STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
OFFICE OF THE COMMISSIONER
22 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

TESTIMONY BEFORE THE JOINT COMMITTEE ON AGRICULTURE, CONSERVATON AND FORESTRY

OPPOSED TO LD 471

An Act to Require Legislative Approval for Certain Leases of Public Lands

March 18, 2021

Senator Dill, Representative O'Neil, and honorable members of the Joint Standing Committee on Agriculture, Conservation and Forestry, my name is Andy Cutko, and I am the Director of the Department of Agriculture, Conservation and Forestry's Bureau of Parks and Lands. I am speaking on behalf of the Department in opposition to LD 471, "An Act to Require Legislative Approval for Certain Leases of Public Lands."

LD 471 would do two things. First, it would require 2/3 legislative approval of certain utility and other leases across public reserved lands; BPL has taken the position in the pending *Black v. Cutko* litigation that such approval is not required by the Maine Constitution Article IX, Section 23, and the Designated Lands Act (Title 12 M.R.S. §598-A). Second, LD 471 would apply retroactively to September 16, 2014. For the reasons discussed below, we advise that the Legislature not amend 12 M.R.S. §1852(4) to require 2/3 legislative approval of utility leases over public reserved lands.

As you may be aware, the Superior Court issued an order yesterday that disagreed with the Bureau's position as to whether leases issued pursuant to 12 M.R.S. §1852(4) are subject to 2/3 legislative approval. The court also held that it is for the Bureau to decide whether leases issued pursuant to 12 M.R.S. §1852(4) substantially alter the uses of public reserved lands. The ruling yesterday is just one component of this ligitation that will continue to play out in court.

The Bureau's professional knowledge and experience with its land base and management plans is instrumental in determining whether a utility lease is consistent with the existing management intent of the public lot. Pursuant to the management planning requirements of Title 12 M.R.S. §1847, the Bureau's forest and land management staff receive public input and determine the range of public uses appropriate for each public lot. A utility lease, for example, may be compatible with public reserved land allocated primarily for timber management, such as the West Forks Plantation and Johnson Mountain Township public lots, but not with public reserved land allocated primarily as a Special Protection Area. For the Committee's reference, the Bureau's decision-making process with respect to leasing a small part of the West Forks

HARLOW BUILDING
18 ELKINS LANE
AUGUSTA, MAINE

DEPARTMENT OF Agriculture Conservation & Forestry

PHONE: (207) 287-3200
FAX: (207) 287-2400
WEB: WWW.MAINE.GOV/DACF

Plantation and Johnson Mountain Township is described in the attached memorandum from September 24, 2020. Fundamentally, familiarity with these kinds of nuances and the technical expertise of Bureau staff makes our staff best qualified to weigh these uses and make such determinations according to state statutes and rules.

Second, the Legislature's potential reconsideration of a lease negotiated in good faith years ago sets a dangerous precedent and undermines public confidence in agency rules and decisions and the consistency by which they are applied and upheld. The Bureau has issued four leases that would presumably be impacted by this legislation. A lease initially approved years ago likely provides the lessee with vested rights, raising questions about the constitutionality of a retroactive application of LD 471 to the CMP lease and other leases issued by the Bureau pursuant to 12 M.R.S. §1852(4). Moreover, a retroactive reversal could significantly deter future project development, including renewable energy, across the agency and regulatory spectrum.

Third, the bill establishes no size threshold for what constitutes a "substantial alteration" pursuant to Title 12 M.R.S. §598-A. Accordingly, the legislation could have unintended consequences for minor leases, including one or two-pole connections to residential leased camps or guy-wire attachments needed for abutting utility lines.

Finally, the bill may conflict with the Maine Constitution. A similar bill in 1999 (119th Legislature, LD 383) would have amended 12 M.R.S. §1852(7) to require 2/3 legislative approval of leases of public reserved land to the federal government. That 1999 bill was determined to be unconstitutional by the Revisor's Office. Because of the similarities to that bill, the Committee may wish to to consult with the Revisor's Office regarding the constitutionality of the 119th Legislature's L.D. 383 if LD 471 moves forward.

The Bureau has approved one major utility corridor lease since 2014: a lease to Central Maine Power across Johnson Mountain and West Forks Townships. This lease was initially granted in 2014 and was revised and amended in June 2020. As noted above, the Bureau's lease to CMP is the subject of a lawsuit, *Black v. Cutko*, pending in the Superior Court's Business and Consumer docket (No. BCD-CV-20-29). The court is reviewing whether the Bureau's lease to CMP is valid. Because a court is reviewing the legality of that lease, the Department respectfully requests that this legislation be tabled until there is a final decision in this case. Furthermore, there is an abundance of documentation in the legal briefs for the case, including a lengthy Administrative Record and materials provided in response to multiple Freedom of Access Act requests, that relate to the justification for the Bureau issuing the lease without the need for Legislative approval. These documents are publicly available and may be provided to the Committee upon request.

Thank you for your careful consideration of this legislation.