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Memorandum

To: Tom Desjardin, Director, Bureau of Parks and Lands

From: Lauren E. Parker, Assistant Attorney General 

Date: July 25, 2018

Subject: Cold Stream Forest

Introduction

You have asked whether the Bureau of Parks and Lands (the BPL), within the Department of Agriculture, Conservation, and Forestry (the DACF), must obtain 2/3 legislative approval, pursuant to either 12 M.R.S.A. § 598-A (Supp. 2017) or 5 M.R.S.A. § 6209(6) (2013), to lease to Central Maine Power Company (CMP) for a transmission line public reserved lands that were acquired with proceeds from the Land for Maine's Future (LMF) Fund (LMF funds). As explained below, 12 M.R.S.A. § 598-A, not 5 M.R.S.A. § 6209(6), applies to the use of public reserved lands that were acquired with LMF funds. Thus, the Bureau may enter into a valid transmission line lease with CMP if such a lease will not "substantially alter" the public reserved lands at issue.

Background

In an application dated September 27, 2017, Central Maine Power (CMP) applied to the Department of Environmental Protection (the DEP) for a permit, pursuant 38 M.R.S.A. § 483-A(1) (Pamph. 2017) (the Site Law), for a high voltage direct current transmission line that would run from Quebec, through Western Maine, to a conversion station in Lewiston. When a development subject to the Site Law is proposed for the unorganized and deorganized areas, the Land Use Planning Commission certifies to the DEP whether the proposed development is an allowed use within the zoning sub-district(s) where it is proposed. 12 M.R.S.A. § 685-B(1)(B-1) (Supp. 2017); 38 M.R.S.A. § 489-A-1 (Pamph. 2017); *see* 12 M.R.S.A. § 682(1) (Supp. 2017) (defining "unorganized and deorganized areas"). CMP's proposed route would cross through several sub-districts zoned by the LUPC as Recreation Protection (P-RR sub-district). In a P-RR sub-district, utility facilities may be allowed by special exception "provided that the applicant shows by substantial evidence that," among other criteria, "there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant." 01-672 C.M.R. ch. 10, § 10.23(I)(3)(d)(8) (2017). The Bureau has identified a possible alternate route for part of CMP's proposed transmission line, which, I understand, would traverse several miles along the

southeastern boundary of the Cold Stream Forest unit of public reserved lands and not be located in a P-RR sub-district.

The Bureau acquired the Cold Stream Forest unit of public reserved lands (Cold Stream Forest) in 2016 with LMF funds and money from the federal Forest Legacy Program.¹ See 5 M.R.S.A. § 6203 (2013) (establishing the LMF Fund); P.L. 2011, ch. 696 (authorizing a bond issuance for the LMF Fund). Cold Stream Forest is part of the Upper Kennebec Region of public reserved lands. Me. Dep't of Agric., Conservation & Forestry, Draft Upper Kennebec Region Management Plan 2 (May 31, 2018). The Bureau acquired Cold Stream Forest "with the primary goal of protecting wild native brook trout habitat, and deer winter habitat." *Id.* at 44. The Bureau will manage Cold Stream Forest pursuant to two habitat management agreements with the Department of Inland Fisheries and Wildlife (the DIFW), the Bureau's multiple use mandate, and a management plan "for multiple uses including outdoor recreation, wildlife habitat, scenic and natural area protection, water quality protection, and production of forest products." *Id.* at 47, 53, 56-57; Trust for Public Land and Me. Dep't of Agric., Conservation & Forestry, Cold Stream Forest: Proposal to the Land for Maine's Future Board 4 (Mar. 28, 2014); see P.L. 2011, ch. 696, § 5(2) ("Land . . . purchased by the State that contains wildlife or fish habitat must be managed by the Department of Conservation using protocol provided by the Department of Inland Fisheries and Wildlife."); 12 M.R.S.A. § 1847 (Supp. 2017) (establishing a multiple use mandate for public reserved lands and requiring a management plan). Because Cold Stream Forest is public reserved land, and was acquired with LMF funds, the Bureau has asked whether 12 M.R.S.A. § 598-A or 5 M.R.S.A. § 6209(6) requires that the Bureau obtain 2/3 legislative approval to lease part of Cold Stream Forest to CMP for a transmission line.

ANALYSIS

Title 12 M.R.S.A. § 598-A and 5 M.R.S.A. § 6209(6) each require 2/3 legislative approval of certain changes in use and conveyances of specified types of public lands. The plain language of 12 M.R.S.A. § 598-A and 5 M.R.S.A. § 6209(6) suggests that each statute applies to a proposed change in use or conveyance of public reserved lands acquired with LMF funds. To determine which statute applies, or whether both statutes apply, it is necessary to review the Bureau's statutes pertaining to public reserved lands, the LMF statutes, and Maine's designated lands statute.

Statutory Framework

1. The Bureau of Parks and Lands – Public Reserved Lands

The DACF, through the Bureau, is one of the State's land-owning agencies. 12 M.R.S.A. §§ 1802, 1803 (Supp. 2017). The Bureau's lands are classified into different categories—state parks and historic sites, public reserved lands, nonreserved public lands, submerged lands and intertidal lands, the Allagash Wilderness Waterway, and public boating facilities. 12 M.R.S.A. §§ 1803(1), 1804(1), (2) (Supp. 2017). Each category of land is subject to its own management directive. 12 M.R.S.A. § 1804(2). Public reserved lands, which include those lands acquired by

¹ This memorandum is limited to addressing state law. It does not opine as to whether a transmission line lease would be allowed pursuant to the federal Forest Legacy Program.

the State and expressly designated as such by the Bureau, are managed pursuant to a multiple use mandate and a management plan.² 12 M.R.S.A. § 1847; *see* 12 M.R.S.A. §§ 1801(8), 1845(1) (defining, respectively, "public reserved lands" and "multiple use"). Public reserved lands are not held strictly for conservation and recreation purposes. Indeed, 12 M.R.S.A. § 1852(4)-(6) (Supp. 2017) authorizes the Bureau to lease public reserved lands for varying purposes, including for electric power transmission, telecommunications, railroad tracks, warehouses, dam sites, and dump sites.

2. Land for Maine's Future

The LMF program is a public land acquisition program funded by bond sales, the proceeds of which are disbursed by the LMF Board. 12 M.R.S.A. §§ 6203, 6206(1)(C), (D) (2013). The LMF program was created in 1987 to facilitate the acquisition and maintenance of "natural areas for recreation, hunting and fishing, conservation, wildlife habitat, vital ecologic functions and scenic beauty."³ 5 M.R.S.A. § 6200 (2013); P.L. 1987, ch. 506. When deciding whether to award funds to an acquisition proposal, the LMF Board considers, among other things, the land's resources and recreational values, including public access. 5 M.R.S.A. § 6207(2), (3) (2013); P.L. 2011, ch. 696, § 5.

To protect the public's investment, land acquired with LMF funds "may not be sold or used for purposes other than those stated in this chapter, unless approved by a 2/3 majority of the Legislature." 5 M.R.S.A. § 6209(6). Electricity generation and transmission are not among the purposes for which the LMF Board funds land acquisitions. *See* 5 M.R.S.A. §§ 6200 & 6207(2), (3). Thus, if 5 M.R.S. § 6209(6) applies to public reserved lands acquired with LMF funds, the Bureau would need 2/3 legislative approval to lease part of Cold Stream Forest to CMP for a transmission line.

3. Designated Lands Statute

In 1993, Maine's Constitution was amended to require 2/3 legislative approval to convey or substantially alter the uses of public lands held for conservation or recreation purposes. Article IX, section 23 of the Maine Constitution states:

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

² The Bureau is in the process of developing its plan for the Upper Kennebec Region, which includes Cold Stream Forest. Prior to adopting a plan, the Bureau must manage Cold Stream Forest in accordance with the Bureau's multiple use mandate. 12 M.R.S.A. § 1847(2); *see also* 12 M.R.S.A. § 1847(3) ("The director may take actions on the public reserved lands consistent with the management plans for those lands and upon any terms and conditions and for any consideration the Director considers reasonable.").

³ Title 5 M.R.S.A. § 6209(2) provides that "[t]itle to all lands acquired pursuant to this chapter must be vested solely in the State." Recent bond authorizations, however, have allowed title to land acquired with LMF funds to be vested in entities that qualify as cooperating entities pursuant to 5 M.R.S.A. § 6201(2) (2013). *E.g.*, P.L. 2011, ch. 696, § 5(1)(B); P.L. 2009, ch. 414, § E-5(2).

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.

Maine's designated lands statute, 12 M.R.S.A. §§ 598 to 598-B (2005 & Supp. 2017), implements Article IX, section 23 of the Maine Constitution. The designated lands statute provides that designated lands "may not be reduced or substantially altered except by a 2/3 vote of the Legislature." 12 M.R.S.A. § 598-A. Both public reserved lands and lands acquired by the State with LMF funds are designated lands. 12 M.R.S.A. § 598-A(2-A)(D), (6). For purposes of the designated lands statute, "substantially altered" means

changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State. . . . The essential purposes of public reserved . . . lands are the protection, management and improvement of those properties for the multiple use objectives established in section 1847. The essential purposes of lands acquired through the Land for Maine's Future Board *that are not held by the Department of Inland Fisheries and Wildlife or by the Department of Agriculture, Conservation and Forestry* are the protection, management and improvement of those lands for recreation, conservation, farming, open space, plant and animal habitat, scenic values, public access and related purposes.

12 M.R.S.A. § 598(5) (Supp. 2017) (emphasis added).⁴

The designated lands statute defines "substantially altered" in reference to the purposes for which the State holds each type of designated lands. When defining the purposes of LMF-funded lands, the designated lands statute incorporates the purposes of the LMF program, but only for those properties that are held by agencies other than the DIFW or the DACF. If the DIFW or the DACF holds the LMF-funded land, the purposes for which the DIFW or the DACF holds that land are the basis for determining whether a use substantially alters it. A proposed transmission line through Cold Stream Forest is therefore measured against the Bureau's multiple use mandate for public reserved lands and its management objectives for Cold Stream Forest, and not against the purposes of the LMF program. Thus, under the designated lands statute, the Bureau may lease part of Cold Stream Forest to CMP for a transmission line without 2/3 legislative approval if the Bureau finds that a transmission line will not alter the physical characteristics of Cold Stream Forest in a way that frustrates the purposes for which the Bureau holds Cold Stream Forest. 12 M.R.S.A. §§ 598(5), 598-A.

⁴ The designated lands statute defines "reduced" to mean: "[A] reduction in acreage of an individual parcel or lot of designated land under 598-A. 'Reduced' does not mean a reduction in the value of the property . . . [nor] does [it] mean the conveyance of an access right by easement in accordance with section 1814-A." 12 M.R.S.A. § 598-A(4). A transmission line lease will not reduce the acreage of Cold Stream Forest owned by the State and, therefore, is not a reduction requiring 2/3 legislative approval.

**12 M.R.S.A. § 598-A, not 5 M.R.S.A. § 6209(6), Applies to Public Reserved Lands
Acquired with LMF Funds**

Because Cold Stream Forest is public reserved land and because Cold Stream Forest was acquired with LMF funds, both 12 M.R.S.A. § 598-A and 5 M.R.S.A. § 6209(6) purport to apply to a transmission line through Cold Stream Forest. But each statute produces a different result: Whereas 5 M.R.S.A. § 6209(6) requires that the Bureau obtain 2/3 legislative approval to run a transmission line through Cold Stream Forest, 12 M.R.S.A. § 598-A would require 2/3 legislative approval of the same use only if the Bureau determines that the transmission line will not alter the physical characteristics of Cold Stream Forest in a way that frustrates the purposes for which the Bureau holds Cold Stream Forest. Title 5 M.R.S.A. § 6209(6) and 12 M.R.S.A. § 598-A produce different results because their respective standards measure the proposed transmission line against different purposes, one of which—the conservation and recreation purposes of the LMF program—is more restrictive than the other—the multiple use mandate of public reserved lands. Where 5 M.R.S.A. § 6209(6) requires 2/3 legislative approval of a transmission line through Cold Stream Forest, and 12 M.R.S.A. § 598-A may not require 2/3 legislative approval of a transmission line through Cold Stream Forest, 5 M.R.S.A. § 6209(6) and 12 M.R.S.A. § 598-A are in conflict. See *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 19, 183 A.3d 749.

"When a more recent amendment to a Maine statute directly conflicts with an older provision, we must, as always determine the intent of the Legislature, and the question becomes whether the older provision has been repealed by implication." *Maine Senate*, 2018 ME 52, ¶ 20, 183 A.3d 749 (quotation marks omitted). This method of statutory construction applies

when a later enactment encompasses the entire subject matter of an earlier act, or when a later statute is inconsistent with or repugnant to an earlier statute. When a later statute does not cover the earlier act in its entirety, but is inconsistent with only some of its provisions, a repeal by implication occurs to the extent of the conflict.

Id. (quotation marks omitted).

At the time the designated lands statute was enacted in 1993, 5 M.R.S.A. § 6209(6) already protected against a sale or change in use of public lands acquired by the State with LMF funds. The more recent designated lands statute protects against the same concerns using different language—"reduced" and "substantially altered"—and covers more types of public lands than does 5 M.R.S.A. § 6209(6).⁵ Although the Legislature could have excluded lands already subject to 5 M.R.S.A. § 6209(6) when enacting the designated lands statute, it chose to include those lands acquired by the State with LMF funds. Additionally, it expressed its intent as to how a proposed change in use of public reserved lands that are acquired with LMF funds and held by the DACF should be evaluated: substantial alteration of those lands is measured against the purposes for which the DACF holds those lands. 12 M.R.S.A. § 598(5). Although the Legislature could have

⁵ The designated lands statute applies only to "real estate held by the State." 12 M.R.S.A. §§ 598(1), (3), 598-A. Title 5 M.R.S.A. § 6209(6) may apply to LMF-funded properties that are not owned by the State. If not, the designated lands statute appears to encompass the entire subject matter of 5 M.R.S.A. § 6209(6).

ascribed the purposes of the LMF program to all lands acquired with LMF funds, including lands held by the DACF, it did not. Instead, it adopted a definition of "substantially altered" that maintains the Bureau's flexibility in managing public reserved lands.⁶ See *An Act to Designate Certain Lands Under the Constitution of the Maine, Article IX, Section 23: Hearing on L.D. 1953 Before the J. Standing Comm. on Energy & Nat. Res.*, 116th Legis. (1994) (testimony of C. Edwin Meadows, Jr., Commissioner of the Department of Conservation). Being the more recent expression of the Legislature as to the use of public reserved lands that were acquired using LMF funds, the designated lands statute "must be deemed a substitute" for 5 M.R.S.A. § 6209(6) when the LMF-funded lands are public reserved lands.⁷ *Maine Senate*, 2018 ME 52, ¶ 23, 183 A.3d 749. Title 5 M.R.S.A. § 6209(6) therefore does not apply to public reserved lands acquired with LMF funds.

Review of Proposed Transmission Line Pursuant to 12 M.R.S.A. § 598-A

The Bureau needs 2/3 legislative approval to lease part of Cold Stream Forest for a transmission line if a transmission line will "substantially alter" Cold Stream Forest. 12 M.R.S.A. § 598-A. A transmission line will "substantially alter" Cold Stream Forest if it "would significantly alter physical characteristics [of Cold Stream Forest] in a way that frustrates . . . the protection, management and improvement of [that] propert[y] for the multiple use objectives" that govern public reserved lands. 12 M.R.S.A. § 598(5). As stated above, the Bureau's multiple use mandate includes the authority to lease public reserved lands for commercial and industrial uses and for the transmission of electricity. 12 M.R.S.A. § 1852(4), (6). That does not mean, however, that a use authorized by 12 M.R.S.A. § 1852 will never "substantially alter" public reserved lands. Rather, such inquiries should be resolved on a case-by-case basis after considering the resources and values of the public reserved lands at issue.

Here, there is no question that a transmission line will alter the physical characteristics of Cold Stream Forest. Such a project entails vegetation removal, surface alteration, and the placement of poles and wires. To determine whether that physical alteration is significant enough to frustrate the purposes for which the Bureau holds Cold Stream Forest, the Bureau must consider the impacts a transmission line will have on wild brook trout habitat, deer wintering habitat, other wildlife and habitat resources, recreational values, and timber harvesting. See *Me. Dep't of Agric., Conservation & Forestry, Cold Stream Forest: Proposal to the Land for Maine's Future Board* (proposing to manage Cold Stream Forest "under the Bureau's multiple use mandate for protection

⁶ In contrast, whether a proposed use of LMF-funded land held by the Department of Marine Resources (the DMR) constitutes a substantial alteration would be measured against the purposes of the LMF program. 12 M.R.S.A. §§ 598(5), 598-A; see 12 M.R.S.A. § 6022(5) (Supp. 2017) (authorizing the DMR to acquire land).

⁷ The Legislature subsequently amended both 12 M.R.S.A. § 598(4)-(5) and 5 M.R.S.A. § 6209(6)-(7) to clarify that the Bureau may grant access rights by easement across a rail trail without obtaining 2/3 legislative approval. P.L. 2011, ch. 278. Those changes, however, do not pertain to public reserved lands. See 12 M.R.S.A. § 1813 (Supp. 2017) (placing rail trails under subchapter 2 of chapter 220, which subchapter pertains to state parks and historic sites and not to public reserved lands).

and enhancement of wildlife habitat, rare or exemplary natural communities, recreation, and timber production"). Additionally, the Bureau and the DIFW must determine whether a transmission line is prohibited by or conflicts with any provision of the Habitat Management Agreements governing the property. P.L. 2011, ch. 696, § 5(2) ("Land . . . purchased by the State that contains wildlife or fish habitat must be managed by the Department of Conservation using protocol provided by the Department of Inland Fisheries and Wildlife."). If, after undertaking that review, the Bureau determines that a transmission line will not frustrate its management of the property for those resources, and the DIFW agrees that a transmission line is not prohibited by or in conflict with the habitat management agreements, the Bureau may enter into a valid transmission line lease with CMP without obtaining 2/3 legislative approval.

Conclusion

Title 12 M.R.S.A. § 598-A, not 5 M.R.S.A. § 6209(6), applies to the Bureau's possible lease of Cold Stream Forest to CMP for a transmission line. If the Bureau determines that a transmission line will not "substantially alter" Cold Stream Forest, it does not need 2/3 legislative approval to enter into a valid transmission line lease with CMP.