STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.,

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.,

Appellants/Cross-Appellees

On Appeal from the Business and Consumer Court
Docket No: BCDWB-CV-2020-00029

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS TO AMICI

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 2
I. Amici Fail to Show that the Bureau Made or Could Have Made a Reduction or Substantial Alteration Determination 2
A. The Lease Effects a Reduction under the Designated Lands Act 2
B. The Lease also Effects a Substantial Alteration 5
II. Amici's Arguments Against a Public Administrative Process are Contrary to Law and the Public's Interests 8
III. Arguments about Hundreds of Other Leases are Irrelevant 12
IV. The Articles of Separation Do Not Preclude Application of Article IX, Section 23 to Original Public Lots 15
V. Amici's Standing Arguments Are Without Merit 22
CONCLUSION 25
CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

Cases

Blanchard v. Town of Bar Harbor, 2019 ME 168, 221 A.3d 554..........................22

Blue Sky W., LLC v. Maine Revenue Servs., 2019 ME 137,
215 A.3d 812 2

Conservation L. Found., Inc. v. Maine, No. AP-98-45,
2002 WL 34947097 (Me. Super. Jan. 28, 2002) 12

Conservation L. Found., Inc. v. Town of Lincolnville, No. AP-00-3,
2001 WL 1736584 (Me. Super. Feb. 28, 2001)......................................24, 25

Cushing v. State, 434 A.2d 486 (Me. 1981) 18, 22

Dudley v. Greene, 35 Me. 14 (1852) 2

Fitzgerald v. Baxter State Park Authority,
385 A.2d 189 (Me. 1978) 22, 23, 24

Forest Ecology Network v. Land Use Regul. Comm'n,
2012 ME 36, 39 A.3d 74 11

Green v. Biddle, 21 U.S. 1 (1823)...16

Kauai Springs, Inc. v. Plan. Comm'n of Cty. of Kauai,
324 P.3d 951 (Haw. 2014)...10

Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.,
671 P.2d 1085 (Idaho 1983) 10

O'Connor v. Oakhurst Dairy, 851 F.3d 69 (1st Cir. 2017) 16, 17

Opinion of the Justices, 308 A.2d 253 (Me. 1973)...18, 19

Pollack v. U.S. Dep't Of Justice, 577 F.3d 736 (7th Cir. 2009)..............................23

Protect the Adirondacks! Inc. v. New York State Dep't of Env't Conservation, 170 N.E.3d 424 (2021) 6

Ricci v. Superintendent, Bureau of Banking, 485 A.2d 645 (Me. 1984) 23, 24

United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669 (1973) 25

Constitutional Provisions

Me. Const. art. IX, § 23 .... *passim*

Me. Const. art. X, § 5, art. 1 16

Me. Const. art. X, § 5, art. 7 .... 16, 18, 20, 21, 22

Statutes and Public Laws

12 M.R.S. § 598 .... 3, 20

12 M.R.S. § 598-A 16, 17, 20

12 M.R.S. § 1801 17

12 M.R.S. § 1803 11

12 M.R.S. § 1814-A 3

12 M.R.S. § 1845 20

12 M.R.S. § 1846 20

12 M.R.S. § 1847 .... 17, 20

12 M.R.S. § 1851 10

12 M.R.S. § 1852 .... *passim*

1786 Mass. Acts, ch. 40 21

P.L. 1973, ch. 628 20

P. & S.L. 1927, ch. 113, § 13 2

Legislative Materials

An Act to Require Legislative Approval for Certain Leases of Public Lands: Hearing on L.D. 471 Before the Agriculture, Conservation and Forestry Committee Hearing, 130th Legis., (March 18, 2021) (testimony of Orlando Delogu, 11:28:30-11:30:40), *available at* https://legislature.maine.gov/audio/#214?event=83543&startDate=2021-03-18T09:00:00-04:00 1

BUREAU OF PUBLIC LANDS, BIENNIAL REPORT TO LEGISLATURE (January 1977) 13

Const. Res. 1993, ch. 1 *passed in* 1993 18

FINAL REPORT OF THE COMMITTEE TO STUDY ISSUES CONCERNING CHANGES TO THE TRADITIONAL USES OF MAINE FORESTS AND LANDS (December 2001) 13, 14, 15

L.D. 228 (116th Legis. 1993) 17

L.D. 228, House Amendment A to Committee Amendment A (116th Legis. 1993), Statement of Fact 17, 18

L.D. 228, Senate Amendment A to Committee Amendment A (116th Legis. 1993) 18

L.D. 228, House Amendment B to Committee Amendment A (116th Legis. 1993) 18

MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY, BUREAU OF PARKS AND LANDS, FISCAL YEAR 2020 ANNUAL REPORT (March 1, 2021) 11, 12

STUDY OF THE JOINT STANDING COMMITTEE ON ENERGY AND NATURAL RESOURCES, CAMP LOTS LEASES ON AND ACCESS TO PUBLIC RESERVED LANDS (January 1984) 13

Agency Rules and Regulations

01-669 C.M.R. ch. 20 § 2.A.4 3

Other Authority

FSC-US Forest Management Standard (v1.0) (approved July 8, 2010), *available at* https://us.fsc.org/preview.fsc-us-forest-management-standard-with-family-forest-indicators.a-189.pdf 4

TEXAS WILDFIRE MITIGATION PROJECT, https://wildfiremitigation.tees.tamus.edu/project-overview 5

Bill Gabbert, California Power lines and equipment started more than 1,500 fires in 4 years, Wildfire Today (May 12, 2021) https://wildfiretoday.com/tag/power-line/ 5

INTRODUCTION

The arguments put forward by the four amici supporting CMP add very little to those already advanced by CMP and the Bureau.[1] If anything, those arguments confirm the Superior Court's conclusions with respect to the application of Article IX, Section 23 to utility transmission line leases and the need for a public process to ensure reviewable decisions by the courts and for the Legislature and the public to have an opportunity to weigh in on significant questions about potential uses of the public reserved lands. The notion that a public process threatens hundreds of camp lot leases reflects a profound misunderstanding both of the actual camp lot leasing program and the impact of Article IX, Section 23. MFPC's belabored argument about the Articles of Separation is totally without merit, and the amici's hyperbolic claims about the Superior Court's ruling allowing any citizen of Maine to sue for any use of the public lands anywhere transparently attempts to turn a straightforward traditional standing determination into a sweeping alteration of the law of standing.

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[1] The interests of the amici should be seen for what they are: commercial supporters and beneficiaries of the New England Clean Energy Connect (NECEC) project. H.Q. Energy Services (U.S.) Inc. (HQUS) is in a joint venture with NECEC Transmission LLC and has no interest in Maine's public reserved lands for any purpose. Instead, it is "an indirect wholly owned subsidiary of Hydro-Québec" (HQUS Gr. Br. 1), itself a corporation owned by the Québec government. It is difficult to imagine a party with less interest in Maine's public lands than the government of a foreign country. HQUS's law firm also represents the Maine Forest Products Council (MFPC). Similarly, Orlando Delogu admitted after being questioned in a legislative committee hearing that he has been compensated by CMP for submitting legal briefs, coordinated with CMP's counsel on legal issues, and worked closely with groups in support of the NECEC, all promoting the NECEC. An Act to Require Legislative Approval for Certain Leases of Public Lands: Hearing on L.D. 471 Before the Agriculture, Conservation and Forestry Committee Hearing, 130th Legis., (March 18, 2021) (testimony of Orlando Delogu, 11:28:30-11:30:40), *available at* https://legislature.maine.gov/audio/#214?event=83543&startDate=2021-03-18T09:00:00-04:00.

ARGUMENT

I. Amici Fail to Show that the Bureau Made or Could Have Made a Reduction or Substantial Alteration Determination.

In one form or another, all the amici attack the Superior Court's factual finding that the Bureau failed to make the constitutionally required determination as to whether the Lease effected a reduction or substantial alteration to the uses of the public lots. This factual finding is reviewed for clear error. *Blue Sky W., LLC v. Me. Revenue Servs.*, 2019 ME 137, ¶ 22, 215 A.3d 812. Amici's arguments fail to grapple with either that finding or the reduction or substantial alteration issue.[2]

A. The Lease Effects a Reduction under the Designated Lands Act

All of the amici appear to focus on the substantial alteration issue and essentially ignore the reduction issue. (HQUS Gr. Br. 15-16) (reduction means sale of public lands); (MFPC Gr. Br. 32) (same); (Delogu Gr. Br. 17) (arguing this case "does not involve any 'reduction' in the quantum of state owned land. There is no sale or gift or an easement interest being transferred."); (Reynolds Gr. Br. 13)

[2] Rather than grapple with this Constitutional standard, MFPC and HQUS advance the same flawed theory as CMP and NECEC: that a 25-year transmission line lease under 12 M.R.S. 1852(4) is not subject to Article IX, Section 23. Yet, even accepting this flawed premise, this transmission line would fall outside any such categorical exemption: HQUS highlights, at 1 n.1, that "CMP is obligated to provide transmission service to HQUS over the Project for a period of **forty years** by virtue of a series of transmission service agreements ("TSAs")." (Emphasis added). Plainly then, the reduction and alteration of use to Johnson Mountain and West Forks will exceed the 25-year time horizon that they wrongly argue is exempt from Article IX, Section 23. For a forty year transmission line, the Legislature must issue that length lease directly, and thus would be the branch making the Article IX, Section 23 determination. *See, e.g.,* P. & S.L. 1927, ch. 113, § 13 (issuing a lease of public reserved lands to Kennebec Reservoir Company); *Dudley v. Greene*, 35 Me. 14, 16 (1852) (responsibility for determining "mode and manner" of managing public reserved lands rests in the "sound judgment and discretion of the Legislature").

(asserting that "[l]eases do not 'reduce' public land, as Maine retains ownership"). They nowhere explain how an easement could be a reduction where a lease is not.

A proper reduction analysis requires looking to the definition of reduced in the Designated Lands Act. The amici do no such thing. For example, MFPC argues that the meaning of reduction is straightforward—it means to make smaller including, specifically, in "price or other quality." (MFPC Gr. Br. 32 & n. 24) (citing Am. Heritage Dictionary). Yet the legislative definition states that "'Reduced' means a reduction in the acreage of an individual parcel. 'Reduced' does not mean a reduction in the value of the property," or the "conveyance of an access right by easement in accordance with section 1814-A." 12 M.R.S. § 598(4). The definition nowhere excludes other types of reductions, like the availability of the lands for the Bureau's multiple use purposes. If the definition of reduction required the exclusion of "the value of the property" and rail-trail access easements, that definition necessarily is broader than amici seem to assert and also must encompass a reduction in the acreage available for Bureau (and public) use.

Indeed, as MFPC should know, under the forestry laws and rules, the installation of a transmission line is considered a "change in use" away from forestry such that a change of use notification must be filed by any commercial forest operator that does so. *See* 01-669 C.M.R. ch. 20 § 2.A.4 ("Change of Land Use means . . . the subsequent use for a particular area does not include growing forest

products."). As Plaintiffs argued below, CMP's contractor itself recognized the applicability of the change of land use notification rule by filing the Forest Operations Notification form (the "Form") required for such a change of use. Plaintiffs' Rule 80C Reply at 18. One Form notes that the NECEC was changing the land use of 93.3 acres in West Forks Plantation *from* forestry uses *to* "Transmission Line" and the other Form notes the same for 224.4 acres in Johnson Mountain. *Id.* at Exhibit A.

This loss of forest acreage—a permanent conversion to scrub-shrub growth around the line—also threatens the certification programs the Bureau emphasizes for these lots. *See, e.g.*, Management Plan, AR II0019-20; 2012 Annual Report, AR VII0023-24.[3] For example, the Forest Stewardship Council certification used by the Bureau prohibits a conversion in excess of 2% of the certified area of the unit.[4] FSC-US Forest Management Standard (v1.0) (approved July 8, 2010) at 58, *available at* https://us.fsc.org/preview.fsc-us-forest-management-standard-with-family-forest-indicators.a-189.pdf. Thus, both the State forestry rules and the third-party certification standards applicable to the public lots make clear that this transmission

[3] This brief uses the following citation conventions: citations to the Appendix begin with an "A" followed by the page number, *i.e.*, (A100); citations to the original Administrative Record filed by the Bureau begin with "AR" followed by the relevant volume and page number, *i.e.*, (AR I0100); citations to the Addendum, which contains the material added to the record by the Court begin with the abbreviation "Add." followed by the page number, *i.e.*, (Add. 100).

[4] The relevant "unit" is the combined Johnson Mountain/West Forks Plantation lots as identified in the Bureau's Management Plan and timber harvesting history. (A489-93); (Add. 0330-55).

line will not only be considered a change in use that cannot be certified or regenerated as a forest but also that it will reduce the acreage of certified forest area and the acreage that can be used for recreation and by wildlife. By any common sense definition, that constitutes a reduction.

B. The Lease also Effects a Substantial Alteration

But apart from whether the NECEC effects a reduction, it plainly substantially alters the uses of the public lots. Though the amici would like to be able to demonstrate that the Lease does not, they are unable to do so. Indeed, MFPC put the determination of "substantial alteration" in very straightforward terms—a use of the land considerably different than the use of the land when designated. (MFPC Gr. Br. 33-34.) It is hard to imagine a more "considerably different" use of forested land than a high-impact transmission line.[5]

HQUS erroneously focuses on the size of the transmission line corridor and argues that the transmission line only covers 2.6% of the public lots and therefore should not be considered substantial. (HQUS Gr. Br. 22.) There is no basis for this view in constitutional interpretation or in fact. First, the impact extends well beyond the leased area, with additional impacts both on theses public lots and off. (Red. Br.

[5] In dry environments, whole forests have been destroyed by fires ignited by the aging transmission lines that were cut through those forests in decades past. *See, e.g.,* TEXAS WILDFIRE MITIGATION PROJECT, https://wildfiremitigation.tees.tamus.edu/project-overview (last visited January 21, 2022); Bill Gabbert, California Power lines and equipment started more than 1,500 fires in 4 years, WILDFIRE TODAY (May 12, 2021) https://wildfiretoday.com/tag/power-line/.

9-10.) Second, conversion of 2% of a forest is considered substantial by forestry certification programs, as discussed above. Finally, this method of minimizing an impact on constitutionally protected land by comparing it to similarly protected contiguous lands has been expressly rejected by other jurisdictions, and should be rejected here. *See, e.g.*, *Protect the Adirondacks! Inc. v. New York State Dep't of Env't Conservation*, 170 N.E.3d 424, 430 (2021). The language of Article IX, Section 23 is plain, and the percentage of the public lot affected cannot exempt this high-impact transmission line from the necessary analysis. Simply put, there is no *de minimis* exception in the Constitution.

Delogu, after disregarding the facts that show how construction of a high-impact transmission line reduces the public reserved lands within the meaning of the Designated Lands Act, lists out "facts" that he believes support a finding of no substantial alteration. (Delogu Gr. Br. 18-19.)[6] But the facts cited by Delogu do not support such a conclusion and, more important, ignore the Bureau's own admissions concerning the absence of any such determination, *see* (Red Br. 42), as well as the stated concerns of Bureau staff. The record shows that Bureau staff were concerned

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[6] Contrary to the Bureau and CMP, as well as the other amici, Delogu acknowledges that Article IX, Section 23 of the Maine Constitution applies to utility leases under 12 M.R.S. § 1852(4). Specifically, Delogu states: "The enactment of Article IX, § 23 clearly does not prohibit the leasing of publically owned land; it follows that the Legislature's 1997 enactment . . . delineating the powers of the BPL to lease publically owned land for a wide range of infrastructure needs/purposes is similarly permissible—a 'public use', subject only to the caveat that it (the lease) does not 'substantially alter' publically owned land. Even this caveat may be waived by 'the vote of 2/3 of all members elected to each House.'" (Delogu Gr. Br. 6.)

that failure to co-locate the NECEC Project and the existing Jackman Tie Line would result in increased "fragmentation of habitat, multiple crossings of Cold Stream, and interference with the Bureau use" (A517), and would increase "the amount of transmission line corridor on public lands by approximately 9,900 feet long and 100 feet wide," reduce by "an additional 23 acres" the amount "of public lands for timber production," and increase "the fragmentation of the forest on public lands" (A499-500). These are the relevant facts, not the largely irrelevant "facts" cited by Delogu, and they simply do not support the conclusion that the Lease does not effect a substantial alteration of the public lots.[7]

Contrary to the Bureau, CMP, and MFPC, HQUS and Delogu also suggest that the Superior Court could have made the constitutionally required determination. (HQUS Gr. Br. 19-22 (citing record facts to argue no substantial alteration from lease regardless of whether such determination was even required)); (Delogu Gr. Br. 18-19 (listing "facts" that were "known by the parties to this proceeding and by the Superior Court" and that support a determination of no substantial alteration)). Plaintiffs agree that the Superior Court could have, and in fact should have, made the constitutionally required determination. (Red Br. 50-53.) As Plaintiffs argued below, the record compels only one conclusion—that NECEC effects a reduction of

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[7] *See* (Red Br. 41-42) (discussing Bureau testimony regarding no documented finding); *see also* (A51-52) (Bureau's resource based analysis of the lease is not the constitutionally required analysis).

or substantial alteration to the uses of the public lots. In fact, the unwillingness of the Superior Court to make a finding in this regard is the basis of Plaintiffs' cross-appeal. *See id.*

II. Amici's Arguments Against a Public Administrative Process are Contrary to Law and the Public's Interests.

On this record, Delogu's conclusion that "[t]he Constitutional requirements of Article IX, § 23 were met; the lease was approved," (Delogu Gr. Br. 19), only serves as further evidence of the necessity of a public administrative process that the Bureau must follow when determining whether a lease of public lands constitutes a reduction or substantial alteration. Although he acknowledges that Article IX, Section 23 applies to utility leases and therefore requires that the Bureau determine whether a utility lease would reduce or substantially alter the public lands, *see supra* note 6, Delogu goes on to argue that the constitutional amendment "imposes no procedural requirements . . . on the agency (BPL) as a prerequisite to carrying out its statutory duties." (Delogu Gr. Br. 7.)

Yet the history of the 2014 and 2020 leases in this case exposes the problem with this faulty reasoning—namely that absent a public administrative process, there is no way for the people of Maine or the Legislature to know whether the Bureau has made the constitutionally required reduction and substantial alteration determination or for such a determination to be challenged. As set forth in more detail in Plaintiffs' principal brief, the first public notice of the 2014 lease was in the

Bureau's 2015 fiscal year report, published on March 1, 2016, which in no way indicated that it was a lease for a high-impact transmission line that would reduce or substantially alter the public lots. (Red Br. 34-35.) Then, after the true nature of the lease came to light in various permitting proceedings in 2019, and the legislative committee of jurisdiction had made clear its view that the lease required 2/3 legislative approval under the Constitution, *see* (Red Br. 12-15), the Bureau nonetheless entered into the amended and restated 2020 lease without informing the Committee or providing any notice to the public. Plaintiffs only learned of the 2020 lease from Assistant Attorney General Parker after they initiated this lawsuit. (A52.)

Significantly, if Plaintiffs had not filed the lawsuit, they likely would not have learned of the 2020 lease for months. Plaintiffs would then have faced the same arguments that CMP and the Bureau raised when Plaintiffs challenged the 2014 lease—that any such challenge must be brought under MAPA and must be brought within 40 days after the lease was executed. *See also* (A41) ("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 . . .").

It is therefore quite remarkable that the amici take the position that the trial court erred in holding that the Bureau must follow a public administrative process before entering into leases that would reduce or substantially alter the public lands that the Bureau holds in trust for the people of Maine. (Delogu Gr. Br. 11-12);

(Reynolds Gr. Br. 15-16); (HQUS Gr. Br. 17). As the trial court explained, "[n]ot 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." (A48.) Such transparency and accountability is particularly important in light of the history and purpose of the public reserved lands and the fact that they are held in trust for the benefit of Maine people. As the Superior Court recognized, "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." (A46.)[8]

HQUS argues that imposing an administrative process requirement by statute in 1851(4), but not expressly doing so in 1852, means that the legislature did not intend for the Bureau to engage in such a process. (HQUS Gr. Br. 16-17 & n.12.)

[8] HQUS wrongly argues that the Superior Court relied only on decisions from Hawaii and Idaho. (HQUS Gr. Br. 15, n.11.) Not so; the Superior Court found that the plain language of the Maine Constitution and Maine statutes "make clear that BPL as public trustee is ultimately accountable to the citizens of Maine." (A45.) The Court recognized that "in a similar context," Hawaii and Idaho had addressed the role of a "public trust." (A45-46.) Moreover, those jurisdictions expressly repudiate HQUS's assertion that the requirements that a public trustee act openly is only applicable where statutes require public hearings. *See Kauai Springs, Inc. v. Plan. Comm'n of Cty. of Kauai*, 324 P.3d 951, 982 (Haw. 2014) ("As the public trust arises out of a constitutional mandate, the duty and authority of the state and its subdivisions to weigh competing public and private uses on a case-by-case basis is independent of statutory duties and authorities created by the legislature."); *Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1095 (Idaho 1983) ("[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine."). The Superior Court correctly held "BPL's duty as trustee to act on the people's behalf requires no less." (A46.)

Yet the Bureau's mandate to adopt the rules necessary for its management of public lands is already in statute just as plainly as it is for its management of submerged lands. *See* 12 M.R.S. § 1803(6); (Red. Br. at 50.) The Bureau uses a public process for submerged lands leases, but despite the requirements of Article IX, Section 23, has not adopted any public process for ensuring that its leases of public reserved lands comport with its trust obligations over those lands. (Red Br. 46-50.)

Such a process is unlikely to be as burdensome as the amici complain. First, the Bureau has great latitude in shaping the contours of that public process. *See, e.g.*, *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 36, 39 A.3d 74, 86. Second, the record here reflects only four transmission line projects post-1993 that might have been subject to section 1852(4): for three of them the Bureau appropriately obtained legislative approval and the fourth was a 500 foot by 30 foot wide lease for a camp lot connection. AR VI0031-32, 0063-68, 0191. In other words, over the 28 years since enactment of Article IX, Section 23, there has been exactly one other transmission line lease under section 1852(4) that would have required a public process before the Bureau. In contrast, according to the fiscal year 2020 report to the Legislature on submerged lands, the Bureau granted 41 new leases and easements, and 71 renewals, amendments and transfers in a single year, all pursuant to a public administrative process. MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY, BUREAU OF PARKS AND LANDS, FISCAL YEAR 2020

ANNUAL REPORT 29 (March 1, 2021). Simply put, there is no reason to believe that the minimal public process that the Superior Court correctly recognized arises from Article IX, Section 23 of the Constitution would be administratively burdensome. Nor could such a burden excuse compliance with the Constitution.

III. Arguments about Hundreds of Other Leases are Irrelevant.

Contrary to Reynolds's claim, the issues before the trial court, and on appeal, pertain to utility leases under 12 M.R.S. § 1852(4), not camp lot leases under 12 M.R.S. § 1852(5). The trial court held that before the Bureau "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." (A44-45) (emphasis added).

These holdings relate only to leases under Section 1852(4). Nowhere does the trial court suggest they have any application to camp lot leases under section 1852(5) as both Reynolds and the Bureau contend. (Reynolds Gr. Br. 11, 13; Bureau Blue Br. 38-41.) This issue was not litigated or briefed below and is beyond the scope of the appeal. *See Conservation L. Found., Inc. v. Maine*, No. AP-98-45, 2002 WL 34947097, at *3 (Me. Super. Jan. 28, 2002) (explaining that court cannot look beyond those parties to the lawsuit to "vitiate the merits of the challenge").

Even if this Court could look beyond the specific issues on appeal regarding utility leases under 12 M.R.S. § 1852(4), camp lot leases under section 1852(5) have a unique factual and legal history that render Reynolds's (and the Bureau's) arguments irrelevant to the utility lease issues:

First, Reynolds completely disregards the fact that his camp lot lease predates the 1993 constitutional amendment. Since it was in existence at the time the amendment was adopted, and because the amendment is not retroactive, the amendment simply does not apply to Reynolds's lease.

Second, Reynolds disregards the fact that although the Bureau renews existing camp lot leases, it has had a policy against issuing new camp lot leases since the 1970s. *See, e.g.*, BUREAU OF PUBLIC LANDS, BIENNIAL REPORT TO LEGISLATURE, 9 (January 1977) ("The Bureau is responsible for nearly 450 camp lot leases on public lands. A moratorium on new leases, recommended by a joint legislative committee in 1973, is continuing although all existing leases are being renewed."); STUDY OF THE JOINT STANDING COMMITTEE ON ENERGY AND NATURAL RESOURCES, CAMP LOTS LEASES ON AND ACCESS TO PUBLIC RESERVED LANDS, i (January 1984) ("The Bureau administers . . . 417 residential leases of camp lots on public lands. These leases, established prior to the existence of the Bureau, may be renewed. However, current policy prevents issuance of any new leases to private persons."); FINAL REPORT OF THE COMMITTEE TO STUDY ISSUES CONCERNING CHANGES TO THE

TRADITIONAL USES OF MAINE FORESTS AND LANDS, 4 (December 2001) (hereafter "2001 Report") ("The Bureau does not issue new residential leases on public lands but does allow the transfer of existing leases.").

Because the Bureau has not and will not issue any new camp lot leases after 1993, the notion that somehow leases in effect prior to 1993, which by definition could not reduce or substantially alter the public lands after passage of the amendment, would be caught up in the Superior Court's ruling represents nothing more than a hyperbolic attempt to distract from the real issue—section 1852(4) leases. At no point in this litigation have Plaintiffs argued that the constitutional amendment requires 2/3 legislative approval to renew any leases that existed prior to 1993 and the trial court did not address such issue. For all these reasons, the assertion that "[u]nder the trial court's ruling, however, the Reynolds lease is invalid because BPL did not determine, before issuing the lease, that it would not reduce or substantially alter the leased land" (Reynolds Gr. Br. 13) simply cannot withstand scrutiny.

In light of this camp lot lease history, Reynolds's claim that "the Legislature has for decades acquiesced in the status quo" (Reynolds Gr. Br. 4) ignores reality. If anything, the Bureau has been following the Legislature's clear directive not to enter into any new camp lot leases but to renew and transfer camp lot leases that existed at the time the Bureau was created in the 1970s. Indeed, the Bureau itself has made

a point to distinguish camp lot leases from other leases when reporting to the Legislature, *see* Annual Reports, AR VII0027, 70-71, 113, 156-57, 209; AR VIII0029, 89-90; *see also* 2001 Report, Testimony of John Titus, Bureau of Parks and Lands (stating "Leases with the Bureau fall into two general categories; those within the Camplot Leasing Program and those which we call leases for special uses."). The camp lot lease argument is a distraction from the actual issues in this case, all of which pertain to utility leases under section 1852(4).

IV. The Articles of Separation Do Not Preclude Application of Article IX, Section 23 to Original Public Lots.

MFPC engages in a tendentious and belabored discussion of the Articles of Separation and the history of the public lots prior to the 1970s, but spends little time discussing anything after 1973, and almost no time discussing the change wrought by Article IX, Section 23 in 1993. Instead, MFPC argues that Article IX, Section 23 was ineffectual as to the original public lots because Massachusetts never consented to prioritizing conservation or recreation over high-impact transmission lines nor to the procedural requirement of two-thirds legislative approval to substantially alter the uses of those original public lots. MFPC's concern for Massachusetts is completely misplaced, and MFPC further has no standing to assert claims that (even if they had merit, which they do not) could only be asserted by Massachusetts. The Articles are a compact between Maine and Massachusetts, in which Massachusetts agreed to allow Maine to separate in exchange for Maine's agreement to various

"terms and conditions." Me. Const. art. X, § 5, art. 1; *see also Green v. Biddle*, 21 U.S. 1, 92 (1823). MFPC has no stake in attempting to enforce those terms and conditions.

In support of its argument on behalf of Massachusetts, MFPC points specifically to the seventh article, which provides in relevant part:

> All grants of land, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located which have been or may be made by the said Commonwealth, before the separation of said District shall take place, and having or to have effect within the said District, shall continue in full force, after the said District shall become a separate State . . . and in all grants hereafter to be made, by either State, of unlocated land within the said District, the same reservations shall be made for the benefit of Schools, and of the Ministry, as have heretofore been usual, in grants made by this Commonwealth.

Me. Const. art. X, § 5, art. 7. MFPC's primary argument is thus that this section's restrictions on the appropriate uses of public reserved lands—the requirement that they be used for "Schools, and the Ministry"—means that they cannot be held for "conservation or recreation," and thus are not the type of public lands subject to Article IX, Section 23. (MFPC Gr. Br. 7-8, 18-22.)

This argument wrongly assumes that (i) public reserved lands must be held by the State for "conservation or recreation" purposes to be protected by Article IX, Section 23 and (ii) 12 M.R.S. § 598-A has no meaning.

First, Article IX, Section 23 applies to "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." Me. Const. art. IX, § 23 (emphasis added). Given Maine's legislative drafting convention of not using the Oxford comma, *see*

O'Connor v. Oakhurst Dairy, 851 F.3d 69, 73 (1st Cir. 2017), MFPC is wrong to assume that "conservation and recreation purposes" must modify not only "real estate held by the State" but also "state park land" and "public lots." Indeed, if the phrase modifies "public lots," it likewise modifies "state park lands," which would be superfluous since state park lands are, by definition, held for recreation and conservation purposes. *See* 12 M.R.S. § 1801(7). Such a modification would also make no sense in the context of Maine's public lots, which under Article X are held more broadly for beneficial public uses rather than exclusively for conservation or recreation purposes. *See* 12 M.R.S. § 1847(1).

Second, the argument is irrelevant in any case because Article IX, Section 23 applies to any lands designated by the Legislature. In 12 M.R.S. § 598-A, the Legislature designated, among others, public reserved lands, which include the public lots. That designation cannot be undone absent a vote of 2/3 of the Legislature, *id.*, and makes MFPC's argument totally irrelevant.

The legislative history of Article IX, Section 23 reinforces that conclusion. The original proposal applied only to state park lands. L.D. 228 (116th Legis. 1993). House Amendment A broadened the lands to be covered to include "state park land, or other real estate designated by the Legislature." L.D. 228, House Amendment A to Committee Amendment A (116th Legis. 1993). That amendment was introduced to "properly protect state parks and other public land." *Id.*, Statement of Fact. The

House amendment also proposed that any reduction or substantial alteration to these lands required a 4/5 vote of the Legislature. *Id.* The Senate resisted the 4/5 requirement and proposed a 2/3 requirement. L.D. 228, Senate Amendment A to Committee Amendment A (116th Legis. 1993). The House then amended the bill to include the public lots as a separate class of protected lands, in language virtually identical to the final Resolve sent to the voters, although it changed the legislative approval requirement from 4/5 to 3/4. L.D. 228, House Amendment B to Committee Amendment A (116th Legis. 1993). Ultimately, the Conference Committee adopted the language treating the public lots as a separate class of protected lands but replaced the 3/4 requirement with a 2/3 requirement and that measure was sent out to the voters. Const. Res. 1993, ch. 1 *passed in* 1993. Plainly the intent of the Legislature was to "properly protect" the public lots as a class.

Moreover, public lots can be held for recreation and conservation in any case. The Law Court has interpreted Article 7 to broadly authorize "public uses." *See Cushing v. State*, 434 A.2d 486, 500 (Me. 1981). The Justices have opined that recreation and conservation are public uses consistent with the Articles of Separation. *Opinion of the Justices*, 308 A.2d 253 (Me. 1973). They explained that the express uses in Article 7 (school and ministry) are not exclusive, but "illustrative of a more comprehensive assemblage of beneficial purposes 'usual' in 'reservations' made by Massachusetts prior to separation[.]" *Id.* at 270.

While MFPC seems to view these "beneficial purposes" as limited only to uses that "spur the development of new, productive, and taxable communities," (MFPC Gr. Br. at 34), the Justices' opinions were broader. They highlighted that an early Maine law allowing certain reserved land to be used for "such public uses . . . as the Legislature may hereafter direct" was viewed at the time as "working no change upon the constitutional requirement for the use of public lots." *Id.* at 270-71. They also pointed to a joint grant by both states in 1824 with language that the reserved land be used simply for "public uses." *Id.* at 271. In neither of these historical examples was there a limitation to spurring development or sustaining communities. Nor is there any rational basis to conclude that if the Maine Legislature may "hereafter direct" new public uses, that the Maine Constitution could not do so (or add a super-majority Legislative requirement).

The Opinion of the Justices expressly rejected the view that recreation and conservation uses were impermissible under the Articles of Separation. They were reviewing a proposed law that established a "multiple use" mandate for the use of public reserved lands. Those uses included both "recreation" and "management of . . . watershed, fish and wildlife . . . ." *Id.* at 261. The Legislature specifically asked the Justices whether the section of the law containing the multiple use provision violated the Articles of Separation. The Justices responded that it did not. *Id.* at 272.

After the Justices confirmed the constitutionality of the proposed law, the Legislature enacted it as P.L. 1973, ch. 628. That law declared it in the public interest "that the public reserved lands be managed under the principles of multiple use . . . ." *Id.* § 4162. "Multiple use" was defined as "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." *Id.* The law further authorized, among other things, the recreational activity of camping. *Id.* Those statutory provisions are now codified as amended at 12 M.R.S. §§ 1845–1847 and 1852(5).

The above history demonstrates that the Justices have recognized both recreation and conservation (*i.e.*, "management of . . . outdoor recreation . . . watershed, fish, and wildlife") as "public uses" of public reserved lands permissible under Article 7, and that, since the 1993 adoption of Article IX, Section 23 the Legislature has held all public reserved lands for multiple use objectives, *see* 12 M.R.S. § 598(5), which may include "conservation and recreation" in addition to other uses pursuant to the multiple use mandate in 12 M.R.S. § 1847. Me. Const. art. IX, § 23. Thus, designation of these lands in 12 M.R.S. § 598-A(2-A)(D) as subject to Article IX, Section 23 was contrary to neither the Articles of Separation nor any "conservation or recreation" requirement in Article IX, Section 23 itself.

MFPC's view of the Articles of Separation as limiting permissible uses of reserved lands to development-focused activities as understood in 1820 should also be rejected. Apart from the self-defeating nature of that argument—transmission lines were hardly understood uses in 1820—while it may be true that in the 18th century Maine's public reserved land served to promote settlement and development, (MFPC Gr. Br. 10) (citing 1786 Mass. Acts, ch. 40), in the 21st century Maine is now settled. There is no longer any need to ensure that new towns will have land for "Schools, and the Ministry." Likewise, some uses of public land that may have been seen as a "beneficial use" in 1820—such as construction of a polluting tannery on a Maine river—would now be unthinkable. MFPC is wrong that the dead hand of the Massachusetts Legislature circa 1820 controls Maine's public lots.

Finally, MFPC argues that Article 7 also mandates an interpretation of Article IX, Section 23 that treats high-impact electric transmission lines and the other uses identified under 12 M.R.S §1852 as pre-existing "uses" of public reserved lands, such that—regardless of any Constitutional amendment or legislation to the contrary—the construction of such projects could *never* be considered to substantially alter the uses of such lands. (MFPC Gr. Br. 34-35.) Indeed, although the Bureau admits that its multiple use mandate "does not include electric power transmission" (Bureau Blue Br. 30), MFPC goes so far as to suggest that transmission lines, which were totally unknown in 1820, somehow are a recognized

use under the Articles that cannot be regulated by the State through a constitutional amendment. But Article 7 does not compel Maine to use its public lands for utility projects. Rather, it operates as a restriction on permissible uses of the reserved lands. *See Cushing,* 434 A.2d at 500. Put simply, the Articles of Separation, adopted over two hundred years ago, do not mandate that Maine use its public lots for high-impact electric transmission; such an assertion is absurd on its face.

V. Amici's Standing Arguments Are Without Merit.

Reynolds and MFPC try to attack the standing of the individual plaintiffs on the ground that the Superior Court's decision opens the door for any citizen of Maine to sue over any use of public lands anywhere. Although that broad conception of standing is the position advanced by the Attorney General in *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 197 (Me. 1978) ("*Baxter*"), it is not what the Superior Court held nor an accurate description of the Plaintiffs here. Reynolds and MFPC mostly repeat CMP's standing arguments against the individual plaintiffs who use the public lands at issue in this case. Rather than repeating Plaintiffs' response to those arguments here, or their arguments regarding NRCM and the legislator plaintiffs, *see* (Red. Br. 55-60), Plaintiffs here address the additional cases and arguments raised particularly by Reynolds.

First, Reynolds cites to *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 15, 221 A.3d 554 for the proposition that "evidence of a blocked view is necessary

to demonstrate a particularized injury that is based on views." (Reynolds Gr. Br. 8.) His narrow argument focused on the compromised views of some plaintiffs, ignores that the same plaintiffs have alleged harm to their continued use of the public reserved lands—the primary harm in this case, which give them standing to sue under *Baxter*. *See, e.g.*, (A159) ("Mr. Buzzell has worked as a commercial whitewater rafting outfitter and as a Registered Maine Guide for whitewater, recreation, fishing, and hunting in and around the public reserved lands that are the subject of BPL's Lease with CMP since approximately 1974, and plans to continue to do so. He is also an avid hunter who has harvested more than a dozen bucks in the areas spanning the propose transmission line and plans to continue to hunt in this area.").

Second, Reynolds cites to *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984) and *Pollack v. U.S. Dep't Of Justice*, 577 F.3d 736, 742-43 (7th Cir. 2009) to support his argument that the individual plaintiffs did not allege a particularized injury. Yet both cases are readily distinguishable. In *Pollack*, the plaintiff "never claims that he visits Foss Park or watches birds in that area . . . This claim is similar to the statements in *Lujan* and *Summers*, where the individuals never claimed to have specific interest in the actual area affected by pollution." *Pollack*, 577 F.3d at 743. Here, the individual plaintiffs have alleged specific use of the public lands at issue and how the transmission line will interfere with their continued use.

See, e.g., (A159-62); *see also* (A105) ("All of the Private Citizen Plaintiffs assert that the Leases and subsequent construction of the NECEC transmission line would disrupt the environment in and around the public reserved land, resulting in harm to their continued use.").

And, unlike *Ricci*, where plaintiffs were Maine citizens who did not receive general public notice, the individual plaintiffs here averred specific use of the public lands at issue and harm to their continued use—just like the plaintiffs in *Baxter*. Plaintiffs will not repeat their analysis of *Baxter* here but do note that Reynolds's analysis of *Baxter* is incorrect. Reynolds argues that the trial court's reliance on *Baxter* was misplaced because it turned on the unique circumstances of one particular public park. (Reynolds Gr. Br. 10). *Baxter*, however, turned on the plaintiffs' use and enjoyment of the park and not the fact that it was a charitable trust. *Baxter*, 385 A.2d at 197. *See also Conservation L. Found., Inc. v. Town of Lincolnville*, No. AP-00-3, 2001 WL 1736584, at *4 (Me. Super. Feb. 28, 2001) ("[R]ather than resting on the charitable public trust, the Court [in *Baxter*] held that the plaintiffs had standing because of their use and enjoyment of the resource.").

Finally, Reynolds's assertion that "any member of the general public who claims even the most tenuous connection to the public reserved land in the vicinity of the camp lot Reynolds and his family have leased from BPL may now challenge the validity of his lease in court" (Reynolds Gr. Br. 1) is wrong as a matter of law.

"[S]tanding is not to be denied simply because many people suffer the same injury.... To deny standing to persons who are in fact injured simply because many others are injured, would mean that the most injurious and widespread Government action could be questioned by nobody." *Conservation L. Found., Inc.*, 2001 WL 1736584, at *4 (quoting *United States v. Students Challenging Regul. Agency Procs.* (SCRAP), 412 U.S. 669, 687-88 (1973)). Under the Superior Court's ruling, as in *Baxter*, if someone wanted to challenge Reynolds's camp lot lease as being a reduction or substantial alteration of the public reserved lands—which as demonstrated above would fail for failure to state a claim—then that person would have to show a particularized injury arising from their use of the leased public reserved lands or adjoining lands; Reynolds's exaggerated claim of the expansion of the standing test is totally misplaced.

CONCLUSION

For all these reasons and the reasons set forth in Plaintiffs' principal brief, the Superior Court's judgment vacating the lease should be affirmed.

Dated: January 24, 2022

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CERTIFICATE OF SERVICE

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