AARON M. FREY
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

125 PRESUMPSCOT ST., SUITE 26
PORTLAND, MAINE 04103
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

September 7, 2021

via hand delivery

Matthew Pollack
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101-4125

Re: *Russell Black, et al. v. Bureau of Parks and Lands, et al.*
Law Docket No. BCD-21-257

Dear Mr. Pollack:

Enclosed for filing please find Director Cutko's and the Bureau of Parks and Lands' Opposition to Senator Black's Motion to Lift Automatic Stay Pending Appeal.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

Lauren E. Parker
Assistant Attorney General

Enclosure

cc: James T. Kilbreth, Esq. (*via email and first-class mail*)
Nolan L. Reichl, Esq. (*via email and first-class mail*)

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.

v.

BUREAU OF PARKS AND LANDS, et al.

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT

DIRECTOR CUTKO'S and the BUREAU OF PARKS AND LANDS' OPPOSITION TO SENATOR BLACK'S MOTION TO LIFT AUTOMATIC STAY PENDING APPEAL

AARON M. FREY
Attorney General

LAUREN E. PARKER
SCOTT W. BOAK
Assistants Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8878

Appellants Director Cutko and the Bureau of Parks and Lands (collectively, the Bureau) oppose appellees and cross-appellants Senator Black, et al.'s motion to lift the automatic stay of the Business and Consumer Court's (*Murphy, J.*) judgment pending appeal. *See* M.R. Civ. P. 62(e), (g). Where, as here, all parties have appealed from and seek to change the court's judgment, this Court should deny Senator Black's motion to lift the automatic stay of execution of that judgment. Additionally, because the court's judgment is not narrowly tailored, an order lifting the stay arguably would call into question the validity of 355 leases and licenses of public reserved lands and nonreserved public lands. Further, an order lifting the stay is not necessary to preserve the status quo of the public lands at issue.

Background

West Forks Plantation and Johnson Mountain Township public reserved lands (the Lots) are original public lots totaling 1241 acres.[1] (Administrative Record (A.R.) II0014, 93, IV0029-38.) *See Opinion of the Justices*, 308 A.2d 253,

[1] Public reserved lands include "all the public reserved lots of the State." 12 M.R.S. § 1801(8)(A) (2021). Public reserved lands are designated lands. 12 M.R.S. § 598-A(2-A)(D) (2021). Designated lands may not be reduced or its uses substantially altered except upon 2/3 vote of each house of the Legislature. Me. Const. Art. IX, § 23; 12 M.R.S. § 598-A (2021). "Substantially altered" means "changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State." 12 M.R.S. § 598(5) (2021). "The essential purposes of public reserved and nonreserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." *Id.*

268-71 (Me. 1973) (discussing the origins of the public lots); *see also Cushing v. State*, 434 A.2d 486, 489 n.6 (Me. 1981) (referring to *Opinion of the Justices*, 308 A.2d 253, for a history of the public lots). Consistent with the Bureau's multiple use management mandate and its Upper Kennebec Region Management Plan, the dominant resource allocation for the Lots is timber management. (A.R. II0093, 109, 115; *see* A.R. II0223-24.) *See* 12 M.R.S. § 1847 (2021) (imposing a multiple-use mandate and requiring management plans for public reserved lands); *see also* 12 M.R.S. § 1807 (2021) (establishing a sustainable harvest level for public reserved lands and nonreserved public lands). The Bureau harvested the Lots in 1986-87 and 2006-07. (A.R. II0093; Record Addendum (R. Add.) 0331.) In 2006, the Bureau recommended harvesting the Lots again in 20 years. (*E.g.*, R. Add. 0334-41, 343-52.)

There is an existing transmission line on the Lots. (A.R. II0093, 235-38; R. Add. 0322, 331.) The Lots have limited waterbodies, wetlands, recreational facilities and use, and no special status or unique wildlife or Maine Natural Areas Program sites. (A.R. II0093-94; R. Add. 0322, 332.) As such, the Lots do not contain Special Protection Areas such as ecological reserves. (*Compare* A.R. II0018-19 & 219, *with* A.R. II0093-94, 109, 115 & R. Add. 0332.) *Cf.* 12 M.R.S. § 1805(5) (2021) (authorizing and limiting the uses of ecological reserves but

capping the amount of acreage the Director may designate as ecological reserves).

In December 2014, pursuant to 12 M.R.S. § 1852(4) (2021),[2] the Bureau executed a non-exclusive lease with Central Maine Power Company (CMP) for electric power transmission on the Lots. (A.R. I0035-60.) In June 2020, the Bureau and CMP executed an amended and restated non-exclusive lease that superseded and terminated the 2014 lease. (A.R. I0001-34.) The leased premises are 32.39 acres, which is 2.6% of the Lots. (*Compare* A.R. I0001, *with* A.R. II0093.) The section of the New England Clean Energy Connect (NECEC) transmission corridor on the Lots will be approximately 0.9 miles in length. (A.R. I0013.) 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.R. I0008.) The lease obligates NECEC LLC to obtain and comply with required federal and state permits for the NECEC transmission corridor. (A.R. I0006.)

In July 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

[2] Title 12 M.R.S. § 1852 was last amended in 2013.

Act and M.R. Civ. P. 80C (Count III).[3] (Pls.' 1st Amd. Compl. ¶¶ 59-82.) The complaint challenges the lease as ultra vires and asks the court to vacate the lease. (*Id.* ¶¶ 1, 74, 82, Wherefore Clauses.) After the court entered judgment on August 10, 2021, Senator Black did not move the Bureau or the court to stay the lease. *See* 5 M.R.S. § 11004 (2021); *Jones v. Sec'y of State*, 2020 ME 111, ¶ 7, 238 A.3d 250.

In its Decision and Order dated August 10, 2021 (the judgment or Order), the court reversed the Bureau's decision to lease 32.39 acres of the Lots to CMP. (Order 29-30.) In the court's view, whether a lease issued pursuant to 12 M.R.S. § 1852(4) substantially alters or reduces public reserved lands is a fact-based determination that the Bureau must but did not make before executing the lease. (Order 12, 17, 26-27, 28-29.) The court dismissed Count II because it was waived. (Order 29.) The Bureau has appealed from the judgment and all prior orders. CMP and NECEC LLC (collectively, NECEC LLC) have appealed from the same. Senator Black cross-appealed from the judgment and prior orders. *See* M.R. App. P. 2C(a)(1).

By operation of M.R. Civ. P. 62(e), the judgment reversing the Bureau's decision to issue the lease is stayed and the lease remains in effect. *Jones*, 2020

[3] Senator Black filed his initial complaint in June of 2020, which pleaded two counts for declaratory judgment (Counts I and II) and one count for injunctive relief (Count III). (Pls.' Compl. ¶¶ 52-80.)

ME 111, ¶ 7, 238 A.3d 250. Senator Black has moved this Court to lift the automatic stay of the judgment.[4] *See* M.R. Civ. P. 62(g). He contends that the judgment from which he has cross-appealed must take effect to preserve the status quo of the Lots and ensure the effectiveness of any judgment to be entered. (Pls.' Mot. to Lift Stay 1-2, 3-5.) This Court should deny the motion.

Argument

To deny Senator Black's motion, the Court need consider only the posture of the case on appeal. Senator Black asks this Court to give immediate effect to a judgment that he has cross-appealed and asked this Court to change. *See* M.R. App. P. 2C(a)(1) ("If the appellee seeks any change in the judgment that is on appeal, the appellee must file a cross-appeal to preserve that issue."); M.R. App. P. 2C restyling notes, June 2017, Me. Judicial Branch website/Rules & Administrative Orders/Rules (last visited Sept. 2, 2021) (same). This inconsistency defeats his motion.

Where a party seeks a change in the court's judgment, this Court should deny that party's motion to have that same judgment take immediate effect

[4] It appears that Senator Black's motion was prompted by a letter, dated August 18, 2021, that NECEC LLC sent to the Department of Environmental Protection (the DEP) in opposition to appellee and cross-appellant Natural Resources Council of Maine's request that the DEP stay permits issued to NECEC LLC. (Pet.'s Mot. to Lift Stay 2-3, 4-5, 9 & n.3.) That letter is not part of the record and was not submitted to or considered by the Bureau.

while the appeal is pending. This is especially so here, where Senator Black did not move the Bureau or the court to stay the lease. *See* 5 M.R.S. § 11004.

Additionally, this Court should deny Senator Black's motion to lift the automatic stay because of the judgment's broad reach in a case of first impression. The judgment announces a new process requirement that, according to the court, "arise[s] by implication from Article IX, Section 23" (Order 20), and thus applies to all designated lands. *See* 12 M.R.S. § 598-A (2021) (designating those state-owned lands that are subject to Article IX, Section 23). That new process includes requirements that the Bureau hold a public process, make pre-execution written findings on whether an authorized action (e.g., issuing a lease pursuant to 12 M.R.S. §§ 1838 or 1852) reduces or substantially alters designated lands, and then wait an unspecified period of time between providing notice of the findings and taking the authorized action. (Order 18, 20-21, 21-23.)

There are approximately 355 leases and licenses of public reserved lands and nonreserved public lands in effect that the Bureau issued pursuant to 12 M.R.S. §§ 1834, 1838, 1848 or 1852 without affording a public process, making written findings, and waiting the unspecified period of time between making

written findings and issuing the leases and licenses.[5] (A.R. VIII0089-90.) An order lifting the automatic stay arguably will call into the question the validity of those leases and licenses while this appeal is pending. At least for the Bureau, this case is not about just this lease; this case challenges the Bureau's administration of its statutes since 1993, when Article IX, Section 23 was adopted and its implementing Designated Lands Act, 12 M.R.S. §§ 598 to 598-B (2021), was enacted.

Were Senator Black not cross-appealing and seeking a change in the judgment, and were the judgment not so far reaching, this Court would likely need to consider the status quo of the Lots and evaluate Senator Black's motion using the traditional test for a party seeking injunctive relief. *See Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Election Practices*, 2015 ME 103, ¶¶ 13-14, 121 A.3d 792. Were the Court to consider those factors, and it need not, the Bureau offers the following clarifying observations about the nature and status quo of the Lots and certain contentions in Senator Black's motion.

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[5] The leases and licenses of public reserved lands and nonreserved public lands are for a variety of purposes: residential camplots (288 leases), commercial sporting camps and campgrounds (10 leases), utilities (18 leases), agriculture (9 licenses), telecommunication facilities (5 leases), dams (1 lease), boat access (1 license), game warden camps (4 leases), university camps (1 lease), sugarbush (3 licenses), and miscellaneous (13 leases). (A.R. VIII0089-90.) The Bureau includes this information in its annual reports to the Joint Standing Committee on Agriculture, Conservation and Forestry. (A.R. VI0132-33, 177, 226, VII0027, 70-71, 113, 156-58, 209, 260-61, VIII0029, 89-90.) *See* 12 M.R.S. §§ 1839, 1853 (2021) (requiring annual reports).

Status Quo of the Lots. Senator Black alleges that the Lots are in a "natural state," but he offers no support for this contention. (Pls.' Mot. to Lift Stay 4.)

For context, the Lots are original public lots once owned by the Commonwealth of Massachusetts. (A.R. IV0029-38.) *See also Opinion of the Justices*, 308 A.2d at 254-56. Both the Commonwealth and Maine reserved from public domain lands the public lots. *Cushing*, 434 A.2d at 489; *Opinion of the Justices*, 308 A.2d at 268-71. To help encourage settlement, the public lots were reserved for uses such as education and ministry. Schepps, *Maine's Public Lots: The Emergence of a Public Trust*, 26 Me. L. Rev. 217, 219 (1974) (providing historical context for land settlement following the Revolutionary War). Pursuant to Article X of the Maine Constitution (Item Seventh of the Articles of Separation), original public lots must be used for beneficial uses, or public uses "generally reflected by the usage of Massachusetts." *Opinion of the Justices*, 308 A.2d at 268-71. (A.R. IV0034, 38.) Since at least 1973, the Bureau, or its predecessor agencies, have managed public reserved lands pursuant to a multiple use mandate that includes commercial timber harvesting, recreation, and conservation. P.L. 1973, ch. 628; 12 M.R.S. §§ 1807, 1845, 1847.

By design, the Lots are of average quality. (A.R. IV0034, 38.) *See* 12 M.R.S. § 1858(1) (2021) (requiring, for purposes of locating reserved public lots, that the land "be of average quality, situation and value as to timber and minerals as

to other land in the township or plantation.") The Bureau manages the Lots primarily for timber and has recently harvested the lots on a 20-year schedule. (A.R. II0093, 109, 115; R. Add. 0331.) There is already a transmission line on the Lots. (A.R. II0093, 235-38.) Senator Black's allegation that the Lots are in a natural state is contrary to the record.

Likelihood of Success on the Merits. In his motion, Senator Black contends that he is likely to succeed on the merits because, as the trial court held, leases of public reserved lands are not categorically exempt from Article IX, Section 23 of the Maine Constitution. (Pls.' Mot. to Lift Stay 7.) This argument is premised on the court's and Senator Black's misunderstanding of a fundamental question posed in this matter. The court held that public reserved lands and leases of such lands are not categorically exempt from application of Article IX, Section 23. (Order on Application of Art. IX, § 23 1, 9, 16 (Mar. 17, 2021).) But that was never the question in this case. Indeed, Article IX, Section 23 and 12 M.R.S. § 598-A(2-A)(D) (2021) make clear that public reserved lands are subject to Article IX, Section 23.

Rather, the initial question presented to the court (and now to this Court) is whether the Legislature has determined that leases issued pursuant to 12 M.R.S. § 1852, including 12 M.R.S. § 1852(4), are categorically not substantial alterations (or reductions) of public reserved lands. (*E.g.*, Bureau's Memo. of

Law 1-2, 2-3, 10, 17 (Jan. 29, 2021).) It is the Bureau's position that the Legislature has made that determination, such that the lease does not require 2/3 legislative approval as a matter of law. (*Id.* 1-2, 2-3, 10-16.)

The trial court did not resolve that issue, however. (*See* Art. IX, § 23 Order 1, 9, 16.) And Senator Black's reliance on the court's holding that public reserved lands and section 1852(4) leases are not categorically exempt from Article IX, Section 23 does not demonstrate that he is likely to succeed on the question of whether the Legislature has determined that section 1852(4) leases are categorically not substantial alterations. This is especially true where the Bureau in 2007 made the Legislature aware of its position that leases issued pursuant to 12 M.R.S. § 1852(4) do not require 2/3 legislative approval, and where the Legislature has not amended the Bureau's statutes to require 2/3 legislative approval of such leases. *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) ("The statutes allow a 25-year utility lease with no legislative review or approval.").

Irreparable Harm. Senator Black appears to contend that harvesting the leased portion of the Lots would constitute a substantial alteration and

irreparable harm. (Pls.' Mot. to Lift Stay 9 n.2.) This argument both misunderstands the purpose of the Lots and is unsupported by law or fact.[6] The court did not hold that timber harvesting on the Lots or on the leased premises would substantially alter the Lots. Nor could it. As a matter of law, timber management, which includes timber harvesting, is a beneficial use consistent with Article X and part of the Bureau's multiple use management mandate. *Opinion of the Justices*, 308 A.2d at 256-57, 261-63, 271-72; 12 M.R.S. §§ 1807, 1845, 1847. And, as shown above, these Lots have a dominant allocation of timber management and are harvested on a twenty-year cycle. (A.R. II0093, 109, 115; R. Add. 0331.)

Senator Black also contends that NECEC LLC will harvest the leased premises if this Court does not lift the automatic stay. (Pls.' Mot. to Lift Stay 5, 9 & n.2.) This contention is also unsupported. NECEC's statement to a separate regulatory agency that it has the right to use the leased premises pursuant to the lease is not the same as a statement that it will exercise those rights while this appeal is pending. Senator Black's contention that any timber harvesting

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[6] Senator Black did not append an affidavit to his motion to lift the automatic stay, nor did he file a verified complaint. *Cf. Town of Charleston v. Sch. Admin. Dist. No. 68*, 2002 ME 95, ¶ 6, 798 A.2d 11002 ("A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant.") (quoting M.R. Civ. P. 65(a)) (alterations omitted).

will constitute clear-cutting is also unsupported by citation to regulatory permits (*see* Pls.' Mot. to Lift Stay 5, 9 n.2), compliance with which is required by the lease (A.R. I0006).

In any event, this Court need not consider the injunctive relief factors to deny Senator Black's motion to lift the automatic stay. This Court should deny Senator Black's motion because he seeks to change the judgment that he would like to take immediate effect, because he never moved the Bureau or the court to stay the lease, and because lifting the automatic stay arguably will call into question the validity of 355 leases and licenses of public reserved lands and nonreserved public lands while this appeal is pending.

Conclusion

For the reasons stated above, the Court should deny the motion.

Dated: September 7, 2021

Respectfully submitted,

AARON M. FREY
Attorney General

Lauren E. Parker
Maine Bar No. 5073
Assistant Attorney General
207-626-8878
lauren.parker@maine.gov

Scott W. Boak
Maine Bar No. 9150
Assistant Attorney General
207-626-8566
scott.boak@maine.gov

Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

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

CERTIFICATE OF SERVICE

I, Lauren E. Parker, hereby certify that I have on this day, September 7, 2021, caused to be served a copy of Director Cutko's and the Bureau of Parks and Lands' Opposition to Senator Black's Motion to Lift Automatic Stay Pending Appeal on counsel of record by electronic mail and U.S. mail, first class postage prepaid, at the following addresses:

James T. Kilbreth III, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland ME 04101-2480
jkilbreth@dwmlaw.com

Nolan L. Reichl, Esq.
Pierce Atwood
254 Commercial Street
Portland ME 04101
nreichl@pierceatwood.com

Dated at Augusta, Maine, this 7th day of September, 2021.

Lauren E. Parker
Assistant Attorney General
Maine Bar No. 5073