STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.,

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Appellants/Cross-Appellees

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT
Docket No. BCDWB-CV-2020-00029

Brief of Amicus Curiae
Troy Jackson, Ben Chipman, Eloise Vitelli, Craig Hickman, Chloe Maxmin, Scott Cyrway, Paul Davis, Patrick Corey and Jennifer Poirier

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Date: January 3, 2022

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STATEMENT OF INTERESTS

Maine Senate President Troy Jackson together with Sen. Ben Chipman, Sen. Eloise Vitelli, Sen. Craig Hickman, Sen. Chloe Maxmin, Sen. Scott Cyrway, Sen. Paul Davis, and Rep. Patrick Corey and Rep. Jennifer Poirier submit the following as Amicus Curiae, pursuant to the Court's Order dated September 30, 2021 permitting filing by interested parties without leave of Court.

All of the Legislators who join as Amicus Curiae have an interest in ensuring that Article IX, Section 23 of the Maine Constitution is properly applied to preserve the Legislature's constitutional right to review and vote on leases that reduce or substantially alter Maine's public lands, including the lease between the Bureau of Parks and Lands ("the Bureau") and Central Maine Power Company ("CMP") for a portion of Johnson Mountain Township and West Forks Planation for the New England Clean Energy Connect ("NECEC"). The interest of these Amici does not stem from a view about the merits or demerits of the NECEC, but rather from a deep concern that the Legislature must be involved in the Executive Branch's decision-making with respect to Maine's public lands and in the continued protection of those treasured lands for the use and enjoyment of Maine people.

INTRODUCTION

The people of Maine and the Maine State Legislature have fought for decades to protect the public lands in this State. By the 1970s, it was clear that Maine had not developed as initially contemplated and, as a result, the State had leased public reserved lands that were originally intended for the ministry and education to private parties, including camp owners, paper companies, and timber companies at virtually no cost. Bob Cummings, a reporter for the Portland Press Herald, published articles in the 1970s documenting the historical mismanagement of the public lands, and the importance of these lands, the purposes for which they were originally intended, and their highest and best uses going forward. In 1981, this Court decided a longstanding issue between the State and the paper companies who leased public lands and held that the paper companies did not have the right to cut the timber on these lands in perpetuity. *Cushing v. State*, 434 A.2d 486, 500-01 (Me. 1981).

Though the Legislature had previously delegated management of Maine's public lands to the Executive Branch, *see, e.g.*, P.L. 1965, ch. 226, §§ 3, 5, 13; P.L. 1973, ch. 628, § 14, in 1993, the Legislature proposed, and the people of Maine voted in favor of, a constitutional amendment that took back the authority that the Legislature had previously delegated to the Executive Branch. Through the constitutional amendment, the Legislature and people of Maine could ensure that the public lands were preserved and made available for public use and enjoyment

and not be used for the benefit of private and corporate interests. Article IX, Section 23 of the Maine Constitution was adopted in 1993 and requires 2/3 legislative approval for any conveyance or use of public lands that will result in a reduction or substantial alteration to such lands.

Appellants here ask this Court to reinterpret the controlling statutes and constitutional provisions in a manner that circumvents the Legislature's constitutional right to review and approve any act of the Bureau that would substantially alter the state's reserved public lands. The legislators joining here as Amicus Curiae ask the Court to reject Appellants' mis-construed application of Maine law governing the leasing of public lands, and affirm the Business Court's judgment below.

STATEMENT OF ISSUES

1. Whether the Bureau is subject to Article IX, Section 23 of the Maine Constitution requiring legislative approval for any lease substantially altering reserved Public Lands when exercising its limited grant of authority pursuant to 12 M.R.S.A. § 1852(4).

2. Whether the Bureau is required to establish and conduct a public administrative process before entering into leases of public lines for high-impact transmission lines.

SUMMARY OF THE ARGUMENT

This Court should affirm the Business Court's interpretation that 12 M.R.S.A. § 1852(4) is not exempted from Article IX, Section 23 of the Maine Constitution. No statute is exempted beyond the Constitution's reach. The

Bureau's proposed interpretation of Section 1852(4) to carve an exception the Legislature never authorized would have the effect of removing the Legislature entirely from the leasing process by avoiding the Legislature's constitutional right to review and approves dispositions of public reserved lands that would substantially alter the land. Where the Bureau exceeded its lawful authority by entering into the lease without 2/3 legislative approval, the lease is *ultra vires* and invalid.

Additionally, this Court should affirm the Business Court's determination that the Bureau's compliance with Article IX, Section 23 requires a public process for the determination whether a contemplated land use threatens substantial alteration to public lands triggering legislative review.

STATEMENT OF FACTS

The Legislators who join in this amicus brief agree with the statement of facts and procedural history as set forth in Plaintiffs-Appellees/Cross-Appellants' principal brief. Amici further reference and incorporate the statement of legislative history set forth in the Business Court's orders dated August 10, 2021 (A. 27-56) and March 17, 2021 (A. 74-89).

ARGUMENT

In no uncertain terms, Article IX, Section 23 of the Maine Constitution requires 2/3 legislative approval for any conveyance of public lands that will result

in a reduction or substantial alteration of the public lands. Despite this legislative oversight provided for in the Constitution, the Bureau has kept the Legislature in the dark about its public lands leases with CMP for the NECEC, and has deprived the Legislators of their constitutional right to vote on the Bureau's lease of Johnson Mountain Township and West Forks Plantation. Reviewing these questions of law *de novo*, this Court should affirm the Business Court's interpretation that 12 M.R.S.A. § 1852(4) is not exempted from Article IX, Section 23 of the Maine Constitution, and that the Bureau must adopt public procedures through which determinations will be made as to whether proposed leases threaten substantial alteration of public lands in a manner that triggers Legislative oversight.

I. 12 M.R.S.A. § 1852(4) Cannot Be Construed to Circumvent the Legislature's Right of Approval for Any Lease Substantially Altering Reserved Public Lands.

This Court should affirm the Business Court's interpretation that 12 M.R.S.A. § 1852(4) is not exempted from Article IX, Section 23 of the Maine Constitution. The Bureau's proposed interpretation of Section 1852(4) would cut the Legislature out of the leasing process by circumventing the Legislature's constitutional right to review any lease that would fundamentally alter the demised state reserve lands. Because the Bureau exceeded its authority by entering into the lease without 2/3 legislative approval, the lease is *ultra vires* and invalid.

A. History of Article IX, Section 23 and Implementing Legislation.

The constitutional provision that ultimately became Article IX, Section 23 of the Maine Constitution was introduced to protect state parks. L.D. 228 (116th Legis. 1993). However, because of concerns about protecting and preserving the public lots after the more than a decade long battle to reclaim them from large paper and timber companies, the Legislature specifically broadened the measure to include the public lots. *See* L.D. 228 (116th Legis. 1993), as amended by Committee Amendment A. The question that was then put out to the voters asked: "Do you favor amending the Constitution of Maine to protect state park or other designated conservation or recreation land by requiring a 2/3 vote of the Legislature to reduce it or change its purpose?" Const. Res. 1993, ch. 1, *approved in* 1993. On November 2, 1993, Maine voters approved the amendment by a definitive margin, and the constitutional resolution was codified as Article IX, Section 23. The codified Constitutional Amendment states:

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

Me. Const. Article IX, § 23. This constitutional provision makes clear the right of the Legislature to approve or disapprove a conveyance of public lands, whether it

be by sale, easement, or lease, when such conveyance would result in a reduction *or substantial alteration* of the uses of public lands.

The Legislature then adopted 12 M.R.S.A. § 598 to implement Article IX, Section 23. Section 598(5) defined the scope of substantial alteration that required Legislature approval to go forward, providing: "'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 that land is held by the State." As the Business Court observed, Section 598 plainly imposes a two-element test to determine whether Article IX, Section 23 is implicated by any contemplated lease of reserved lands. *See* A.42 ("[T]he statutory definition of 'substantial alteration' involves two aspects: whether the use significantly alters the land's physical characteristics, and whether the alterations 'frustrate' the essential purposes for which the land is held.")

B. Section 1852(4) is not exempted from the Constitution.

The Bureau erroneously contends that Section 1852(4) can be construed in a manner that exempts the Bureau from the legislative oversight mandated under Article IX, Section 23. Bureau Blue Br. 25. The Bureau's argument ignores the reality that *no* statutory provision can effectively exclude or exempt itself from conformance with Maine's Constitution.

Statutes are construed to preserve their constitutionality. *See Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d 62. "Thus, when there is a reasonable interpretation of a statute that will satisfy constitutional requirements, [the Court] will adopt that interpretation notwithstanding other possible interpretations of the statute that could violate the Constitution." *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551, *abrogated on other grounds by Gaudette v. Davis*, 2017 ME 86 (internal citation omitted). That means a statute need not specify each and every overriding constitutional provision to which its application is subject in order to remain a valid legislative enactment within the Constitution's bounds.

For example, Section 1852's omission of cross-reference to the Maine Constitution's Contract Clause, Article 1, Section 11, cannot be construed to exclude the statute from the overriding prerequisite affecting any Bureau lease. Rather, the rules of construction require that Section 1852 is read in harmony with the Contract Clause to authorize the Bureau to enter or modify leases only to the extent the leases satisfy the state's Contract Clause obligations. The Law Court has recognized similar implied limitations on the scope of the Public Utilities Commission's authority. *See New England Tel. & Tel. Co. v. Pub. Utilities Comm'n*, 148 Me. 374, 379, 94 A.2d 801, 804 (1953). There, the Court observed that the PUC's statutory grant of authority is inherently constrained within the

bounds of Article I, Section 21's prohibition on taking private property for public use without just compensation. 148 Me. at 379. "It is unnecessary to discuss these overriding constitutional provisions because, as we have before said, the Maine Public Utilities Commission is a creature of statute and bound to act in accordance with the statute which created it." *Id.*

The Bureau is similarly obligated to satisfy the requirements of Article IX, Section 23—like all other provisions of the Constitution—in all aspects of its mandated operations. That includes any leasing activity on public reserved lands for high-impact utility corridor easements, such as the NECEC. Section 1852(4) merely authorizes the Bureau to undertake or otherwise consider such leases. The Bureau's prerequisite to satisfy Article IX, Section 23's requirements, where applicable to a particular leasing decision, is implied within Section 1852(4) in order for the statute to survive Constitutional scrutiny. That means that any contemplated lease of reserved public lands threatens a substantial alteration of the land in any manner that frustrates other possible uses of that land triggers the Constitution's requirement for Legislative oversight. *See* 12 M.R.S.A. § 598(5). Section 1852(4) cannot be construed as an automatic skip around the Legislature's Article IX Section 23 check-and-balance power.

The Bureau alternatively defends its avoidance of Article IX, Section 23 on the basis that no lease of public reserved lands for utility lines could frustrate the

essential purpose of the land where multi-purpose usage is authorized by the Legislature. Regardless whether the land at issue here is deemed to have a multi-use purpose, any lease entered into by the Bureau for construction of a major transmission line, such as the NECEC, inherently results in a substantial alteration that frustrates other possible uses for the public lands. Once developed as an electricity corridor through the Bureau's leasing activity, the reserved public lands are forever excluded from *any other* form of use, thereby establishing a substantial alteration

At bottom, harmonizing 12 M.R.S.A. § 1852(4) with Article IX, Section 23 demonstrates that a high-impact transmission line like NECEC that crosses public lands for the purpose of delivering power to Massachusetts is precisely the kind of reduction or substantial alteration of the public lands that the Legislature had in mind when it drafted Article IX, Section 23 to require approval of 2/3 of the Legislature.[1] This intended application of § 1852(4) is further supported by Legislature's recent adoption of the July 19, 2021 "Joint Resolution, Expressing the Sense of the Legislature Regarding the use of Public Land Lease by State," which states in pertinent part:

[1] An earlier version of the legislation required a 3/4 vote of the Legislature, reflecting the importance the Legislature attached to protection of public lots like those in West Forks Plantation and Johnson Mountain Township. Amend. HB/CA to L.D. 228, No. H-428 (116th Legis. 1993). The legislation was revised to require 2/3 approval to be consistent with other constitutional provisions. L.D. 228 (116th Legis. 1993).

> That We, the Members of the One Hundred and Thirtieth Legislature now assembled in the First Special Session, on behalf of the people we represent, express our sense in accordance with the Constitution of Maine, that the lease provided to CMP to cross the public reserved lands in West Forks Plantation and in Johnson Mountain Township constitutes a substantial alteration of those lands, requiring a 2/3 vote of all the members elected to each House of the Legislature.

This Joint Resolution passed both Houses (the Senate overwhelmingly, 28-6). State of Maine Legislature, *Summary of SP 594*, https://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280081562 (last visited Jan. 3, 2021).

The history and purpose of the constitutional amendment is clear—the Legislature has the authority to approve conveyances of public lands that effect a reduction or substantial alteration by a 2/3 vote of each House. Because the Bureau clearly exceeded its authority by entering into the 2020 Lease without going through any type of process related to the reduction or substantial alteration determination and without giving the Legislature the opportunity to vote on it, the Lease is invalid and the trial court's decision to vacate it should be affirmed. Moreover, in light of the Bureau's past conduct of completely excluding the Legislature from the lease with CMP, the Legislators who support this brief have significant concerns about the fairness and transparency of any actions related to the 2020 Lease if it were to be remanded to the Bureau but not reversed.

II. The Bureau Must Adopt Public Administrative Processes for Leasing Activities to Demonstrate Compliance with Article IX, Section 23.

The Business Court's decision that a public administrative process is necessary so that the public and the Legislature are aware of what is going on with conveyances of the State's public lands is accurate. Specifically, the lower court recognized that the Bureau must have a public administrative process that allows the people of Maine as well as the Legislature to participate in and review the conveyance of the public lands that might result in a reduction or substantial alteration of the uses of public lands. *See* A. 44-47. In this case, the Bureau repeatedly entered into the leases with CMP that dodged public and legislative scrutiny. If the Bureau had adopted a public process, as has long been required by 12 M.R.S.A. § 1803(6), then the Legislature would have been privy to the information it was actively trying to share as well as receive.

Astonishingly, the Bureau has consistently asserted that there are no requirements that it hold any process. *See* Bureau Blue Br. 39-42. Not only does that position ignore the constitutional command of Article IX Section 23 and its public trust responsibilities, but it also flouts a clear legislative command that it adopt rules: Section 1803(6) directs that the Bureau "shall adopt, amend, repeal and enforce reasonable rules necessary" "[f]or the protection and preservation of … submerged lands, public reserved lands and nonreserved public lands … and "[f]or observance of the conditions and restrictions, expressed in deeds of trust or

otherwise, of public reserved lands," 12 M.R.S.A. § 1803(6)(A), (C). Though the Bureau has adopted a comprehensive set of rules for submerged lands that place the burden of proof of each element on the applicant and that provide for an express process for public participation, *Britton v. Dep't of Conservation*, 2009 ME 60, ¶ 2, 974 A.2d 303; 01-670 CMR ch. 53, § 1.7.C, it has not adopted any rules whatsoever for the protection and preservation of public reserved lands.[2]

To ensure that the Bureau adopts the kind of process contemplated by 12 M.R.S.A. § 1803(6), Senator Rick Bennett introduced L.D. 1075 (An Act to Protect Public Lands) in the first regular session of the 130th Legislature. It provides:

> The Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands shall adopt rules to establish an objective evaluation process for determining if a proposed activity on land designated under this chapter would cause the land to be reduced or substantially altered. These rules must also include provisions for public notice and comment before authorizing any such activity and for determining the appropriate instrument to be used to authorize that activity, including but not limited to whether an easement, lease, license or other instrument should be used. Rules adopted pursuant to this section are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

[2] The governing legislative committee has made it abundantly clear to Director Cutko that the Bureau needs to have rules and a process for determining whether a proposed use of public lands would result in a substantial alteration. Director Cutko acknowledged the need, promised to provide such information to the committee, but instead went ahead and negotiated and executed the 2020 Lease. (Add. 0141 -143.) *See also* Committee Letter at A.534-36.

L.D. 1075 (130th Legis. 2021). Because of the timing of the referendum, L.D. 1075 was tabled and carried over to the next regular session of the Legislature.

It is imperative that the Bureau, as trustee of the public lands of this State, comply with its constitutional and statutory obligations related to the public lands. That is the only way that the Legislature will be able to exercise its oversight authority over public lands that the people returned to it upon passage of the constitutional amendment in 1993.

CONCLUSION

For all of the foregoing reasons, the Legislators respectfully request that if the legal issues in this case are not dismissed as moot, that Court affirm the trial court's decision reversing the 2020 Lease and require a public administrative process for such leases.

Dated at Portland, Maine, this 3rd day of January, 2022

/s/ James G. Monteleone

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CERTIFICATE OF SERVICE

I, James G. Monteleone, hereby certify that on this 3rd day of January 2022, I served the foregoing Brief of *Amicus Curiae* on counsel for Appellants by electronic mail:

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