



and the Department informed the Court they take no position on the issue of standing.

Plaintiffs are represented by Attorneys James Kilbreth, David Kallin, Adam Cote, and Jeana McCormick. Defendants Andy Cutko and BPL are represented by Assistant Attorneys General Lauren Parker and Scott Boak. Defendant CMP is represented by Attorneys Nolan Reichl and Matthew Altieri.

### **LEGAL STANDARD**

When reviewing a motion to dismiss under Rule 12(b)(6), the Court “consider[s] the facts in the complaint as if they were admitted.” *Bonney v. Stephens Mem’l Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed “in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). “Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that [it] might prove in support of [its] claim.” *Id.*

The standard applicable to a Rule 12(b)(1) motion to dismiss for lack of standing is different than that applicable to a Rule 12(b)(6) motion for failure to state a claim. *Mun. Review Comm. v. USA Energy Grp., LLC*, No. BCD-CV-15-22, 2015 WL 4876449, at \*2 (Me. B.C.D. June 3, 2015). Because this Court’s subject matter jurisdiction depends on each Plaintiff’s standing, the Court “make[s] no favorable inferences in favor of the plaintiff such as [it does] when reviewing a motion to dismiss for failure to state a claim . . . .” *Tomer v. Me. Human Rights Comm’n*, 2008 ME 190, ¶ 9, 962 A.2d 335.

### **DISCUSSION**

MAPA provides a right to judicial review for parties “aggrieved” by final agency action pursuant to 5 M.R.S. § 11001. A person is considered aggrieved for the purposes of MAPA “if

that person has suffered particularized injury—that is, if the agency action operated prejudicially and directly upon the party’s property, pecuniary, or personal rights.” *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378 (citing *Storer v. Dep’t of Envtl. Prot.*, 656 A.2d 1191, 1192 (Me. 1995)). Generally, “the injury suffered must be distinct from any suffered by the public at large and must be more than an abstract injury.” *Id.* Courts examine the issue of standing in context to determine whether the asserted effect on the party’s rights genuinely flows from the challenged agency action. *Id.* In this matter, the Plaintiffs can be divided into three distinct groups, each asserting their own injuries stemming from the Leases granted by BPL: 1) Private Citizen Plaintiffs; 2) the National Resources Council of Maine (“NRCM”); and 3) Current and Former State Legislators (“Legislator Plaintiffs”). Whether or not each group has suffered particularized injury such that it qualifies as aggrieved under MAPA will be addressed in turn.

#### **I. Private Citizen Plaintiffs**

The first category of plaintiffs is a group of private citizens who claim a variety of personal and professional uses of the public reserve land subject to the Lease, as well as the surrounding area. In total, the group amounts to ten individuals: Edwin Buzzell, Greg Caruso, Charlene Cummings, Robert Haynes, Cathy Johnson, Ron Joseph, John R. Nicholas Jr., George Smith, Clifford Stevens, and Todd Towle.

Plaintiffs assert that, as a matter of course, members of the public who use public lands have standing to challenge a lease on those reserved lands. Despite this, the Law Court has never established a definitive right for members of the public to challenge the State’s management of public lands, based on being members of the public alone. However, in *Fitzgerald v. Baxter State Park*, the Law Court addressed the meaning of “particularized injury” as it relates to private citizens’ standing to challenge aspects of public land management. *Fitzgerald v. Baxter State Park*,

385 A.2d 189, 196 (Me. 1978).<sup>2</sup>

In *Fitzgerald*, five individual plaintiffs sought injunctive relief restraining the Baxter State Park Authority (the “Authority”) from the use of heavy equipment when cleaning up areas of timber blow-down in the park. *Id.* at 194. On appeal to the Law Court, the central issue was whether the “five individual plaintiffs, as Maine citizens, domiciliaries, voters and property owners, and actual *users* of Baxter State Park” had standing to challenge the Authority’s management decisions. *Id.* at 196. To make such a determination, the Law Court considered the plaintiffs’ allegations to determine whether the plaintiffs suffered particularized injury.

Crucial to the Law Court’s determination were the allegations made by each of the plaintiffs that they had substantially used Baxter State Park in the past and planned to use it substantially in the future. *Id.* at 197. Because the plaintiffs had established their actual use of the park, the Law Court stated that the plaintiffs’ allegations established “a direct and personal injury . . . to their interest in Baxter State Park, which, although not an economic interest in the sense of involving their livelihood or financial liability, is nonetheless worthy of protection of the law.” Thus, the Law Court decided the plaintiffs had suffered a particularized injury and had standing.<sup>3</sup>

In the matter currently before the Court, the public reserved lands subject to the Lease are kept as a public trust, and full and free public access to the public reserve lands is the privilege of every citizen of the State. 12 M.R.S. § 1846(1). To this end, the State, for the public benefit, has

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<sup>2</sup> CMP takes issue with Plaintiffs’ argument that standing is “prudential” and not statutory, and that this Court must consider the issue standing within the confines of Rule 80C jurisprudence. *Fitzgerald* was not a Rule 80C action, but the Law Court nevertheless held the Plaintiffs to the standard of whether they were “aggrieved” in the sense of having suffered “particularized injury.” The Court therefore disagrees with CMP that *Fitzgerald* has little or nothing to offer the Court in conducting the standing analysis in this case.

<sup>3</sup> The Law Court also stated, “[a]ny citizen of Maine who shows himself to have suffered ‘particularized injury’ as a result of the action of the Baxter State Park Authority has standing to obtain judicial review and to seek injunctive relief against that proposed action.” *Id.* at 197.

vested title, possession, and the responsibility for the management of the public reserved lands in the BPL. 12 M.R.S. § 1847(1). This arrangement is not unlike the relationship between Baxter State Park and the Authority in *Fitzgerald*, where the Law Court noted that the Legislature created the Authority by statute to manage and regulate use of the park in accordance with “the grand design of Governor Baxter’s gift to the people of Maine.” *Fitzgerald*, 385 A.2d at 195. Importantly, the Court in *Baxter* held that by force of *statute*, any action by the Authority in operating Baxter State Park was both an action by the trustee of a charitable trust of which the Authority is the agent, and was also a governmental action in carrying out the mission and mandate imposed by statute. *Id.*

Here, the Private Citizen Plaintiffs make allegations almost identical to those made by Plaintiffs in *Fitzgerald*. For instance, Mr. Buzzell has alleged that in his work as a commercial whitewater rafting outfitter and registered Maine Guide, he has engaged in business and recreation in and around the public reserved land subject to the Lease. (First Amnd. Compl. ¶ 17.) Many of the other plaintiffs have alleged that they use lands in and around the public reserve lands subject to the Lease for recreation, while others (Mr. Smith, Mr. Joseph, and Ms. Cummings) have asserted that they use, and will continue to use, the lands for both scientific and journalistic purposes. (First Amnd. Compl. ¶¶ 19, 22, 24.) 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 reserve land, resulting in harm to their continued use. Applying the Law Court’s analysis in *Fitzgerald* to the Private Citizen Plaintiffs’ allegations, the Court finds a particularized injury, such that the Private Citizen Plaintiffs are aggrieved under 5 M.R.S. § 11001. Accordingly, the Private Citizen Plaintiffs have standing in this matter.<sup>4</sup>

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<sup>4</sup> In addition to the plaintiffs described as “Private Citizen Plaintiffs,” Former State Senate President Richard Bennett has asserted a history of engaging in recreational activities on Maine’s public lands and plans to

## **II. The Natural Resources Council of Maine**

The second category of plaintiffs is a single organization, the NRCM. It alleges that its members have “used and plan to continue to use, the public reserved land in and around Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides.” (First Amnd. Compl. ¶ 16.) “An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, and the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Conservation Law Found. v. Town of Lincolnville*, No. AP-003, 2001 WL 1736584, at \*6 (Me. Super. Ct. Feb. 28, 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. Inc.*, 528 U.S. 167, 180 (2000)).

The Natural Resources Council of Maine is a non-profit organization that has a stated mission of “protecting, restoring, and conserving Maine’s environment, now and for future generations.” A number of the Private Citizen Plaintiffs, already determined to have standing, are also members of the Natural Resources Council of Maine. Likewise, the claims at issue, seeking the invalidation of leases of public reserved lands, are undoubtedly germane to the organization’s purpose of conserving Maine’s environment. Accordingly, the NRCM has standing to proceed in this matter.

## **III. Current and Former Maine Legislators**

The third and final category of plaintiffs in this matter is the Legislator Plaintiffs. CMP relies upon federal case law pertaining to the Article 3 standing of members of Congress to challenge institutional injuries. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997); *Coleman v. Miller*,

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continue doing so. As such, Mr. Bennett has standing in this matter regardless of the Court’s determination regarding current and former Maine legislators.

307 U.S. 433, 436 (1939). Maine Courts have not previously decided when, or if, individual legislators have standing to sue for institutional injuries. The closest the Law Court has come to the issue was to assume without deciding that the Maine Senate had standing to bring State statutory and constitutional challenges to Maine's system of Rank Choice Voting (RCV). *See Senate v. Sec'y of State*, 2018 ME 52, ¶ 25, 183 A.3d 749.<sup>5</sup>

The Court, however, need not resolve the question at this stage because it finds that both the Private Citizen Plaintiffs and the NRCM have standing to challenge the BPL's alleged unconstitutional lease of public reserved land and this case will be moving forward. The Court also recognizes that some of current or former state legislators are on the ballot in the November 3<sup>rd</sup> election. The Court could revisit the question of whether Legislator Plaintiffs have standing after the election, after it rules on the other pending motions to dismiss, and should either or both of the parties wish to press the issue.

## CONCLUSION

For the reasons stated above, this Court finds that the Private Citizen Plaintiffs' substantial prior use and plans for continued use of the public reserved land subject to the Leases amount to a particularized injury such that they have standing to sue and enforce their rights. Likewise, because members of the NRCM have standing to sue as individuals for reasons germane to the organization's mission, the NRCM also has standing in this matter. Finally, the Court defers judgment on the standing of the Legislative Plaintiffs until after the upcoming November 3<sup>rd</sup> election and after it rules on the other pending motions to dismiss.

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<sup>5</sup> CMP noted in oral argument that (and as the Court also recalls) in the RCV case the Senate as a whole voted to permit the named Senators to bring that Declaratory Judgment action. It does not appear that any such vote occurred in this matter.

The entry will be: Defendant CMP's Motion to Dismiss for lack of standing is denied.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

October 30, 2020  
DATE

/s  
M. Michaela Murpy  
Justice, Business and Consumer Docket