

MEMORANDUM

Date: May 8, 2019

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Lambert Coffin

Issue: This memorandum addresses the issue of whether the Central Maine Power's ("CMP") lease with the Bureau of Parks and Lands ("BPL") to construct transmission corridor and facilities across two public reserved land lots is valid without approval of two thirds of the members of each elected House in the Maine Legislature pursuant to Article IX section 23 of the Maine Constitution and Maine statutes governing the use of such lands.

Brief

conclusion: The 2014 lease between CMP and BPL is not valid unless and until it is ratified by two-thirds vote of each House of the Maine Legislature.

I. Brief Factual Background

In December 2014, Central Maine Power ("CMP") entered into a 25-year lease agreement ("the Lease"), renewable in five-year increments with seemingly no limit on the number of renewals, with the Bureau of Parks and Lands ("BPL"), which is part of the Maine Department of Agriculture, Conservation and Forestry. The Lease recites 12 M.R.S. § 1852(4)(A) as BPL's authority to enter such a lease. Section 1852(4)(A) permits BPL to lease its land to utilities, to "[s]et and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips;". The 2014 Lease gives CMP non-exclusive use of a 300-foot wide and one-mile long transmission line corridor located on two parcels of Maine's public reserved lands. The 2014 Lease also grants CMP the right, among other things, to construct and maintain "poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity."

CMP has proposed construction of a new 145-mile, high-voltage, direct current transmission line to Canada. This new transmission corridor as proposed would use the 300-foot corridor through the Johnson Mountain and the West Forks Plantation Northeast parcels in northwest Maine leased in 2014 to CMP: land that is presently forested and largely without any significant permanent structures.

The Johnson Mountain parcel and the West Forks Plantation Northeast parcel are part of the approximately 43,300 acres of public lands known as the Upper Kennebec Region managed by the

BPL.¹ The proposed management plan for these two parcels designates these lands for timber management, wildlife management, and recreation.²

II. Constitutional & Statutory Framework

In November 1993, Maine residents voted to amend the Maine Constitution to protect certain types of Maine land, such as Johnson Mountain parcel and the West Forks Plantation Northeast parcel. The Amendment reads:

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.*

Me. Const. art. IX, § 23 (emphasis added). This ballot question passed with more than 72 percent of the vote. By way of background, Maine has approximately 600,000 acres of public reserved lands that are areas now managed by the BPL.³ 12 M.R.S. § 1803(1)(B).

Following this 1993 amendment that created additional constitutional protections for Maine's public lands, the Legislature enacted a number of statutes related to the constitutional amendment.

In 1994, the Legislature classified public reserved lands as "designated lands" which entitled such lands to certain added protections. 12 M.R.S. § 598-A(2-A)(D). Consistent with the constitutional amendment, the Legislature also passed a statute providing that "designated lands . . . may not be reduced or *substantially altered, except by a 2/3 vote of the Legislature.*" 12 M.R.S. § 598-A (emphasis added). The Legislature defined "substantially altered" as changing the land "so as to *significantly alter physical characteristics* in a way that frustrates the *essential purposes for which that land is held* by the State." 12 M.R.S. § 598(5) (emphasis added). The statute continues on to say that "[t]he 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.* Section 1847 requires that "the public reserved lands be managed to demonstrate exemplary land management practices, including silvicultural, wildlife and recreation management practices." 12 M.R.S. § 1847(1). Under this same subchapter, the legislature defines "multiple use" as:

- A. The 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;

¹ Final Draft of Upper Kennebec Region Management Plan, January 2019, pending adoption by Commissioner of Department of Agriculture, Conservation and Forestry, pgs. 82-83, 98, 104: available at https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/upper_kennebec_region.html (accessed April 26, 2019).

² *Id.* at pg. 98, 104.

³ In 1995, the Legislature established the Bureau of Parks and Lands by consolidating the former Bureau of Public Lands with the former Bureau of Parks and Recreation. The laws pertaining to the two bureaus were located in separate chapters but were subsequently combined, see 12 M.R.S. §§ 1801-1900, so that management of all lands was consolidated in one bureau including numerous statutes regarding public reserved lands, 12 M.R.S.A. §§ 1845-1859. However, the legislative history indicates that the consolidation was not intended in any way to substantively alter or amend the meaning of the statutory provisions.

- B. 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;
- C. That some land will not be used for all of the resources; and
- D. The harmonious and coordinated management of the various resources without impairing the productivity of the land and with consideration being given to the relative values of the various resources and not necessarily to the combination of uses that will give the greatest dollar return or the greatest unit output.

12 M.R.S. § 1845.

With these objectives, the director of BPL is required to create or revise a plan for the management of the public reserved lands, and after “adequate opportunity for public review and comment,” the commissioner of the BPL must adopt a specific plan for each unit of public reserved land. 12 M.R.S. § 1847(2). “The plan must provide for the demonstration of appropriate management practices that will enhance the timber, wildlife, recreation, economic and other values of the lands.” 12 M.R.S. § 1847(2). Further, each plan “must include consideration of the related systems of silviculture and regeneration of forest resources and must provide for outdoor recreation including remote, undeveloped areas, timber, watershed protection, wildlife and fish.” *Id.*⁴

III. Legal Analysis

Pursuant to 12 M.R.S. § 1852, BPL has the authority to lease public reserved land for utilities and rights-of-way in order to “[s]et and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips . . .” *Id.* This authority to lease, however, is necessarily tempered by the constitutional amendment and Section 598-A requiring approval by two-thirds of the legislature if any such lease would allow activity that substantially alters the public land. *See e.g. Melanson v. Belyea*, 1997 Me 150, ¶ 4, 698 A.2d 492, 493 (1997) (“Thus we consider the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.”); *Rubin v. Bd. of Env'tl. Prot.*, 577 A.2d 1189, 1192 (Me. 1990) (“We must interpret a statute in a manner that preserves the meaning of all of the statute's parts.”).

Thus, the question arises: Whether the present, 2014 CMP lease in and of itself, or the build out of CMP's proposed transmission line, constitute a substantial alteration of the use of the public lands that trigger the constitutional requirement to obtain two-thirds approval of the lease by the legislature?

⁴ Before adoption of a management plan, the director must allow “adequate opportunity for review and comment” by the public. 12 M.R.S.A. § 1847(2). “The director may take actions on the public reserved lands consistent with the management plans for those lands and upon any terms and conditions for any consideration the director considers reasonable.” 12 M.R.S.A. § 1847(3).

If yes, then the 2014 Lease is void because BPL acted beyond its statutory authority in executing it. *See Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 12, 868 A.2d 172, 176 (“Subject to equitable defenses ... a governmental action may be challenged at any time, as ultra vires, when the action itself is beyond the jurisdiction or authority of the administrative body to act.”); *see also Brackett v. Town of Rangeley*, 2003 ME 109, ¶ 26, 831 A.2d 422 (“When a public officer or agency exceeds its statutory authority or proceeds in a manner not authorized by law, its resulting orders, decrees or judgments are null and void and may be attacked collaterally.”). In short, is BPL authorized to grant CMP the 2014 Lease rights without legislative approval?

a. The 2014 CMP Lease and BPL public documents fail to address whether CMP’s intended use requires two-thirds legislature approval required by Me. Const. art. IX, § 23 and 12 M.R.S. 598-A.

As an initial matter, whether BPL undertook an analysis regarding its authority enter the Lease pursuant to the amendment and Section 598-A is unclear. The 2014 Lease itself is silent as to any consideration of either. Indeed, the parties specified that the Lease was allowed based on the authority given to the BPL pursuant to 12 M.R.S. 1852(4), yet failed to address whether BPL also had authority to lease the public land pursuant to Section 598-A.

The silence as to BPL’s authority to enter into the 2014 Lease continues in BPL’s Management Plan documents specific to the Upper Kennebec Region. BPL is in the final process of updating the 15-year management plan for the Upper Kennebec Region.⁵ In the Final Draft Plan, which is pending approval by the commissioner, the only reference to the 2014 Lease and CMP’s proposed transmission line in BPL’s 114-page management plan is the following:

A new 300-foot wide by mile-long transmission line lease crossing both lots from north to south was executed with CMP in December 2014; the line has not yet been built.⁶

Additionally, prior to the Final Draft Plan, three public meetings took place as part of this process, held on October 19, 2016, November 17, 2016, and June 20, 2018. Only the November 17, 2016 public meeting included any reference to BPL’s Lease with CMP (with identical language as above), and did not reflect any analysis or discussion about the same.

Despite the absence of an affirmative determination in the Lease, BPL and CMP are clearly aware of the requirements of the Constitution and Section 598-A. For example, the legislative record reflects multiple transactions between BPL and parties obtaining, by resolve a two-thirds majority of the legislature, statutory approval to move forward with land transactions that triggered Section 598-A. Indeed, BPL has even previously obtained such legislative approval to enter into a lease agreement.⁷ Similarly, CMP has also been party to multiple land transactions that required two-thirds legislative approval pursuant to Section 598-A.⁸ Given these histories, the

⁵ Management Plan Documents and public meeting minutes are available at: https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/upper_kennebec_region.html (accessed May 1, 2019).

⁶ Final Draft Plan, pg. 82.

⁷ *See, e.g.* LD 2237 (123rd Legis. 2009) Resolve, Chapter 179, Authorizing the Dept. of Conservation, Bureau of Parks and Lands to Convey Certain Lands and Enter into Certain Leases with the Federal Government.

⁸ *See, e.g.*, LD 1930 (123rd Legis. 2008) (Resolve Chapter 161, Authorizing the Dept. of Inland Fisheries and Wildlife to Convey Certain Lands; LD 1803 (124th Legis. 2010) Resolve, Chapter 209, Authorizing Certain Land Transactions by the

absence of any recognition of Section 598-A's limitations on BPL's leasing authority is conspicuous. Regardless of BPL's position, further investigation is warranted on whether CMP's intended use will substantially alter the Johnson Mountain parcel and the West Forks Plantation Northeast parcel.

b. The 2014 Lease permits significant alteration such that it requires two-thirds Legislative approval pursuant to the Me. Const. art. IX, § 23 and 12 M.R.S. § 598-A.

The essential purpose of public reserved lands is to protect and manage the land in a way that is consistent with its multiple uses, meaning management of renewable resources such as "outdoor recreation, timber, watershed, fish and wildlife and other public purposes." 12 M.R.S. §§ 598(5), 1845, 1847. At issue here, the Johnson Mountain parcel and the West Forks Plantation Northeast parcel are designated for timber management, wildlife management, and recreation uses.

The construction of CMP's transmission corridor would frustrate the purpose of each of the three designated uses for these parcels. The installation and maintenance of the transmission line requires the permanent removal of the forest in the corridor. This would eliminate this area from the timber base of the public reserved lands for the period of the lease (which, by its terms, is renewable in perpetuity) and for decades thereafter until the forest is able to regrow to its previous condition. Such construction and maintenance would be an alternation of the habitat type and would adversely affect those plants and wildlife that live in, use, and/or travel through that one-mile long portion of the public lands parcel. Clearing a mile long, 150-foot wide corridor and erecting 100-foot-tall poles and transmission lines into previously forested public lands would also alter the opportunity for and experience of remote, backcountry recreational uses in that area. In short, the CMP Lease permits the permanent removal of the existing forest in public lands, to be replaced with a permanently maintained open area with a transmission line, on public lands designated for timber, wildlife, and recreation.

The legal error was compounded by the terms of the Lease. The transmission line contemplated in the 300-foot corridor granted in the Lease is a new use for that land. If CMP had been seeking a lease to renew a current use on the land to be leased, the use of Section 1852 by the BPL might have been feasible. CMP's proposal, however, was for a new use of the land and only the Maine Legislature has the authority to determine if that use substantially alters existing uses and whether two-thirds of them think that proposed new use is acceptable.

The entire point of the amendment was to avoid what happened with the lease. The suitability of a use can only be assessed and decided within the context of the land associated with the proposed use. And because the state values its public lands so highly, the constitution was amended to ensure that only our elected representatives make that decision.

CONCLUSION

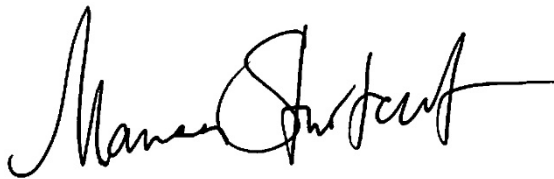
Maine residents voted to amend the Maine Constitution, to require their legislative representatives to review, consider, and approve any use of protected Maine lands that so strays from the intended use of the public reserved land. The people of Maine felt strongly enough about

January 22, 2020
Page 6

this issue to ratify an amendment to the Constitution. This directive cannot be disregarded or misinterpreted.

In sum, the 2014 lease of a 300-foot wide one-mile long corridor through forested public land amounts to a substantial alteration of the use and frustrates these lots' essential purpose as public land. Accordingly, consistent with the vote of Maine citizens, the 2014 CMP Lease is not valid unless and until it has been ratified by two-thirds vote of the members of the Senate and House of the Maine Legislature.

Very truly yours,

A handwritten signature in black ink, appearing to read "Maureen Sturtevant". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Maureen M. Sturtevant

MMS/