring annual reports on public reserved lands). The Legislature has made no attempt to alter the existing procedural framework despite receiving annual notice of a multitude of leases being entered into by BPL. *See Thompson v. Shaw's Supermarkets, Inc.*, 2004 ME 63, ¶ 7, 847 A.2d 406 (legislative acquiescence in administrative interpretation of statutes administered by that agency). The purposeful lack of such process is clear when

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[11] Rather than engaging in the plain language review of the governing statutes discussed herein, the trial court relied on decisions from Hawaii and Idaho. In doing so, the trial court overlooked that those decisions discussed *existing* procedural requirements and, therefore, are completely inapposite. For example, *In re Waiola O Molokai, Inc.*—a Hawaii Supreme Court decision—discussed the propriety of water use, well construction and pump installation permits issued under Hawaii's unique constitutional and statutory framework governing water rights. 83 P.3d 664, 670-71 (Haw. 2004) (citing Haw. Const. art XI, §§1, 7, art. XII, § 7). Under that complex scheme, the applicable administrative agency was *statutorily required* to "cause a notice thereof to be published in a newspaper having general circulation within the affected area" and accept "written objections to the proposed permit." Haw. Rev. Stat. § 174C-52.

In the cited Idaho Supreme Court decision, *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Id. 1983), the focus was on the public trust doctrine as applied to navigable waters of the state. *Id.* at 1087-88. In reviewing the agency's actions, the Idaho court noted the adherence to *existing* statutorily specified procedures, including the publishing of general public notice, the acceptance of public objections, the holding of a public hearing, and the issuance of findings. *Id.* at 1096-97.

12 M.R.S. § 1852 is compared to the statutory scheme for sale of public reserved lands (falling within the ambit of Article IX, Section 23 as a reduction of land) for which the Legislature *has* mandated a public administrative process. *See* 12 M.R.S. § 1851(4) ("Before requesting approval from the Legislature, the director shall give notice of the proposed sale, exchange or relocation and may hold a public hearing. A public hearing must be held by the director if requested by any party."). The Legislature's decision not to include such a requirement with respect to leases must be considered explicit and intentional. *See DaimlerChrysler Corp. v. Me. Revenue Servs.*, 2007 ME 62, ¶ 17, 922 A.2d 465; *Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 17, 95 A.2d 285.

Looking to the broader context of Title 12, Chapter 220, Subchapter 4—the comprehensive statutory scheme governing BPL's management of the public reserved lands—it is clear no support for an implied public administrative process exists. Under this statutory framework, BPL is required to manage the public reserved lands in accordance with principles of multiple use, 12 M.R.S. § 1847(1), which includes undertaking a public process to establish and "adopt a specific action plan for each unit of the public reserved lands system." 12 M.R.S. § 1847(2); *see also* A.R. VIII0059-61. This plan takes into account multiple use objectives specifically referenced by the Legislature in the Designated Lands Act. *See* 12 M.R.S. § 1847(1). Other than the "adequate opportunity for public review

and comment" on a proposed management plan, *id.* at (2), Subchapter 4 is devoid of any required public administrative process.[12] Again, this must be considered a deliberate decision by the Legislature. *See DaimlerChrysler Corp.*, 2007 ME 62, ¶ 17, 922 A.2d 465; *Arsenault*, 2006 ME 111, ¶ 17, 95 A.2d 285.

This current framework has existed unchanged for nearly thirty years. BPL has issued hundreds of leases in accordance with the understanding that no public process was required. *See* A.R. VIII0089-90. If the Legislature had determined this framework unworkable or improper, it could have acted to alter it. *See Thompson*, 2004 ME 63, ¶ 7, 847 A.2d at 409. The Legislature has consistently chosen not to take such action. The trial court erred when it stepped in and did so. *See Myrick v. James*, 444 A.2d 987, 992 (Me. 1982) ("[The courts may not] change such a rule or policy once the Legislature has specifically taken that rule or policy out of the arena of the judicial prerogative . . . by a positive and definitive statutory pronouncement, legitimately within its own prerogative, of a specific rule or policy.").

The trial court discounted and ignored actions taken by BPL in reliance on its long-standing interpretation of how these statutes apply to its leasing authority. *See Enhanced Comms. of N. New England, Inc. v. Public Utils. Comm'n*, 2017 ME

[12] The Legislature has not required BPL to promulgate any formal rules with respect to its management of public reserved lands, including the sale or leasing thereof. The only action that requires a public process—the issuance of a management plan—derives its procedural requirements from the clear requirements of the Maine Administrative Procedures Act because it is a "rule" within the meaning of that Act. *See* 5 M.R.S. § 8002(9) (defining "rule").

178, ¶ 7, 169 A.3d 408 (providing courts should generally "refus[e] to second-guess agencies on matters within their expertise"); *S.D. Warren Co. v. Bd. of Envt'l Prot.*, 2005 ME 27, ¶ 4, 868 A.2d 210 ("The administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result."). This was error and threatens to upend decades of BPL's established practice and procedure when leasing public reserved lands and further places the validity of hundreds of leases into question.

More broadly, the trial court's decision, if upheld, serves as precedent for parties to request, and courts to impose, new procedural requirements on administrative agencies that do not appear in any rule, statute or constitutional provision. *See* note 10 (contrasting procedural due process concerns). This threatens the predictability, stability and continuity of law that entities rely upon when dealing with state agencies and making a decision of whether to do business or invest in Maine.

III. Competent evidence in the record supports lawful issuance of the Lease by BPL.

It is well established that an administrative agency's decision will be upheld if there is any competent evidence in the record to support the determination. *See Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128. The trial court did not apply this deferential standard of review. Instead, the trial

court improperly shifted the burden to BPL to support its leasing decision. A. 54; *see Doe*, 2018 ME 164, ¶ 11, 198 A.3d 782 (stating the principle that the "party seeking to overturn the agency's decision bears the burden of persuasion"). This was error.[13]

Properly viewed, there is a deluge of competent evidence in the record to support the execution of the Lease by BPL, whether a substantial alteration of use analysis is required or otherwise. In 2014, when CMP first approached BPL, there were discussions regarding the appropriate routing of a transmission line through the public reserved lots. A.R. III0008, A. 507-08. The purpose of these discussions was to establish a route for the Project that would avoid sensitive habitats such as Tomhegan Stream and Cold Stream Forest. A. 494, 497, 501. BPL staff physically walked the proposed route to observe its characteristics and

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[13] HQUS agrees with BPL and CMP that the trial court also erred when it struck the document proffered by BPL as a synthesis of its considerations prior to entering into the Lease—the September 24, 2020 memorandum. *See* A. 69; *see also* BPL Brief at 48; CMP Brief at 37-39. To the extent that a separate declaratory judgment record was also purportedly made—HQUS agreeing with BPL and CMP that this matter should have proceeded solely as a Rule 80C appeal from final agency action—the trial court erred by not considering the memorandum in that portion of the proceedings, particularly because it set forth the agency's interpretation of the statutory scheme administered by it. *See S.D. Warren Co. v. Bd. of Env't Prot.*, 2005 ME 27, ¶ 4, 868 A.2d 210.

Further, recognizing the importance of these findings, BPL expressly requested that, in the event of such action by the trial court, the matter be remanded so that BPL could establish a record sufficient for judicial review. A. 229. The trial court declined. A. 54-55, 69. This was error. *See, e.g., Narowetz v. Bd. of Dental Practice*, 2021 ME 46, ¶ 22, 259 A.3d 771; *Chapel Road Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶ 13, 787 A.2d 137; *Kurlanski*, 2001 ME 147, 782 A.2d 783; *Gashgai*, 390 A.2d at 1085-86; *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918-19 (Me. 1984); *see also Gonzales v. Thomas*, 547 U.S. 183, 187 (2006); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

suitability for leasing and the Project. A. 497, 507. Further, in order to ensure that the proposed route would also respect wildlife, vernal pools and riparian buffers, BPL consulted with the Maine Department of Inland Fisheries and Wildlife to establish performance standards for CMP's use of the leased lands. A.R. IV0002; A. 501-05. When the Upper Kennebec Region Management Plan was issued in 2019—which included substantial public involvement—BPL assigned the Johnson Mountain Township and West Forks original public reserved lots a dominant usage of timber management. A.R. II0003, II0016; A. 489. The management plan specifically recognized the existence of an existing transmission line (the Jackson Tie Line) and that BPL was leasing the property for the construction of a new transmission line.[14] *Id.* BPL also reiterated that these specific lots have limited waterbodies, wetlands, no established recreational facilities and no special or unique wildlife or ecological reserves. A. 489-92. In short, the lots are average in nature and quality.[15]

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[14] The management plan included significant public involvement, including by several individual Appellees. *See* 12 M.R.S. § 1847(2); CMP Brief at 8 n.4.

[15] That the Lots are "average" is by design. *See* 12 M.R.S. § 1858(1); P.L. 1824, ch. 280, § 8; Lee M. Schepps, *Maine's Public Lots: The Emergence of a Public Trust*, 26 ME. L. REV. 217, 219-220 (1974). In contrast to this designed "averageness" of the Lots, Appellees, in their initial pleadings, pointed to public lands such as Debsconeag Lake Wilderness Area, Bigelow, Mahoosuc, and Deboullie as representative of the "jewels" that Article IX, Section 23 was intended to preserve. *See* A. 164. The lands promoted by Appellees, however, are not exclusively original public reserved lots and certainly do not share a similar stature to the Johnson Mountain Township and West Forks Plantation original public lots.

Based on the foregoing, the record contained competent evidence to support the execution of the Lease as being in accordance with the statutory scheme governing the public reserved lands and, if required, a determination that no substantial alteration to the use of public reserved lots would occur as a result of the Lease and the use authorized thereunder.[16]

Pursuant to the Designated Lands Act, the only relevant question is whether the proposed action would frustrate the essential purposes the land at issue is held. *See* 12 M.R.S. § 598(5). For public reserved lots, the essential purpose is the "protection, management and improvement" of such lands for under the principles of multiple use set forth in 12 M.R.S. § 1847. For the Lots, BPL has assigned a

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For example, Debonsceag Lake Wilderness Area is a conservation parcel owned and managed by The Nature Conservancy. *See* Central Penobscot Region Management Plan, ME. DEPT. OF AGRIC., CONSERVATION & FORESTRY, BUR. OF PARKS & LANDS, at 10 (May 27, 2014), https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/docs/central_penobscot_plan_context.pdf (last visited Dec. 6, 2021). The Bigelow Preserve comprises of over 35,000 acres and were acquired by various means, including land swaps and is specifically held for conservation and recreation. Flagstaff Region Management Plan, ME. DEPT. OF AGRIC., CONSERVATION & FORESTRY, BUR. OF PARKS & LANDS, at 36-37 (June 12, 2007), https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/flagstaff_region/docs/Flagstaff%20Plan-B-PartIV-Resources-Issues.pdf (last visited Dec. 6, 2021).

[16] Throughout the proceedings below, Appellees have focused significant effort on explaining the larger consequences of the Project in Maine. *See, e.g.*, A. 170. As required by Article IX, Section 23, however, the focus of the inquiry is appropriately limited to specific public reserved lots at issue. The broader effect of the Project is appropriately within the jurisdiction of the Maine Department of Environmental Protection, which after a comprehensive review these impacts, granted approval for the Project. *See Findings of Fact and Order*, Me. Dep't of Env't Prot., Docket No. L-27625 (May 11, 2020), available at https://www.maine.gov/dep/ftp/projects/necec/2020-05-11-final-department-order.pdf (last visited Dec. 2, 2021). This focus on broader implications of the Project evidences the blurring of the lines between various forums that Appellees have undertaken as part of their approach to opposing the Project.

dominant usage of timber management and further manages them for multiple use. A. 489-92. A non-exclusive transmission line lease that covers 2.6% of the total area of the Lots—and which requires all stumpage be paid to BPL, *see* A. 414—cannot be considered to frustrate the principles of multiple use in these circumstances. *Compare* A. 413, *with* A. 489. Fundamentally, a lease for transmission lines *is* one of the statutorily recognized and approved uses of public reserved lands that are considered consistent with the principles of multiple use.

This conclusion is further exemplified by the trial court's and Appellees' focus on the use of the Lots for conservation and recreation. Beyond a few stashed boats and indications of limited hunting, there are no recreation facilities on the Lots. A. 489. The Lots have no unique wildlife or special status lands. *Id.* The existence of a transmission line on 2.6% of the Lots does not "frustrate" these limited "uses", much less in a manner than can be deemed to rise to the level of "substantially alter[ing]" those uses within the meaning of Article IX, Section 23 or the Designated Lands Act.

The trial court erred when it did not accept this substantial and competent record evidence as supporting BPL's position that, if such a determination was required, no substantial alteration of the Lots would occur as a result of executing the Lease and the uses authorized thereunder. *See Wells v. Portland Yacht Club*,

2001 ME 20, ¶¶ 10-11, 771 A.2d 371; *Christian Fellowship*, 2001 ME 16, ¶ 19, 769 A.2d 834; *Glasser v. Town of Northport*, 589 A.2d 1280, 1282 (Me. 1991).

IV. The trial court failed to accord BPL with the appropriate level of deference.

More broadly, the trial court's decision failed to accord BPL's reasoned leasing decision with the appropriate level of deference to administrative agencies acting within their sphere of authority. This was error and if allowed to stand, the trial court's decision tells businesses that, no matter how thorough the actions of an agency, the outcome of judicial review of such action cannot be predicted with any sense of accuracy.

The constitutional doctrine of separation of powers requires that judicial review of "state agency decision-making is deferential and limited." *Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128. A rigorous application of this principle means the trial court owed BPL "the deference to which a co-equal branch of [Maine's] state government is entitled." *Kuvaja v. Bethel Savs. Bank*, 495 A.2d 804, 80 (Me. 1985); *see also New England Outdoor Ctr. v. Comm'nr of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009. When the trial court rejected the factual findings of BPL and summarily vacated the Lease, it denied BPL this deference.

It is well established that it is within the agency's sole purview to consider the facts and render a decision on items within its sphere of authority. Judicial

review of that decision is limited to discerning "errors of law, abuse of discretion, or findings of fact not supported by the record." *Save our Sebasticook, Inc. v. Bd. of Env't Prot.*, 2007 ME 102, ¶ 13, 928 A.2d 736 (quotation marks omitted). If the findings of the agency "are supported by substantial evidence in the record," the court must affirm the decision, "even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d 1128; *see also Aviation Oil Co. v. Dept. of Env't Prot.*, 584 A.2d 611, 614 (Me. 1990). The court may not usurp the function of the administrative agency by substituting its own findings. *Christian Fellowship & Renewal Center v. Town of Limington*, 2001 ME 16, ¶ 15, 769 A.2d 834. Any "review that would redecide the weight and significance given the evidence by the administrative agency would lead to ad hoc judicial decision-making, without giving due regard to the agency's expertise, and would exceed" the judicial authority. *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128.

The trial court violated these well-established precedents when it "redecide[d] the weight and significance given the evidence by the administrative agency," *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128, and reached a conclusion opposite that of BPL. This exceeded the bounds of the trial courts

authority and was a "judicial usurpation of administrative functions." *Gashgai v. Bd. of Reg. in Medicine*, 390 A.2d 1080, 1085 (Me. 1978).

This Court has recently affirmed the appropriate level of deference shown to an administrative agency acting within its sphere of expertise when the Court affirmed the issuance of the CPCN for the Project. *See NextEra Energy Resources, LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117. HQUS respectfully requests that this Court do the same in this matter and continue to show businesses that Maine affords those seeking to invest and do business with the necessary level of stability and predictability in administrative and judicial systems.

CONCLUSION

For all of the reasons set forth herein and all of those reasons set forth by CMP and BPL, HQUS respectfully requests that this Court vacate the decisions of the trial court and affirm BPL's execution of the Lease.

Dated: December 13, 2021

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CERTIFICATE OF SERVICE

I, P. Andrew Hamilton, Esq., hereby certify that on or before December 14, 2021, two copies of the brief of Amici H.Q. Energy Services (U.S.) Inc., in the docketed Law Court case No. BCD-21-257, Russell Black, et al. v. Bureau of Parks and Lands, et al. have been sent by first class U. S. mail, postage prepaid, to each of the attorneys (shown below) on the Notice of Service list promulgated by the Court. Additionally, a single copy of the brief has (at the same time) been sent electronically to Mathew Pollack, Clerk, Maine Supreme Judicial Court.

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