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September 2, 2021

RE: False Mainers for Fair Laws Television Advertisement

Dear Station Manager:

I am counsel to Mainers for Local Power PAC. I write with regard to advertisements currently running on your station by the Hydro-Quebec Maine Partnership and by Mainers for Fair Laws. The text for each advertisement is attached to this letter. These advertisements are inaccurate and misleading. For the sake of both FCC licensing requirements and the public interest, your station should immediately refuse to continue to air them.

First, the advertisements are inaccurate and misleading in that they state that the word retroactivity in Ballot Question One would give politicians the power to apply new laws to things that happened in the past. It does no such thing. Politicians have always had the ability to pass retroactive laws, which are governed by 1 M.R.S. § 302—a Maine statute that has been on the books for decades. Ballot Question One does not grant them any new power.

It is further well-established under Maine case law that legislation can apply retroactively. For example, in *State v. L.V.I. Group*, the Law Court upheld the retroactive application of an amendment to a state statute that changed the definition of employer for purposes of severance pay liability. 1997 ME 25, ¶¶ 1, 6, 690 A.2d 960, 962, 963. In *Kittery Retail Ventures, LLC v. Town of Kittery*, the Law Court affirmed the validity of a referendum that retroactively enacted zoning changes and, thus, prohibited the development of a shopping mall for which the developer had received preliminary approvals from the planning board. 2004 ME 65, ⁋⁋ 1-5, 856 A.2d 1183. Also, in *City of Portland v. Fisherman's Wharf Assocs. II*, the Law Court explained "[w]e have also recognized the Legislature's authority to make statutes operate retroactively" and held that the citizens' proposed initiative, which included a retroactivity provision, was valid and prevented the development of a condominium on the waterfront. 541 A.2d 160, 163-64 (Me. 1988). Ballot Question One does nothing to change or add to politicians' ability to pass retroactive laws. Considering that politicians have long been able to pass retroactive laws in Maine, voting no on the referendum will not in any way stop politicians from passing retroactive laws.

Second, the advertisements are inaccurate and misleading in that they imply that the lease of public lands between Central Maine Power Company and the Bureau of Public Lands for a high impact transmission line is something that legally happened in the past. This is demonstrably false. On August 10, 2021, the Superior Court issued a decision vacating the lease that allowed the high impact transmission line to be constructed on the public lands because the Bureau of Public Lands did not comply with the requirements of Article IX, Section 23 of the Maine Constitution. A copy of this judicial decision is attached.

Under FCC regulations, your station is required to remove inaccurate and misleading advertisements. Unlike federal candidates, independent political organizations do not have a "right to command the use of broadcast facilities." *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 113 (1973). Because you need not air these advertisements, your station bears responsibility for its content when you do grant access. *See Felix v. Westinghouse Radio Stations,* 186 F.2d 1, 6 (3rd Cir. 1950).

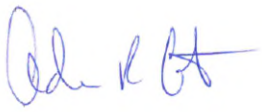
Moreover, you have a duty "to protect the public from false, misleading or deceptive advertising." *Licensee Responsibility With Respect to the Broadcast of False, Misleading or Deceptive Advertising*, 74 F.C.C. 2d 623 (1961). Failure to prevent the airing of "false and misleading advertising" may be "probative of an underlying abdication of licensee responsibility" that can be cause for the loss of a station's license. *Cosmopolitan Broad. Corp. v. F.C.C.*, 581 F.2d 917, 927 (D.C. Cir. 1978).

Lastly, the advertisement for Mainers for Fair Laws does not include the address of the person who made or financed the expenditure in direct violation 21-A M.R.S. § 1055-A. Section 1055-A requires that "the communication must clearly and conspicuously state the . . . address of the person who made or financed the expenditure for the communication . . . ." *See also* State of Maine, Commission on Governmental Ethics & Election Practices, *Guidebook for Political Action Committees & Ballot Question Committees*, 30-31 (July 2017, Revised May 2020) ("Maine Election Law also requires disclosure of statements to be on communications expressly advocating for or against a ballot question . . . These disclosure statements must clearly and conspicuously state the name and address of the person (including organizations) who made or financed the expenditure for the communication.").

This advertisement is inaccurate and misleading and fails to comply with basic disclosure requirements. We ask that you refuse to continue to air this advertisement.

We can be reached at (800) 727-1941 if you have any questions regarding this letter. Please contact us to inform us of your decision. Thank you for your attention to this matter.

Sincerely,



Adam R. Cote

Enclosures

Hydro-Quebec Maine Partnership Television Advertisement

Question One reads like a legal disclaimer written by lawyers. But what does it really mean for Maine? It gives politicians power to impose new laws and restrictions retroactively as far back as 2014. Power to overturn projects and interfere with private investment. Question One sets a dangerous precedent. It's bad for Maine's economy and bad for Maine jobs. When it comes to Question One, vote no to retroactive laws.

Mainers for Fair Laws Television Advertisement

This is Ballot Question One. It's a lot of words but there is really only one that matters. Retroactivity would give politicians the power to apply new laws to things that happened legally in the past. Meaning people and businesses could be unfairly punished for things that happened long before the laws were even on the books. So when it comes to Question One, read the fine print then Vote No to stop politicians from passing retroactive laws.

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-2020-29

RUSSELL BLACK, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**DECISION AND ORDER**
	)	**(14 M.R.S.A. § 5953 & M.R. Civ. P. 80C)**
	)	
ANDY CUTKO, *et al.*,	)	
Defendants.	)	

In 1993 the people of Maine decided that their public lands were worthy of constitutional protection. Through their ratification of Article IX, Section 23 of the Maine Constitution, designated public lands cannot be "reduced" or their "uses substantially altered" unless two thirds of both houses of the Maine Legislature agree to any such change. The central question presented in this case is whether certain decisions made in 2014 and 2020 by the Bureau of Public Lands ("BPL"), the Executive Branch agency that holds title to the lands for the benefit of all Maine people, complied with this unique and consequential Amendment.

In analyzing this question, a number of significant issues of first impression have been identified by the Court and the parties. The Court therefore encouraged the parties at various stages of this litigation to agree to a Report of at least some of those questions directly to the Law Court pursuant to Rule 24 of the Maine Rules of Appellate Procedure. However, the parties could not agree on a Stipulated Record which would permit the Court to make such a report under Rule 24(a), and BPL decided not to move for such a Report under Rule 24(c) after the Court ruled against it on a potentially dispositive issue.

Plaintiffs in this action challenge BPL's 2014 and 2020 decisions to lease to Central Maine Power Company ("CMP") [1] portions of two parcels of public reserved land to construct part of the New England Clean Energy Connect transmission corridor. The lands at issue are located in the Upper Kennebec Region, specifically in West Forks Plantation and Johnson Mountain Township.

Pending before the Court are the parties' respective motions for judgment on Plaintiffs' Declaratory Judgment claim and Plaintiffs' Rule 80C appeal. Both have been fully briefed and are now before the Court for decision. Plaintiffs are represented by Attorneys James Kilbreth, David Kallin, Adam Cote, and Jeana McCormick. Defendants Andy Cutko and BPL are represented by Assistant Attorneys General Lauren Parker and Scott Boak. Defendants CMP and NECEC Transmission, LLC are represented by Attorneys Nolan Reichl and Matthew Altieri.

BACKGROUND

Maine's historical practices regarding its management of public land provide context to the issues presented. A more detailed discussion of that history is outlined in the Court's orders dated December 21, 2020 and March 17, 2021 and are incorporated by reference, but is summarized briefly as follows. After acquiring approximately 7 million acres from Massachusetts upon statehood, Maine sold or gave away all but 400,000 acres of this land, mostly prior to 1890. The remaining 400,000 acres of public land were reserved in each of Maine's unorganized townships as approximately 1000 acre lots. Over the years, the State leased

[1] CMP assigned the 2020 lease to NECEC Transmission, LLC in early 2021. NECEC Transmission was joined as a defendant in this case. The Court will refer to them collectively as CMP for the sake of consistency with prior orders in the case.

these public reserved lands at virtually no cost to camp owners, paper companies, and timber companies. In the early 1970s, a reporter published a series of articles in the Portland Press Herald that called attention to Maine's historical management practices and alleged abuses of the public lot leasing program.

In the years that followed, various legal and political efforts were undertaken to preserve the public reserved lands and to ensure their availability for the public's use for generations to come. The culmination of these efforts, legally speaking, was the 1993 Amendment to the Maine Constitution, *see* Me. Const. art. IX, § 23. The Amendment states as follows: "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." *Id.* The legislation implementing the Amendment designated "public reserve lands" for this constitutional protection, and the West Forks Plantation and Johnson Mountain Township parcels fall within this category. 12 M.R.S.A. §§ 598-B(2-A)(D), 1801(8).

In addition, the Legislature declared when enacting 12 M.R.S.A. Section 1846(1) in 1997 as follows: "[I]t is the policy of the State to keep the public reserved lands as a *public trust* and that full and free public access to the public reserved lands to the extent permitted by law, together with the right to reasonable use of those lands, is the privilege of every citizen of the State." *Id.* (emphasis added).

In the summer of 2014, CMP approached the Governor's Office about its proposed transmission line project and its interest in crossing the West Forks Plantation and Johnson Mountain Township public lots. R. III0001. BPL and CMP proceeded to negotiate a lease agreement. During this process, AAG Lauren Parker, David Rodrigues (BPL's Director of Real

Property Management and former Senior Planner), and several others provided input and comments on the various lease drafts, with Mr. Rodrigues at one point inquiring: "Didn't we get a determination from the [Attorney General's] office that a lease is a contract and the legislature should not be able to break an existing contract?" R. III0053.

The lease was ultimately signed on December 15, 2014 ("the 2014 lease"). Under the agreement, BPL agreed to lease to CMP a "three hundred (300) foot wide by approximately one mile long transmission line corridor" (consisting of roughly 33 acres) located on the West Forks and Johnson Mountain public lots. R. I0035–36. The lease specified an initial term of 25 years and established the annual rent at $1400, to be adjusted by an appraisal. [2] *Id.* BPL did not provide notice to the Legislature or to the public of its intentions to enter into the lease; it did not seek or obtain 2/3 legislative approval of the lease; it did not make any contemporaneous written findings as to why it was not seeking legislative approval; and the lease did not come to light until—depending on the version of subsequent events believed by different parties—months or years after it was executed.[3]

Additionally, CMP did not obtain a Certificate of Public Convenience and Necessity ("CPCN") from the Public Utilities Commission ("PUC") prior to entering into the 2014 lease as required by law. *See* 35-A M.R.S.A. § 3132(13). Rather, the CPCN process commenced after the

[2] On June 22, 2015, the lease was amended to increase the annual lease payment from $1400 to $3680. R. I0061.

[3] The 2014 lease was briefly mentioned in BPL's annual report to the Legislature's Joint Standing Committee on Agriculture, Conservation, and Forestry, dated March 1, 2016. Specifically, BPL noted: "During 2015 the Bureau saw increased requests for new powerline corridor leases across its lands, reflecting continued interest in wind generation for supplying more 'green' energy to the demand centers in southern New England." R. VII0158. "One lease completed in FY 2015 involves a 300-foot corridor 4,700 feet in length crossing two small public lots in the Forks area." *Id.*

lease was executed, with CMP applying for a CPCN in September 2017. Pls.' R. Add. 30. The PUC ultimately issued a CPCN in May 2019. R. I0002.

During the timeframe in which the CPCN process took place, an issue arose regarding a potential CMP utility line lease that would traverse Cold Stream Forest—a different parcel of public reserved lands. The then-sitting director of BPL asked AAG Parker for an opinion on the prospective lease, inquiring "whether [BPL] … must obtain 2/3 legislative approval, pursuant to either 12 M.R.S.A. § 598-A [] or 5 M.R.S.A. § 6209(6) [], to lease to Central Maine Power Company (CMP) for a transmission line public reserved lands that were acquired with proceeds from the Land for Maine's Future (LMF) Fund." Pls.' R. Add. 1.

In a memorandum response dated July 25, 2018, AAG Parker explained that "12 M.R.S.A § 598-A [the Designated Lands Act] applies, not 5 M.R.S.A. § 6209(6)" and that the proposed transmission line is "measured against the Bureau's multiple use mandate for public reserved lands and its management objectives for Cold Stream Forest, and not against the purposes of the LMF program." *Id.* at 1, 4, 7. She further advised that "the Bureau needs 2/3 legislative approval to lease part of Cold Stream Forest for a transmission line if a transmission line will 'substantially alter' Cold Stream Forest." *Id.* at 6. Thus, AAG Parker concluded that "the Bureau may enter into a valid transmission line lease with CMP if such a lease will not 'substantially alter' the public reserved lands at issue" (*id.* at 1, 7), i.e., the "transmission line will not alter the physical characteristics of Cold Stream Forest in a way that frustrates the purposes for which the Bureau holds Cold Stream Forest." *Id.* at 4 (citing 12 M.R.S.A. §§ 598(5), 598-A). On the "substantial alteration issue," AAG Parker explained that there "is no question that a transmission line will alter the physical characteristics of Cold Stream Forest," and identified various factors for BPL to evaluate in deciding whether the proposed lease would

effectuate a "substantial alteration" of that land. *Id.* at 6–7. The record therefore reveals that by late July 2018, BPL seemed to recognize that it was required to conduct a "substantial alteration" analysis pursuant to the Maine Constitution and Maine statute before it entered into a transmission line lease of public reserved lands.

Meanwhile, BPL's management planning process for public reserved lands in the upper Kennebec region (including the Johnson Mountain and West Forks lots) was underway. That process commenced in 2016 and completed on June 25, 2019 with BPL's adoption of the Upper Kennebec Region Management Plan. There is only a brief mention in the plan acknowledging a "new 300-foot wide by mile-long transmission line lease … executed with CMP in December 2014." R. II0093.

In December 2019, Senator Black and several co-sponsors initiated legislation (L.D. 1893) pertaining to the 2014 lease. Pls.' R. Add. at 120–22. As introduced, L.D. 1893 required that any lease of public reserved lands under 12 M.R.S.A. Section 1852 be at reasonable market value and be approved by a supermajority of the Legislature pursuant to Article IX, Section 23. Subsequent committee amendments added new language that directed BPL to terminate the lease and declared that the project would substantially alter the West Forks/Johnson Mountain public reserved lands. Pls.' R. Add. at 123–25. A public hearing on L.D. 1893 took place on January 21, 2020.

As L.D. 1893 worked its way through the legislative process, AAG Parker attended a work session held by the Committee on Agriculture, Conservation, and Forestry ("ACF committee") and answered the committee's questions about her 2018 memorandum regarding the Cold Stream Forest public reserved lands. In an email sent on March 3, 2020, Representative Kinney followed up with AAG Parker, asking her to weigh in on the validity of the 2014 lease

and to address two issues: (1) "whether the planned transmission corridor w[ould] 'substantially alter' designated public reserved lands and whether there should have been a vote of two-thirds of the Legislature per the Constitution of Maine" and (2) whether "the [2014] lease [was] valid since CMP did not receive a [CPCN] from the Public Utilities Commission prior to entering the lease agreement with the State."

The following day (March 4, 2020), AAG Parker responded to Representative Kinney. She informed Representative Kinney that prior to entering into the 2014 lease, BPL did not ask the Office of Attorney General ("OAG")—and the OAG did not opine—whether the lease would substantially alter the West Forks/Johnson Mountain parcels. However, she stated that BPL's current view was that it did not need to have obtained 2/3 legislative approval of the 2014 CMP lease because it did not regard the 2014 lease as substantially altering the public reserved lands at issue. AAG Parker informed Representative Kinney that she had since advised BPL that their position was "legally defensible." As to the second issue, AAG Parker explained that BPL considered the lease valid despite it predating the CPCN—a position that she said also was "legally defensible based, at a minimum, on a harmless error standard." AAG Parker acknowledged, however, that only a court could finally determine whether BPL's positions and interpretations were correct. The Parker-Kinney email exchange was forwarded to Defendant Cutko, and several others on March 4th and 5th, 2020. [4]

[4] The Court discussed this email with counsel in chambers the day of oral argument. The initial concern was that this email exchange had just surfaced as part of a very prolonged Freedom of Access process. As part of this colloquy, AAG Parker clarified that she was unaware a new lease was under negotiation at the time of her conversation with Representative Kinney in early March 2020 as that was being handled by outside counsel. She also clarified that while the OAG had consulted with BPL on the 2014 lease, their advice was limited to technical lease requirements, and not the issue of "substantial alteration."

The ACF committee unanimously voted that L.D. 1893 "ought to pass." The full Legislature, however, did not consider the bill because it adjourned on March 17, 2020 due to the COVID-19 pandemic.[5]

On March 25, 2020, attorneys for CMP circulated an email enclosing a draft of a "new BPL lease related to NECEC." R. IV0122. Ultimately, CMP and BPL entered into a new lease ("the 2020 lease"), with CMP signing the document on June 15, 2020 and BPL signing it on June 23, 2020. The 2020 lease—captioned "Amended and Restated Transmission Line Lease"[6]—states that it supersedes and terminates the 2014 lease; it slightly clarifies the acreage involved; it contemplates a new annual rent of $65,000; and it authorizes a transfer of the lease from CMP to NECEC Transmission. R. I0001–12. Otherwise, the 2020 and 2014 agreements are largely similar and lease to CMP a 300-foot-wide corridor on the West Forks and Johnson Mountain public reserved lands.

[5] Additionally, in 2021, Senator Black introduced L.D. 471, which would require that transmission line projects on public reserved lands be approved by a supermajority of the Legislature and states that the construction of transmission lines constitutes a substantial alteration under Article IX, Section 23. Moreover, it would make these amendments retroactive to September 16, 2014 (it appears that L.D. 471 was carried over to a subsequent session). Similar legislation is the subject of a citizen's ballot initiative, which was certified by the Maine Secretary of State in February 2021. The Governor issued a proclamation requiring that a referendum on the initiated bill be submitted to the voters on November 2, 2021. *Caiazzo v. Secretary of State*, 2021 ME 42, ¶ 5, – A.3d –.

[6] As part of an effort to explain the change in the lease's title, outside counsel for BPL stated in an email:

> With input from Andy Cutko, we've characterized this as an "Amended and Restated Lease," and added a provision … that specifies this Amended and Restated Lease expressly supersedes the 2014 Lease. (As opposed to just signing a new Lease and signing a separate agreement to terminate the 2014 Lease.) Idea is to help show that this 2020 Lease does nothing to "substantially alter" the leased premises now, while still providing a new lease agreement that is being executed after the 2019 CPCN.

R. V0117.

As was the case with the 2014 lease, BPL did not provide notice to the Legislature or the public before signing the lease, and it did not seek or obtain 2/3 legislative approval of the 2020 lease. Nor did it make any contemporaneous written findings as to why it did not seek such approval.

Procedural History

On June 23, 2020—the day the 2020 lease was executed —Plaintiffs filed a Complaint challenging the 2014 lease.[7] At some point after the lawsuit was filed, AAG Parker informed Plaintiffs that CMP and BPL had entered into a new lease. So, on July 17, 2020, Plaintiffs amended their complaint to challenge both the 2014 and 2020 leases. The Amended Complaint alleges, among other things, that the execution of the leases was *ultra vires*, asserting that BPL did not obtain approval of the leases by a supermajority of the Legislature as required by Article IX, Section 23 of the Maine Constitution and that the 2014 lease was signed before the issuance of a CPCN. It alleged three counts: Declaratory Judgment (Count I), Injunctive Relief (Count II), and, in the alternative, Review of Final Agency Action under the Maine Administrative Procedures Act ("MAPA") and Rule 80C of the Maine Rules of Civil Procedure (Count III).

BPL and CMP subsequently moved to dismiss the Declaratory Judgment and Injunctive Relief counts, arguing that the action should proceed only as an administrative appeal under Rule 80C and MAPA.[8] BPL filed the administrative record while these motions were pending and the Court invited supplemental briefing thereafter. On December 21, 2020, the Court denied BPL

[7] The day after Plaintiffs filed their lawsuit, outside counsel for BPL circulated an email indicating that the lawsuit had been filed, but "[f]ortuitously the State had already signed the new lease." Pls.' R. Add. 303.

[8] CMP also raised a standing-based challenge which Director Cutko did not join. The Court issued a decision regarding CMP's standing argument on October 30, 2020 and concluded that at least some of the named Plaintiffs have standing.

and CMP's motions and permitted the case to proceed in Count I as a declaratory judgment action (with some limitations) and as a Rule 80C action in Count III.[9]

Following briefing by the parties, the Court next addressed a legal issue that was potentially dispositive of the case: Whether leases of public reserved lands issued pursuant to 12 M.R.S.A. Section 1852(4) are exempt from Article IX, Section 23. In an order dated March 17, 2021, the Court concluded that leases under Section 1852(4) are not categorically exempt from the application of this constitutional provision or 12 M.R.S.A. §§ 598–598-B. The Court also concluded that the Legislature had entrusted to BPL the obligation of making a determination in the first instance regarding whether a proposed action on public reserved land would reduce or substantially alter the uses for which the State holds that land in trust for the public. The Court first concluded that the language in both the Constitution and enabling statute is clear. Second, the people of Maine through the Amendment retracted authority previously delegated to the Executive Branch by the Legislature. Third, the Legislature's unique constitutional prerogative to have final say over how public lands are used in certain instances cannot be effectuated—and could be undermined or thwarted—unless BPL determines at the outset whether a proposed use of designated public lands results in a "substantial alteration" as defined by the Legislature; and importantly, that these steps must take place publicly, and before any lease is executed.

After deciding these legal questions, various record-related issues remained unresolved, so the Court addressed the scope of the record in an order dated April 21, 2021. The Record was compiled over the course of several months, in part because Plaintiffs have made a broad Freedom of Access request and the materials have been provided by BPL in different batches,

[9] The Court concluded that Plaintiffs' claim for injunctive relief under Count II was remedial and potentially duplicative and thus deferred ruling on it until after the Court decided Plaintiffs' claim under Rule 80C.

and were actually still being provided during final briefing on the merits. In the April 21, 2021 order, the Court struck from the administrative record a September 2020 BPL-prepared memorandum—authored after both leases were signed and while this case was under active litigation—on the grounds that it was an impermissible post-hoc justification of the actions it had taken with respect to the 2014 and 2020 leases. Additionally, the Court ruled on various proposed modifications and corrections to the record and reiterated the proper scope of the Declaratory Judgment count.

Subsequently, CMP and BPL appealed the Court's orders, but the Law Court dismissed the appeals as untimely and/or interlocutory. Briefing on the merits of the Rule 80C claim followed, and all parties moved for judgment on Plaintiffs' Declaratory Judgment claim. The Court held oral argument in this matter on July 16, 2021.

DISCUSSION

A. Count I—Declaratory Judgment

14 M.R.S.A. Section 5953 provides this Court with jurisdiction to "declare rights, status and other legal relations" between the parties. While Defendants have argued that no declaratory judgment can be issued by the Court as to the 2014 lease, and that the Court only has jurisdiction over the 2020 lease pursuant to MAPA, the Court previously rejected these arguments, but limited the scope of what Plaintiffs could argue in this Count. Specifically, the Court ruled that Plaintiffs could assert as part of their Declaratory Judgment action that BPL's decision to enter into the leases was *ultra vires* and could argue, among other things, that BPL failed to provide as to either lease any meaningful, public administrative process prior to executing the leases.[10]

[10] Plaintiffs also argue that BPL lacked authority to enter into the leases because the 2014 lease was executed prior to the issuance of a CPCN and legislative approval of the leases was constitutionally

As noted previously, the Court has concluded that BPL must make a determination as to whether a proposed use of public lands would reduce or substantially alter the uses of those lands and must do so *before* the use is "substantially altered." This is not just a regulatory or statutory requirement. It is required by the plain language of Article IX, Section 23's mandate that a supermajority of the Legislature must approve reductions and substantial alterations to the uses of designated lands. Furthermore, the applicable statutory framework—which entrusts BPL with the care and management of public reserved lands and provides BPL with a statutory definition of "substantial alteration" —confirms the Court's interpretation on this point. As the Court has noted on prior occasions, it is difficult to understand what the definition is otherwise for. Its existence can only legally be understood as comprising part of the post-Amendment delegation of authority to BPL by the Maine Legislature.

Having summarized its prior legal conclusions, the Court turns to the arguments made in the parties' merits briefing regarding both leases in order to address the "rights, status and other legal relations" of the parties. 14 M.R.S.A. § 5953. More specifically, the Court will be focusing on what the Maine Constitution and the enabling statutes required BPL to do and decide before entering into these leases. The Court will first have to address the issue of mootness raised by the Defendants.

1. Plaintiffs' challenge to the 2014 lease is justiciable.

Plaintiffs' Declaratory Judgment claim as it pertains to the 2014 lease is not moot, or alternatively, it is amenable to at least one of the mootness exceptions. Defendants argue that BPL and CMP's execution of the 2020 lease terminated the 2014 lease and thus mooted all of

required as a matter of law. The Court need not address these contentions in light of its disposition of this Count below.

Plaintiffs' claims as to the 2014 lease. They say that the 2020 lease—not the 2014 lease—governs the contractual relationship between BPL and CMP and defines their legal rights with respect to the leased property.

The Court nevertheless concludes that sufficient practical effects flow from the resolution of Plaintiffs' issues surrounding the 2014 lease to justify a decision by the Court. *Campaign for Sensible Transp. v. Me. Tpk. Auth*., 658 A.2d 213, 215 (Me. 1995) (explaining that "[t]he test for mootness is whether 'sufficient practical effects [flow] from the resolution of [the] litigation to justify the application of limited judicial resources.'"). As Plaintiffs point out, the 2014 lease was the predicate for the 2020 lease and the two leases are inextricably linked such that the Court's legal rulings on the 2014 lease affect its rulings on the 2020 lease.

BPL, for instance, relies upon its pre-2014 lease conduct to support its contention that it made the constitutionally required substantial alteration decision before entering into the 2014 lease. It then uses the actions in 2014 as a basis for asserting that it made the requisite constitutional determination prior to entering into the 2020 lease. Similarly, BPL and CMP further argue that the pre-2020 lease management plan process, during which the already-executed 2014 lease was mentioned, constituted a public process sufficient to satisfy the requirements of Maine law. The Court's evaluation of such an argument must take into account the adequacy of the process associated with the 2014 lease. The issues surrounding the 2014 and 2020 leases simply cannot be disentangled.

In any event, Plaintiffs' challenge to the 2014 lease may be considered because the "public interest" and "capable of repetition but evading review" exceptions to the mootness doctrine apply. *A.I. v. State*, 2020 ME 6, ¶ 9, 223 A.3d 910 (setting forth the exceptions to the mootness doctrine). First, with respect to the public interest exception, a court may consider an

issue despite its mootness if it involves "questions of great public concern that, in the interest of providing future guidance to the bar and public [the Court] may address." *Id.* "In deciding whether an issue meets the public interest exception, [courts] consider the following criteria: whether the question is public or private, how much court officials need an authoritative determination for future rulings, and how likely the question is to recur in the future." *Mainers for Fair Bear Hunting v. Dep't of Inland Fisheries & Wildlife*, 2016 ME 57, ¶ 8, 136 A.3d 714, 717 (internal quotation marks omitted).

The Court is satisfied that the public interest exception is applicable here. The questions surrounding the 2014 lease are plainly public in nature and address BPL's authority to lease land that is held in trust for the public. The two referenda related to the Corridor, along with public proceedings challenging the project in multiple forums, reveal that the public's interest in the lease is strong and ongoing. Moreover, the 2014 lease involves various issues of first impression for which authoritative guidance is needed by the agency and the courts. While BPL asserts that the Court can provide this guidance through its adjudication of the 2020 lease, the issues surrounding the 2014 and 2020 leases do not fully overlap. For instance, unlike the 2020 lease, the 2014 lease did not become public in time for Plaintiffs to seek judicial review under Rule 80C, raising an important question about BPL's leasing process, i.e., whether BPL was obligated to make its determinations public so that Plaintiffs could seek judicial review. As far as the record reveals, BPL has yet to adopt any recognizable administrative process that would enable judicial review of BPL's leasing-related decisions, which suggests that the issue is likely to arise again and authoritative guidance would be useful.

Second, the Court finds that the issues surrounding the 2014 lease fall under the mootness exception for issues that "are capable of repetition but evade review because of their

fleeting or indeterminate nature." *A.I.*, 2020 ME 6, ¶ 9, 223 A.3d 910. BPL, under two different administrations, has taken positions that convince the Court that the issues related to the 2014 lease will recur. BPL has also asserted alternative—and sometimes inconsistent—arguments. BPL has at times asserted that it was not required to make a reduction/substantial alteration determination before either lease was executed. It has also asserted that it actually did make such a determination which could simply be "inferred" by the execution of the leases and/or by the existence of a management plan that was finalized in 2019. It has asserted that the determination did not need to be memorialized in writing or be made public before the leases were signed. Additionally, it has asserted that utility leases are categorically exempt from the requirements of Article IX, Section 23 and that the passage of the Amendment did not affect BPL's ability to convey 25-year leases for transmission lines and a whole host of other projects including pipelines and landing strips. And BPL asserted that it has no obligation to keep the public or Legislature informed of its decisions on a timeline that would make judicial review possible, although AAG Parker did inform Plaintiffs' counsel of the existence of the 2020 lease after the fact, and after they had filed this litigation on June 23, 2020. BPL's position on the latter particularly underscores how the issues associated with the 2014 lease tend to evade review: if BPL's leasing decisions are not transparently made or publicly declared until after the expiration of the period for filing a rule 80C appeal, the opportunities for judicial review diminish. Moreover, as noted, there are issues unique to the 2014 lease that the Court's adjudication of the 2020 lease would not encompass. Accordingly, the Court is not persuaded that the "capable of repetition but evading review" exception is inapplicable under these circumstances.

Thus, the Court concludes that the 2014 lease is justiciable and addresses it as part of Plaintiffs' Declaratory Judgment claim.

2. *BPL must apply the definitions set forth in 12 M.R.S.A. Section 598 when deciding whether a proposed lease reduces or substantially alters the uses of the public reserved lands at issue.*

Again, the starting point for the Court's discussion must be Article IX, Section 23 of the Maine Constitution:

> 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.

The Legislature in 12 M.R.S.A. Sections 598–598-B enacted implementing legislation to give effect to this constitutional provision. As relevant here, the Legislature defined the term "reduced" to mean "a reduction in the acreage of an individual parcel or lot of designated land under section 598-A." 12 M.R.S.A. § 598(4). Meanwhile, "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.A. § 598(5).

As the Court explained in its March 17, 2021 order, the 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. As to the later, "the essential purposes for which [] land is held by the State" can be found in both the Maine Constitution and in the definition provided by the Legislature.

It must be underscored that Article IX, Section 23 directly speaks to the matter of "essential purposes." The Amendment applies by its terms to lands "[1] *held by the State for conservation or recreation purposes* and [2] designated by legislation implementing this section." Me. Const. art. IX, § 23 (emphasis added). Without question then, the Maine

Constitution establishes that conservation and/or recreation are as a fundamental matter the "essential purposes" for which the land in question is held by the State.

The Legislature also has defined the essential purposes of public reserved lands: "The essential purposes of public reserved and non-reserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S.A. § 598(5). While "multiple use" is defined in other provisions, the Legislature has specifically defined "essential proposes" with reference to the "multiple use objectives" set forth in 12 M.R.S.A. Section 1847. Specifically, subsection 1847(1) states:

> **1. Purpose**. The Legislature declares that it is in the public interest and for the general benefit of the people of this State . . . that the public reserved lands be managed under the principles of multiple use [1] to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning and that the public reserved lands be managed [2] to demonstrate exemplary land management practices, including silvicultural, wildlife and recreation management practices, as a demonstration of state policies governing management of forested and related types of lands.

12 M.R.S.A. § 1847(1).

Given these legislative definitions of "reduction" and "substantial alteration," it is clear to the Court that BPL must make the reduction/substantial alteration determination contemplated in Article IX, Section 23 by applying those statutory definitions set forth by the Legislature. BPL argues that its "management plans" are a sufficient substitute for these statutory definitions but the Court is not persuaded. BPL's execution of a management plan is not a substitute for application of definitions legislatively mandated. In addition, the Court would note that there was no management plan in effect when the 2014 lease was issued. Thus, the management plan process could not possibly have been the basis for any finding that the 2014 lease did not reduce or substantially alter the public reserved lands at issue.

Moreover, with respect to the 2020 lease, the management plan finalized in June of 2019—which makes no mention of the statutory definitions of reduction or substantial alteration—did not relieve BPL of its obligation to make the reduction and substantial alteration determination in accordance with the statute. The analysis associated with the management plan is fundamentally different from the analysis BPL must undertake when applying the statutory definition. For instance, the dominant and secondary uses that BPL assigns to the land in its management plan are not the same "uses" against which the statute measures "substantial alteration." The agency-assigned dominant and secondary uses are not objectives in themselves, *see* 12 M.R.S.A. §§ 598(5), 1847(1), although arguably they could be said to represent part of BPL's plan to meet its objectives. A lease under 12 M.R.S.A. Section 1852(4), although perhaps consistent with BPL's plan, could nevertheless frustrate the essential purposes for which the land is held by the State. Additionally, the management plans are by definition geared toward "management." The statutory definition, however, requires BPL to look beyond its management objectives and analyze whether the proposed lease frustrates the *protection* and *improvement* of the property for the multiple use objectives established in Section 1847(1). 12 M.R.S.A. § 598(5).

The Court therefore concludes that BPL must make the determination required by Article IX, Section 23 by applying the specific statutory definitions set forth in 12 M.R.S.A. Section 598. BPL has no authority to ignore or re-write a statute of the Legislature, particularly one with such a clear constitutional foundation.

3. The reduction/substantial alteration determination must be made public and be made as part of a public administrative process before BPL decides to enter the lease and before it conveys any property interest in the public lands.

Before it decides to enter and before it executes a lease under 12 M.R.S. Section 1852(4), the Court has found that BPL must make a reduction/substantial alteration determination. The

Court has also concluded that the Maine Constitution requires that any such determination must be made pursuant to a public administrative process.

It is axiomatic in Maine that administrative processes must be public processes, unless the Legislature provides otherwise. Neither Defendant seems to contest this basic premise, nor have they pointed to any legislative exemption made for BPL to do otherwise. And given the subject matter at issue here —constitutionally protected public lands — the need for transparency and public process is heightened. Indeed, the West Forks and Johnson Mountain public reserved lands are not just public lands, they are *public trust* lands. 12 M.R.S.A. § 1846(1).

While the traditional notion of the public trust has generally included sovereign waters and submerged lands, the Legislature has recognized that public reserved lands are natural resources valuable enough to be held in trust for the public's continued access and reasonable use. *See id.* Moreover, the Legislature has assigned BPL the important role of trustee of those lands, providing in Section 1847 that "title, possession and the responsibility for the management of the public reserved lands be vested and established in the bureau acting on behalf of the people of the State." 12 M.R.S.A. § 1847(1).

These provisions make clear that BPL as public trustee is ultimately accountable to the citizens of Maine. Thus, as one court put it in a similar context, a public trustee "as the primary guardian of public rights under the trust, must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process." *In re Wai'ola O Moloka'i, Inc.,* 83 P.3d 664, 693 (Haw. 2004) (quotation marks omitted). "[T]he state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority

these rights command." *Id.*; *see also Kootenai Envtl. All. v. Panhandle Yacht Club*, 671 P.2d 1085, 1091 (Idaho 1983) ("public trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon" (emphasis original)). BPL's reduction/substantial alteration decision—which ultimately may determine whether public trust lands are leased to private entities for uses like setting power lines, building landing strips, or pipelines—is the type of critical decision that BPL must make openly and through an administrative process that reflects the public's important interests under the trust. BPL's duty as trustee to act on the people's behalf requires no less.

Additionally, the process-related requirements set forth above arise by implication from Article IX, Section 23. Defendants challenge the notion that there is a constitutional basis for requiring any additional public process. In doing so, they focus their argument on the federal Due Process Clause, maintaining that Plaintiffs lack any constitutionally cognizable property interest in the public reserved lands at issue. However, it is not a federal right that is at issue here, but one that arises from our State Constitution. Article IX, Section 23 does not require satisfaction of the traditional procedural due process test. Rather, Article IX, Section 23 provides a separate source for mandating additional procedural protections[11] and the Court has concluded

[11] The Massachusetts Constitution contains a relatively similar provision, which provides in part that:

> [T]he protection of the people in their right to the conservation, development and utilization of agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> …
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

Mass. Const. amend. art. 97. Additionally, the notion that the state cannot transfer land from one public use to another in the absence of explicit legislative authority appears to have roots in Massachusetts

that a public administrative process consistent with the requirements of the Maine Administrative Procedures Act is constitutionally required. *And see,* 5 M.R.S.A. § 9051-A(1)–(2).

4. BPL's public reduction/substantial alteration determination must be done in such a way as to permit the Legislature to carry out its duty under Article IX, Section 23 and to permit judicial review.

Any reduction/substantial alteration determination must be made under circumstances that allow the Legislature to exercise its constitutional prerogative to have the final say in cases where a reduction or substantial alteration is found. Not only does this mean that BPL's determination must be public, as described above, but it also means as noted previously that the determination must be announced before BPL executes a lease that would cause a substantial alteration.

Additionally, the public determination must be issued so as to allow any citizen of Maine (including legislators with standing) to obtain judicial review of decisions in which no reduction or substantial alteration is found. Indeed, the availability of judicial review safeguards the Legislature's constitutional role. Only through judicial review can members of the public remedy mistaken reduction/substantial alteration determinations regarding proposed projects that, but for

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common law. *Smith v. City of Westfield*, 82 N.E.3d 390, 399–401 (Mass. 2017); *Mahajan v. Dep't of Envtl. Prot.*, 984 N.E.2d 821, 830–31 (Mass. 2013); *Op. of Justices to Senate*, 424 N.E.2d 1092, 1100 (Mass. 1981); *Gould v. Greylock Reservation Com.*, 215 N.E.2d 114, 121 (Mass. 1966).

BPL's mistakes, should have been sent to the Legislature for a vote as required by the Constitution.

Widely available judicial review also fits within the very notions of a public trust:

> Judicial review of public trust dispensions complements the concept of a public trust. . . . The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager. Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come. The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.

In re Wai'ola O Moloka'i, 83 P.3d at 684-85 (citations and internal quotation marks omitted).

Thus, judicial review in this context safeguards the Legislature's constitutional role as well as the public trust itself.

5. If the requirements set forth above are not fulfilled, Article IX, Section 23 would effectively be a nullity and the Legislature's constitutional prerogative—in addition to the public trust—would be thwarted or undermined.

The Court has concluded that if the above-described public procedures are not required, Article IX, Section 23 would be hollow and the Legislature's ability to discharge its constitutional duty would be undermined or thwarted.

Similarly, the above requirements are necessary to protect the legislatively-created public trust against actions that may undermine it. Not only do these requirements guard against improvident dispositions of public trust lands, they also encourage transparency and accountability to the people of Maine, the ultimate beneficiaries of the trust. Furthermore, they make sure that any reductions or substantial alterations to public trust lands are attributable to the decisions of the Legislature which is what this unique Amendment requires.

Thus, in light of these constitutional and statutory requirements, the Court concludes and declares the rights of the parties as follows as to both the 2014 and 2020 leases. In order to have

authority to execute a lease of these public trust lands, the BPL Director who signed the lease was required prior to deciding to enter into the lease and prior to executing it, to provide a public administrative process, and make a public, pre-execution determination as to whether the lease would result in a reduction or substantial alteration of the uses of the public land. BPL was also required to use the definitions of reduction/substantial alteration established by the Legislature. In addition, the decision had to have been made in such a way that permitted any member of the public or a legislator with standing to be able to exercise their rights to judicial review of the decision.

Remedies for Count I

Based upon the legal arguments made by the parties as to both leases in Count I, the Court has concluded that Plaintiffs are correct as to what BPL is required to decide and steps it must take before its Director had the legal and constitutional authority to enter into these leases. That declaration, however, will be the only remedy provided on Count I for the following reasons.

First, with respect to the 2014 lease, the Defendants have stated at various times in this litigation, that the lease is no longer in effect. This was of course part of their argument as to why they claim Count I is moot, but as noted above, that is not the only factor the Court must consider in a mootness analysis. However, their concession that the 2014 lease is effectively void does affect the remedy that the Court should consider on this Count. Under these circumstances, the only remedy provided will be the declaration above as to what the parties' rights and obligations were as to that lease.

With respect to the 2020 lease, Plaintiffs were able to timely file an appeal under the Maine Administrative Procedure Act in Count III as an alternative to the Declaratory Judgment

claim in Count I. Given the Court's analysis below as to merits of that claim, as well as the remedy provided, the only remedy as to the 2020 lease will be the declaration made above. The Court concludes that any other remedy would be duplicative of the remedy provided on Count III.

B. Count III—Review of Final Agency Action

Plaintiffs have filed a Rule 80C appeal challenging BPL's decision to enter into and execute the 2020 lease. While both Defendants have consistently argued that the Court lacks authority to review the 2014 lease pursuant to a Declaratory Judgment, but did concede the Court has authority to review the 2020 lease pursuant to the Maine Administrative Procedure Act.

As part of their administrative appeal, Plaintiffs allege that (1) there is no competent evidence in the record to show that BPL made the requisite findings and determination regarding whether the lease reduces or substantially alters the uses of the public lands at issue; (2) there is no competent evidence supporting BPL's contention that the lease does not substantially alter the subject lands; and (3) BPL lacked authority to enter into the leases without 2/3 legislative approval as required by 12 M.R.S.A. Section 598-A and Article IX, Section 23. The Court addresses Plaintiffs' Rule 80C challenge below.

As noted above, the Court's consideration of Plaintiffs' Rule 80C appeal is informed by the constitutional and statutory arguments made by the parties with respect to the Declaratory Judgment claim in Count I. The Court now incorporates by reference the legal conclusions made as the starting point for its analysis on Count III. *See supra* discussion of Count I. Accordingly, the legal conclusions made and legal analysis conducted under the Declaratory Judgment claim above apply with equal force with respect to the 2020 lease for purposes of Plaintiffs' Rule 80C appeal.

As noted previously, BPL took the position, at least at some point during this litigation, that leases such as the ones at issue here are categorically exempt from the requirements of Article IX, Section 23, and thus the agency was not obligated to make a "reduction" or "substantial alteration" determination. The Court rejected that contention in its March 17, 2021 Order. Now, in its merits brief, BPL argues that it actually did consider the substantial alteration issue and determined that the 2020 lease would not substantially alter the uses of these public trust lands.

The Court has reviewed the extensive administrative record. Based upon this review, the Court can find no competent evidence supporting BPL's assertion that it made the requisite public, pre-execution findings that the 2020 lease would not reduce or substantially alter the uses of the lands. Both Defendants ask the Court to "infer" that BPL made these determinations, pointing to BPL's actions in 2014 as well as the management plan process, but the record does not support these assertions.

In 2014, BPL conducted what it terms a "resource-based analysis." Specifically, it conducted a site visit of the subject property, considered the impact of the proposed route on a stream and its trout population and negotiated with CMP to reroute the proposed corridor to avoid a stream crossing. However, none of this constitutes competent evidence from which the Court can infer that the requisite determination was made. A "resource-based analysis" is not the standard called for in Article IX, Section 23 and in 12 M.R.S.A. Section 598. Neither the record nor the briefing discloses whether this "resource-based analysis" was parallel to the constitutional and statutory standards such that they could be considered "coextensive" as BPL asserts. Consideration by BPL of some degree of environmental impact does not permit such an inference. The Constitution demands answers to different questions: namely, would the project

result in a reduction or substantial alteration of the uses of these public trust lands? And it further requires, for reasons set out above, that a public process for answering these questions be employed by BPL before the lease is executed. While judicial review of the 2020 lease was made possible given AAG Parker's belated disclosure of the lease, there is no competent evidence in the record to support any assertion that BPL—prior to deciding to enter into the lease and prior to executing the lease—made the requisite finding as to whether the 2020 lease would reduce or substantially alter the uses of the subject lands, and certainly not one using the controlling statutory definitions.

Defendants largely rely upon the management plan finalized in 2019 to support their assertion that the proper determination was made. But as discussed previously, designing and implementing a management plan is not the same as making a public, pre-lease determination that the lease would not frustrate the essential purposes as articulated in the Maine Constitution and as defined by the Maine Legislature.

In the absence of any such competent evidence that these constitutional and statutory requirements were fulfilled, the Court concludes that BPL Director Cutko lacked authority to enter into the 2020 lease.

Because the Court has determined that BPL lacked authority to enter into the 2020 lease, the Court will not consider the other arguments made by Plaintiffs as to this lease.

Remedies for Count III

Plaintiffs have throughout this litigation asked that this Court make the determination of whether the leases in question constitute a "reduction" or "substantial alteration" of these public trust lands, and they still seek this as part of the remedy requested. The Court has consistently declined to act as the fact-finder in this case, as it does not believe that is what the Legislature

intended when it enacted the enabling legislation that not only delegated management authority to BPL, but also gave the agency definitions to apply in making these important determinations.

Plaintiffs have also pointed to certain actions taken within the last two years by the Legislature which without question express a desire on the part of a significant number of its members to deem this project to be a substantial alteration in uses. The Plaintiffs seem to suggest that these actions or expressions by the Legislature support their position that the Court should also find that a "substantial alteration" will occur if the construction on the public lands goes forward. However, the Court agrees with the Defendants on this point generally, and specifically with respect to a recent Proclamation of the Maine Legislature issued on July 19, 2021. The Court has no authority to consider these actions as they did not effectively change the law that is in effect now. The Court's job is to do its best to construe laws after they are finally enacted either by the Legislature and approved by the Governor; or enacted by the people of Maine.

As the multiple and difficult issues of first impression presented in this matter have been litigated and decided, the proper role of the Superior Court and the doctrine of separation of powers have loomed large. However, what has been clear to the Court since the beginning of this case is this: after the people of Maine ratified Article IX Section 23, the Maine Legislature entrusted the management of this public trust to BPL, and it provided BPL with definitions to use when deciding in the first instance whether a "reduction" or "substantial alteration" in use might occur with respect to these lands.

The Court has now concluded that there is no competent evidence in the record to support BPL's assertion that it made these determinations, and that Director Cutko therefore lacked authority to enter into the 2020 lease. The next issue is what remedy the Court has the authority to provide under these circumstances.

For their part, Defendants argue that should the Court find that no competent evidence supports its assertions, the Court should simply remand the case to BPL to make the determinations now, but that it should not vacate the lease. The Defendants argue that vacating the lease will cause disruption to other litigation in which they are involved and to their construction plans on the public lands. Plaintiffs argue that if the Director had no authority to sign the lease it must be vacated. Importantly, the parties cannot agree on what kind of a public process is required if the Court were to simply remand. Again, there is an apparent dearth of cases in Maine addressing what remedies are appropriate under such circumstances, and the parties have once again directed the Court to federal law.

The Court has reviewed the cases proffered by the parties and finds the cases cited by Plaintiffs to be the most applicable, as they provide guidance regarding what courts should do when agencies bypass fundamental procedural steps in reaching an ultimate decision. *See Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers,* 985 F.3d 1032, 1051–54 (D.C. Cir. 2021). This is not a situation where an agency failed to take an important step in a public administrative process. In this case, BPL provided no public administrative process at all prior to deciding to enter into the 2020 lease. Article IX, Section 23 and the Maine Legislature's designation of these lands as public trust lands make these shortcomings very fundamental. The Court therefore declines to order remand without vacatur as requested. BPL exceeded its authority when it entered into the 2020 lease with CMP, and BPL's decision to do so is reversed.

To be clear, the Court has not changed its mind about the need for BPL to be the forum where the determinations of "reduction" or "substantial alteration" are to be made in the first instance. Unless and until a different law is finally enacted which changes this current

delegation to the agency—which could still perhaps occur depending on the final outcome of the November 2021 referendum—those determinations must be made by BPL.

At the same time, the Court is not permitted as a matter of separation of powers to create such a process for the agency; it can only find, as it has, that a public process was required given this unique Constitutional Amendment and the enabling statute enacted by the Legislature. A "simple remand" would be anything but simple. No recognizable process currently exists and the parties could spend many months litigating in multiple forums how much process is required. The Court is convinced a remand under these circumstances would create its own "disruption."

There is one issue upon which the parties agree, and that is that this Decision and Order will be followed by appeals and cross appeals. The legal and constitutional questions presented by this case can therefore be presented to the Law Court for resolution, as it sees fit, before BPL can know what is or is not legally required of it both as to law and to process, should the case be remanded to it once the appeals are concluded.

CONCLUSION

The entry will be: As to the Declaratory Judgment claim in Count I, the Court grants Plaintiffs' Motion for Judgment, and has issued a declaration on the rights and obligations of the parties above, for the reasons stated. The Court denies Director Cutko and BPL's Motion to Dismiss Count I and CMP's Motion for Judgment on Count I. As to Count II's claim for Injunctive Relief, the Court finds that this form of relief was not pursued in the merits briefing or oral argument and is therefore waived. As to Plaintiffs' Appeal of Final Agency Action in Count III, the Court finds no competent evidence to support BPL's claim that it made the constitutionally-required finding of no "reduction" and/or no "substantial alteration" before it

entered into the 2020 lease with CMP. Director Cutko therefore exceeded his authority, and his decision is therefore reversed.

This Decision and Order may be noted on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

8/10/2021

DATE

SUPERIOR COURT JUSTICE

Entered on the docket: 08/10/2021