STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-20-29

RUSSELL BLACK, *et al.*,

Plaintiffs,

v.

ANDY CUTKO, *et al.*

Defendants.

ORDER ON THE APPLICATION OF ART. IX, § 23 OF THE MAINE CONSTITUTION TO THE BUREAU OF PARKS AND LANDS' AUTHORITY TO LEASE PUBLIC RESERVED LOTS

Plaintiffs in this action challenge the Bureau of Parks and Lands' ("BPL") decision to enter into two leases[1] with Central Maine Power Company ("CMP") for two parcels of public reserved land in Somerset County in order to construct part of the New England Clean Energy Connect transmission corridor. After reviewing the parties' filings on Plaintiffs' Motion Regarding Record and Creation of a Factual Record, the Court discerned that the following legal issue raised by BPL[2] could be dispositive of this case: whether utility leases, pursuant to 12 M.R.S. § 1852(4), are exempt from Article IX, Section 23 of the Maine Constitution. The Court ordered the parties to brief this legal issue and held oral argument via Zoom on February 12, 2021.

After consideration of the parties' arguments on briefs and at hearing, the constitutional provision at issue, the legislation implementing that constitutional provision, and BPL's statutory leasing authority both prior to the constitutional amendment and after, the Court concludes that utility leases (including those for electric power transmission), pursuant to 12 M.R.S. § 1852(4), are not categorically exempt from application of Article IX, Section 23 of the Maine Constitution.

[1] The first lease was executed on December 15, 2014, while the "amended and restated" lease was executed on June 23, 2020.

[2] At the hearing the Court recalled CMP as the party highlighting the issue, but a review of the paperwork showed that it was BPL who first made this assertion.

BPL has been delegated the authority to manage public lands and it is also required to make a determination whether the leases result in a substantial alteration to the uses of the public land. If they do, the leases must be approved by the Maine Legislature by 2/3 vote of both chambers.

ANALYSIS

The starting point for this analysis must be the constitutional provision itself. Article IX, Section 23 of the Maine Constitution provides:

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

The key question presented here is how and to what extent this amendment affected the executive branch's authority over "State park land, public lots or other real estate held by the State for conservation or recreation purposes." To determine this, the Court must review what authority had been delegated to BPL by statute before the amendment, and how that authority may have changed after the Legislature and the people of Maine enacted and then ratified this amendment. The Court agrees with the parties that this case implicates the doctrine of separation of powers as provided in the Maine Constitution. The Court also agrees with the parties that it must be mindful about the limits of the authority of the three branches as they play out in this case.

Under Maine's doctrine of separation of powers, the source and extent of authority of the executive branch has been held to be similar to the source and extent of authority of the judicial branch; by comparison, the Legislative authority to legislate is often described as "absolute."

> The authority of the executive and judicial departments is a grant. These departments can exercise only the powers enumerated in and conferred upon them by the Constitution and such as are necessarily implied therefrom. The powers of the Legislature in matters of

> legislation, broadly speaking are absolute, except as restricted and limited by the Constitution. As to the executive, and judiciary, the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority.

Me. Equal Justice Partners v. Comm'r, 2018 ME 127, ¶ 40, 193 A.3d 796 (Alexander, J., dissenting) (quoting *Sawyer v. Gilmore*, 109 Me. 169, 180, 83 A. 673, 678 (1912)). The Legislature makes the laws of the State; the executive branch enforces those laws. Me. Const. art. IV, pt. 3, § 1; Me. Const. art. V, pt. 1, § 12. The Supreme Judicial Court and other courts established by the Legislature are vested with the judicial power. Me. Const. art. VI, § 1.

The parties seem to agree that, prior to the amendment, the Legislature broadly delegated authority to the executive branch to manage, sell, and lease public lands. Though the agent in charge may have been different or merged into another agency, and the location in the Maine Revised Statutes may have been different, the authority was created by statute as to what actions State agents could take with public reserved lands. Leasing for purposes of setting utility lines was one of those actions. *E.g.*, P.L. 1973, ch. 628, § 14 ("The Forest Commissioner may take the following action on the public reserved lands: . . . Lease the right, for a term of years not exceeding 25, to set poles and maintain utility lines . . . .").

While the pertinent State agent historically had robust authority over public reserved lands, it is important to note that the Legislature did make changes, some more substantive than others, over time. In 1987, the statutes setting out this delegation were relocated from title 30 to title 12. *See* P.L. 1987, ch. 737. At that time the Legislature also determined that it was in the best interest of the people of the State of Maine "that title, possession and the responsibility for the management of the public reserved lands . . . be vested and established in an agent of the State acting on behalf of all of the people of the State"; that the public reserved lands be "managed under the principles of multiple use to produce a sustained yield of products and services"; and that the public reserved

"lands be managed to demonstrate exemplary land management practices, including silvicultural wildlife and recreational management practices . . . ." *Id.* § 2, *codified at* 12 M.R.S. § 585(1).[3]

Remaining portions of section 585 figure prominently in the parties' statutory construction arguments.[4] Section 585(1), as quoted in the preceding sentence, explained the general purpose of the management of public reserved lands, which were to be managed under multiple-use principles. Then section 585(2) defined various terms for use in section 585, including "multiple use" (which the Court quotes in full in footnote 7, *infra*), "public reserved lands," and "sustained yield." Section 585(3) placed the "care, custody, control and responsibility for the management of the public reserved lands" in the hands of the commissioner of Conservation. It also made the commissioner responsible for "prepar[ing], revis[ing] from time to time and maintain[ing] a comprehensive management plan for the management of the public reserved lands . . . ." These plans were to "provide for a flexible and practical approach" to the management of the lands, and the commissioner was required to "compile and maintain an adequate inventory of the public reserved lands, including . . . the other multiple use values for which the public reserved lands are managed." Importantly, the management plans had to "provide for the demonstration of appropriate management practices [to] enhance the timber, wildlife, recreation, economic and other values of the lands."

Then, "[w]ithin the context of the comprehensive management plan, the commissioner, after adequate opportunity for public review and comment, [had to] adopt specific action plans for

[3] The statutes governing public reserved lands were located in title 12, part 2, chapter 202-B.

[4] The Court's quotations in following paragraphs are from the main volume of the 1994 publication of the Maine Revised Statutes Annotated, which did not yet include non-emergency laws from the second regular session of the 116th Legislature. The Designated Lands Act, P.L. 1993, ch. 639, which implemented the constitutional amendment at issue, was a non-emergency law from the second regular session of the 116th Legislature and became effective on July 14, 1994. Accordingly, these quotations detail the delegated authority as it existed immediately before implementation of the constitutional amendment.

each of the units of the public reserved lands system." These "action plan[s] [had to] include consideration of the related systems of silviculture and regeneration of forest resources and . . . provide for outdoor recreation, including remote, undeveloped areas, timber, watershed protection, wildlife and fish." Section 585 then proceeded in subsection 4 to describe the *actions* that the director of the (then) Bureau of Public Lands could take on the public reserved lands in the event the actions were "consistent with the management plans . . . ." Section 585(4) was where the provision permitting leasing of public reserved lands for electric power transmission was located (along with many other activities that were permitted before the amendment: setting and maintaining bridges and landing strips; laying and maintaining pipelines and railroad tracks; and, with the consent of the Governor, leasing mill privileges and other rights in land for industrial and commercial purposes, dam sites, dump sites, the rights to pen, construct, put in, maintain and use ditches, tunnels, conduits, flumes and other works for the drainage and passage of water, and flowage rights).

Not too long after the 1987 move to title 12, in 1993, the 116th Legislature proposed a momentous constitutional amendment. The genesis of this amendment is worth highlighting briefly, and the Bureau seems to recognize the constitutional amendment bore at least some legal significance. The following information was taken from the briefs of the Plaintiffs and the Bureau.

Work by an investigative journalist in the 1970s called into question how Maine had administered public reserved lands dating back to the 1800s – which included giving away over time all but 400,000 acres of the approximately 7 million acres that had originally existed. Of these remaining 400,000 acres, the State was leasing these public reserved lands at minimal cost to camp owners, paper companies, and timber companies. The 1993 constitutional amendment was proposed to place a limit on this historical practice of selling state parks and historic sites, but

during the legislative process its scope was expanded to include public reserved lands. As Plaintiffs highlight, the Law Court in *Cushing v. State* explained that "[t]he State holds title to the public reserved lots as trustee and is constrained to hold and preserve these lots for the 'public uses' contemplated by the Articles of Separation." 434 A.2d 486, 500 (Me. 1981) (citing *Opinion of the Justices*, 308 A.2d 253, 271 (Me. 1973)). The Law Court further noted that there were constitutional limits on the State's authority to convey interests in public reserved lands to private parties. *Id.* It follows then that the 1993 constitutional amendment can only be properly understood within the context of such limitations; which means the Court must decide what impact if any the amendment had on the State's authority to convey interests in public reserved lands to private parties.

The initial proposal read: "**Sec. 23. Alienation of state park land prohibited.** Land owned and designated by the State as a state park or memorial must continue in that use forever and may not be sold or transferred." L.D. 228 (116th Legis. 1993). And as the Bureau points out, the Legislature then expanded the scope of the proposed constitutional amendment. *See* Comm. Amend. A to L.D. 228, No. H-92 (116th Legis. 1993); Comm. Conf. Amend. A to Comm. Amend. A to L.D. 228, No. H-679 (116th Legis. 1993). The final constitutional resolve passed by the Legislature highlighted this expansion by asking the citizens of Maine if they "favor[ed] 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, *passed in* 1993 (emphasis added). The people answered "yes" to the question, and what was approved is as follows:

> **Sec. 23.** State park land. State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of

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

Const. Res. 1993, ch. 1, *approved in* 1993.

The Court interprets this amendment as taking back from the executive branch authority previously delegated to it by the Legislature. And beginning with the 116th Legislature, and then through ratification by the people of Maine, what was taken back was the final say as to whether public reserved lands could be sold, and – pertinent here – whether the uses of the public lands could be "substantially altered." By design, the people of Maine also made any sale or substantial alteration of these lands challenging to achieve, as a supermajority vote is required in both Houses of the Maine Legislature.

Next, the Legislature enacted implementing legislation, which defined a term that is at the heart of this case: "substantially altered."

> "Substantially altered" means changes in the use of designated lands that significantly alter its physical characteristics in a way that frustrates the essential purposes for which that land is held by the State. . . . The essential purposes of public lots and public reserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 585 . . . .

P.L. 1993, ch. 639, § 1 (effective July 14, 1994), *codified at* 12 M.R.S. § 598(5). As the Plaintiffs point out, there is no explicit exemption made for any particular type of property conveyance, such as for an easement or lease. What matters are 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.

In addition, the Legislature made its express intent undeniably clear in implementing legislation that it was retracting authority previously delegated to BPL, and returning that authority

to the Legislature in particular circumstances:

> The following lands are designated lands under the Constitution of Maine, Article IX, Section 23. Designated lands under this section may not be reduced or substantially altered, except by a 2/3 vote of the Legislature. It is the intent of the Legislature that individual holdings of land or classes of land may be added to the list of designated lands under this section in the manner normally reserved for amending the public laws of the State. *Once so designated, however, it is the intent of the Legislature that designated lands remain subject to the provisions of this section and the Constitution of Maine, Article IX, Section 23 until such time as the designation is repealed or limited by a 2/3 vote of the Legislature.*

P.L. 1993, ch. 639, § 1 (emphasis added), *codified at* 12 M.R.S. § 598-A.[5] The question then becomes: what does it mean to be subject to the provisions of the Designated Lands Act (the implementing legislation) and Article IX, Section 23 of the Maine Constitution? This brings the Court to the parties' arguments on what changed (or purportedly did not change) with BPL's delegated authority over public reserved lands after the constitutional amendment was approved by the citizens of Maine and subsequently implemented by the Legislature.[6]

BPL's argument starts from the assumption that Plaintiffs are arguing the Designated Lands Act impliedly repealed BPL's leasing authority for electric power transmission. The Court does not interpret Plaintiffs' argument as being based on implied repeal. Moreover, counsel for Plaintiffs clarified at oral argument that they are not arguing implied repeal but are instead arguing that the constitution as of 1994 placed an additional condition on that leasing authority. The condition is that reductions or substantial alterations to the uses of public reserved lands must be approved by 2/3 of each House of the Legislature. This would logically mean that BPL – the agent

[5] Public reserved lots (or lands) were thereafter designated. *See* P.L. 1993, ch. 639, § 1; 12 M.R.S. § 585(2)(B), *repealed by* P.L. 1997, ch. 678, § 5; *see also* 12 M.R.S. § 598-A(2-A)(D).

[6] For the sake of completeness, it is worth noting that in 1995 the Legislature combined the Bureau of Public Lands and the Bureau of Parks and Recreation within the Department of Conservation into the Bureau of Parks and Lands. *See* P.L. 1995, ch. 502.

entrusted with the care and management of the public reserved lands – must make a determination whether an action would reduce or substantially alter the uses of public reserved lands before the use is "substantially altered." Unless such a determination is made by BPL, the Legislature's constitutional prerogative can be frustrated or even thwarted.

BPL's view of its authority as of 1993 is that, as to a myriad of uses of public lands, its authority has not changed at all, and that certain categories of uses are "exempt" from application of the constitutional standard and always have been. BPL asserts that the multiple-use mandate discussed in what was then 12 M.R.S. § 585 included the authority to lease public reserved lands for electric power transmission for up to 25 years. However, it is important to note that the definition of "multiple use" did not discuss electric power transmission at all. Instead, "multiple use" is defined in the context of the renewable surface *resources*.[7] Nevertheless, BPL's argument

[7] The full definition in section 585 (which was substantially the same as the current definition in section 1845(1)) was as follows:

> (1) The management of all of the various renewable surface resources of the public reserved lots, including outdoor recreation, timber, watershed, fish and wildlife and other public purposes;
>
> (2) Making the most judicious use of the land for some or all of these resources over areas large and diverse enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions;
>
> (3) That some land will be used for less than all of the resources; and
>
> (4) Harmonious and coordinated management of the various resources, each with the other, without impairing the productivity of the land, with consideration being given to the relative values of the various resources and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

12 M.R.S. § 585(2)(A), *repealed by* P.L. 1997, ch. 678. Leases for electric power transmission arise in the provision permitting the director take *actions* consistent with the management plans (which are based on the multiple uses). Notably, each of (1) through (4) quoted above contain specific references to "resources." Additionally, CMP simply calls these "broad standards," (CMP Rebuttal Brief 5), but does not explain what is particularly broad about "the various renewable surface resources of the public reserved lots, including

is premised on the assumption that electric power transmission was an aspect of the multiple-use objectives for public reserved lands. Thus, according to BPL, when the Legislature enacted the Designated Lands Act in 1994 and defined "substantially altered" in reference to the essential purposes multiple-use mandate in section 585, it meant that public reserved lands could only be "substantially altered" by frustrating the essential purposes for which the State held the land – and one of those essential purposes was leasing the land for electric power transmission. Because of this the Designated Lands Act, according to BPL, confirms that its leasing authority was unaffected by the constitutional amendment.

However, it is important to note that if the constitutional amendment did nothing to limit or constrain BPL's leasing authority for electric power transmission projects, then the constitutional amendment also did nothing at all to limit or constrain BPL's authority to conduct a myriad of other activities, or even a combination of these activities. Taking this argument to its logical extreme would mean that *anything* that was listed in any portion of section 585 was part of the multiple-use mandate and exempt from application of the constitutional standard. Therefore, as "leas[ing] [for] mill privileges and other rights in land for industrial and commercial purposes, dam sites, dump sites, the rights to pen, construct, put in, maintain and use ditches, tunnels, conduits, flumes and other works for the drainage and passage of water, flowage rights and other rights of value in the public reserved lands" were part of the multiple-use mandate, as was leasing to "[l]ay and maintain or use pipelines and railroad tracks," and none of those could ever substantially alter the uses of the land. 12 M.R.S. § 585(4)(C)(2), (G), *repealed by* P.L. 1997, ch. 678. Plaintiffs highlight in their reply the extreme results of this reasoning:

> [t]he Bureau Director could execute leases that allowed for development equivalent to the Portland Jetport ("landing strip"), a

outdoor *recreation*, *timber*, *watershed*, *fish* and *wildlife* and *other public purposes* . . . ." 12 M.R.S. § 585(2)(A)(1) (emphases added), *repealed by* P.L. 1997, ch. 678.

> residential subdivision ("residential leaseholds"), a massive factory ("industrial purposes"), the Maine mall ("commercial purposes"), or the Juniper Ridge Landfill (a "dump"), all without ever seeking or obtaining legislative approval, even though no one could maintain with a straight-face that these activities would not "reduce" or "substantially alter" the silviculture, wildlife, and recreation uses of the lands involved. Given that these multiple non-forest uses described in 12 M.R.S. § 1852 were also authorized actions in 1993—by then-12 M.R.S. § 585(4)—when the constitutional amendment passed, it is inconceivable that the people of Maine approved the constitutional amendment requiring super-majority legislative approval for a public lot to be reduced or its uses changed but simultaneously included a silent exception for reductions or changes resulting from all of the non-forest uses outlined in then-12 M.R.S. § 585(4).

(Pl.s' Reply Brief 14.)[8]

It would also follow from BPL's interpretation of its authority that no member of the public, no abutter to the public lands, and no "aggrieved party" could ever go to Court to argue that such leases for such activities by BPL were conveyed in excess of the agency authority as BPL seems to assert that all such activities are "exempt."

CMP's argument as to what happened regarding the leasing provisions, the Designated Lands Act, and the constitutional amendment closely mirrors BPL's. It agrees with BPL that when the Legislature enacted the Designated Lands Act in 1994, it defined "substantially altered" with reference to the multiple-use objectives detailed in section 585. That is, CMP asserts that since section 585 as a whole included the leasing authority at that time (located at 12 M.R.S. §

[8] BPL makes the final point that the Legislature "renewed" BPL's authority to lease public reserved lands for electric power transmission when it enacted section 1852(4) in 1997. According to BPL, because other provisions contained specific cross-references to the Designated Lands Act (e.g., 12 M.R.S. § 1851(1)), the lack of a cross-reference to the Designated Lands Act is proof that the Legislature made a conscious decision not to subject section 1852(4) to the 2/3 legislative approval requirement. The Court reviewed the legislative history to these changes but could not find any intent that could be inferred from this, particularly in contrast to the express intent contained in the Designated Lands Act's requirement that uses of public reserved land remain subject to the constitutional amendment unless the land is "undesignated" by a 2/3 vote of the Legislature. In other words, if there is a conflict between negative inferred intent and express intent, the Court must rely upon the statement of express intent.

585(4)(C)), leasing for electric transmission facilities was an essential purpose for which the State held the lands. CMP also points to the Legislature's claim of "no substantive changes" to the law[9] (when it moved BPL's statutory authority to the 1800s in title 12 in 1997) to mean that the law already authorized BPL to lease electric transmission facilities as an essential purpose (i.e., based on the multiple-use objectives) for which the land was held.[10] As the Court has already noted regarding BPL's assertion of this same point, however, the definition of "multiple use" spoke only in the context of renewable surface resources and said nothing of leasing for electric power transmission.

Plaintiffs, of course, in addition to their reliance on the plain language of the constitutional amendment and the "once so designated" language in the Designated Lands Act, do not agree with BPL and CMP's statutory interpretation. They argue that the leasing activities permitted by statute (both the former section, 12 M.R.S. § 585(4)(C), and the section enacted in 1997 and still in effect, 12 M.R.S. § 1852(4)) are permissible *activities* that must be consistent with the *uses* described in the management plan based upon the multiple-use objectives. In other words, counter to CMP and BPL, Plaintiffs argue that leasing for the various purposes provided in the statutory authority were not and are not "multiple-use objectives." Plaintiffs point to the requirement that "the public reserved lands be managed under the principles of multiple use," which multiple uses are defined

[9] As the L.D. said, "[t]here are no substantive changes from current law in this subchapter." L.D. 1852, Summary, § 4, at 76 (118th Legis. 1997).

[10] CMP does not grapple with the fact that the definition of "substantially altered" was also amended in 1997 to change the reference from section 585 to section 1847. When it was enacted in 1997, section 1847(1) became what was the purpose portion of section 585 (i.e., 12 M.R.S. § 585(1)(A)-(C)), section 1847(2) became what was the responsibility portion of section 585 (i.e., 12 M.R.S. § 585(3)), and section 1847(3) became what was a sliver of the action portion of section 585 (i.e., 12 M.R.S. § 585(4), without the additional subparts, many of which ended up in section 1852). The definitions of "multiple use" and "sustained yield" (i.e., 12 M.R.S. § 585(2)(A), (C)) became section 1845. In this sense, the 1997 enactment undercuts CMP's argument because the definition of "substantially altered" pointed to a section (section 1847) that said nothing about leasing for electric transmission lines.

as being, in part, "[t]he management of all of the various renewable surface resources of the public reserved lands including outdoor recreation, timber, watershed, fish and wildlife and other public purposes," as well as "exemplary land management practices, including silvicultural, wildlife and recreation management practices . . . ." 12 M.R.S. §§ 1845(1)(A), 1847(1). These are thus the "essential purposes" for which the State holds the land: "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.* § 598(5). BPL and CMP's reliance on the original reference to section 585 in the definition of "substantially altered" does not change this because the multiple-use objectives were clearly defined in section 585 and were differentiated from the *actions* that could be taken consistent with those *uses*.

As noted in footnote 10, section 585(1), (3), and the first part of (4) became what is now section 1847. Subsection (1) made clear that "[i]t is in the public interest that the public reserved lands be managed under the principles of multiple use to produce a sustained yield of products and services," and subsection (2) then specifically tied the definitions of "multiple use" and "sustained yield" to renewable natural resources. 12 M.R.S. § 585(1)(B), (2)(A), (C), *repealed by* P.L. 1997, ch. 678. After listing these uses and the management plans necessary to effectuate these purposes, *id.* § 585(3), *repealed by* P.L. 1997, ch. 678, section 585 then proceeded to explain that the commissioner had to adopt action plans within the context of the comprehensive management plan. *Id.* § 585(3), *repealed by* P.L. 1997, ch. 678.

Following that, in a subsection titled "Actions," section 585 stated that the director could take "the following actions on the public reserved lands *consistent with the management plans for those lands* and upon such terms and conditions and for such consideration as the director considers reasonable," *id.* § 585(4) (emphasis added), *repealed by* P.L. 1997, ch. 678. Those following

actions included such items as leasing for electric power transmission, landing strips, pipelines, industrial and commercial purposes, etc. Therefore, leasing for electric power transmission was not a multiple-use objective but was instead an action that could be taken as long as it was consistent with the management plan.

Plaintiffs then point to the 1997 recodification of the authority statutes and additional revision to the definition of "substantially altered" as confirmation of the above interpretation for mainly the same reasons discussed in footnote 10. The 1997 amendment to the definition of "substantially altered" changed the reference from section 585 to section 1847, not sections 1847 *and* 1852. Section 1847 contained the requirement for management under the principles of multiple use as well as enactment of management plans and action plans. It did not contain any reference to leasing for electric power transmission. In this sense, the 1997 recodification and revision confirmed that leasing for electric power transmission was not a multiple-use objective.

In summary, the Court first agrees with Plaintiffs' interpretation of how Article IX, Section 23 and the Designated Lands Act affected BPL's authority over State lands, including public reserved lands. Before the constitutional amendment, BPL was vested with broad authority over public reserved lands. As has been detailed, prior to the constitutional amendment BPL could lease public reserved lands for electric power transmission for up to 25 years. That same authority exists today but it has been limited by the Maine Constitution and the Designated Lands Act. The Legislature and the people of Maine – through the constitutional amendment – retracted some of the authority previously delegated to BPL.[11] The Maine Constitution, "the supreme law of the state," *La Fleur ex rel. Anderson v. Frost*, 146 Me. 270, 280, 80 A.2d 407, 412 (1951), was

[11] Unlike the Public Utilities Commission, where the Legislature has delegated essentially all of its authority, *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 32, 237 A.3d 882, the Legislature here retained authority for itself in instances of reductions or substantial alterations to the uses of public reserved lands.

amended to place a condition on executive action with public reserved lands.

Second, BPL and CMP seem to want the Court to turn its attention away from what occurred in 1993 and 1994 when the amendment and Designated Lands Act were enacted and to engage instead in statutory construction. However, harmonizing language within a statute, or harmonizing statutes, is not the same as comparing a constitutional amendment (and its enabling statute) with the statutes that have been referenced in BPL and CMP's arguments. Instead of comparing only the pre-amendment and post-amendment statutes regarding utility leases, the Court must take as its starting point the constitutional amendment, and it must accord appropriate weight to what the people of Maine enacted when they ratified this amendment. In addition, to the extent any comparison between the broad language of the enabling statute and statutes that address utility leases (and many other kinds of leases and uses) that were still in effect after the amendment create any ambiguity, the Court concludes that any ambiguity must be resolved in favor of the constitutional amendment and the clear expression of intent in its enabling statute.

In sum, for this unique constitutional amendment to have any effect, the amendment itself, the Designated Lands Act, and statutes that remain on the books after the amendment must be read harmoniously. *Cf. Phelps v. United States*, 274 U.S. 341, 344 (1927) ("Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."); *Alliance for Retired Americans v. Sec'y of State*, 2020 ME 123, ¶ 9, 240 A.3d 45 (in the event of a conflict between the constitution and a statute, the Court must interpret in a manner that renders the statute constitutional). This constitutional amendment limited the scope of BPL's authority over public reserved lands by placing a condition on it: that public reserved lands cannot "be reduced or [their] uses substantially altered except on the vote of 2/3 of all the members elected to each House." Me. Const. art. IX, § 23. Thus, BPL is obligated to determine whether a particular

action (including a lease for electric power transmission pursuant to section 1852(4)) reduces or substantially alters the uses of public reserved lands before it takes that particular action.

Finally, contrary to what BPL intimated in its Rebuttal Brief, the effect of such a holding is not that the constitutional amendment says *every* action (including any section 1852(4) lease) is a substantial alteration that must be taken to the Legislature. Instead, BPL must exercise its delegated authority to make a determination on a case-by-case basis. And contrary to the statements made by CMP and BPL that any finding by the Court that the constitutional standard of "substantial alteration" applies to these leases would violate the separation of powers doctrine by abrogating the authority of the Legislature, the Court disagrees. On the contrary, the Court has attempted here to give appropriate weight to the amendment, and in doing so to respect the authority that was restored to the Legislature by the amendment. Therefore, if BPL determines that a proposed use of public lands results in "substantial alteration," the Legislative branch must be given the final say on the issue, and be able to exercise the authority that the people of Maine returned to it – their elected representatives – when they ratified Article IX, Section 23.

The entry will be: Utility leases, pursuant to 12 M.R.S. § 1852(4), are not categorically exempt from application of Article IX, Section 23 of the Maine Constitution. The Clerk shall note this Order on the docket by reference pursuant to M.R. Civ. P. 79(a). Counsel for the parties shall make themselves available to participate in a conference with the Court to establish the course of future proceedings. Clerk of the Business and Consumer Court will send notice of this conference to counsel of record for Wednesday, March 24, 2021 at 10:00 am. The conference will be conducted by Zoom and recorded by the Clerk.

Dated: 3/17/2021

Hon. M. Michaela Murphy
Justice, Maine Superior Court