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Subject: The Constitutionality of the Department of Public Land's Expenditure of Revenues from Public Lands to Cover its Operating Expenses.

Opinion of the Attorney General

I. QUESTIONS PRESENTED

Whether the Legislature may appropriate to the Department of Public Lands supplemental funding in excess of the original budget amount allocated to DPL under Public Law 20-11 from the DPL Operations Fund for Fiscal Year 2018.

II. SHORT ANSWER

No. The Supreme Court in *Dep't of Pub. Lands v. Commonwealth* has held that the Constitution presently requires all revenues generated from public lands to be transferred to MPLT.¹ Any statute or regulation that would deprive MPLT of the revenue from public lands violates the Article XI, Section 6 of the Constitution. *Id.* As such, based on a broad interpretation of DPL, 4 CMC § 2803(c) violates Article XI, Section 6 of the Constitution by depriving MPLT of revenues generated from public lands. Section 2803(c) requires each year for DPL to deposit all revenues generated from public lands into the DPL Operations Fund, pay DPL's operational expenses inclusive of any debts, liabilities and obligations" from the DPL Operations Fund, and remit the remaining funds to MPLT. *See* 4 CMC § 2803(c)(1)² and Section 2803(c)(3).³ Funding for DPL's operational expenses and other obligations must be appropriated by the Legislature using other funds.

Even if Section 2803(c) were to survive constitutional scrutiny, unobligated and unappropriated funds such as those contemplated for supplemental appropriation to DPL in FY 2018, cannot be appropriated by the Legislature. The funds must be transferred to MPLT. MPLT is the final

¹ *Dep't of Pub. Lands v. Commonwealth*, 2010 MP 14 ¶ 30.

² "All revenues received by the Department, from whatever source shall be deposited in the DPL Operations Fund bank account(s) in banks located in the Commonwealth that are insured by the FDIC." 1 CMC § 2803(c)(1).

³ "All debts, liabilities, obligations and operational expenses of the Department including land compensation judgments shall be paid from the DPL Operations Fund bank account(s)." 1 CMC § 2803(c)(3).

recipient of all revenues generated from public lands. A supplemental appropriation to DPL would contravene the constitutional mandate that funds be ultimately transferred to MPLT for investment. *See Dep't Pub. Lands* at ¶ 32.

III. FACTS

A. Historical Background

As originally ratified in 1977, Article XI of the Constitution created two entities involved in public lands: the Marianas Public Land Corporation (“MPLC”) and MPLT. While MPLT was established as a permanent constitutional institution, MPLC’s existence was only guaranteed for 10 years, at which point the Legislature could dissolve MPLC and transfer its functions to the executive branch upon a two-thirds affirmative vote in both houses of the Legislature.⁴ Section 4(f) was amended by the Second Constitutional Convention Amendment 32 to guarantee MPLC’s existence for 12 years, but made its dissolution mandatory.⁵

In 1994, Governor Froilan C. Tenorio issued Executive Order 94-2, which dissolved MPLC and transferred its functions to the Department of Lands and Natural Resources’ Division of Public Lands.⁶ Thereafter, the Legislature transferred functions of MPLC to a number of different successor agencies.⁷ Ultimately, the Legislature passed Public Law 15-2 which created the Department of Public Lands in 2006.⁸

Each of MPLC’s statutory successor agencies has been granted more or less the same “fundamental policies” as found in Article XI, Section 5.⁹ MPLC’s “fundamental policies” included the following provision:

The corporation shall receive all moneys from the public lands except those from lands in which freehold interest has been transferred to another agency of government pursuant to section 5(b), and shall transfer these moneys after the end of the fiscal year to the Marianas Public Land Trust *except that the corporation shall retain the amount necessary to meet reasonable expenses of administration and management, land surveying, homestead development, and any other expenses reasonably necessary for the accomplishment of its functions.* The annual budget

⁴ NMI CONST. art. XI, § 4(f) (amended 1985).

⁵ NMI CONST. art. XI, § 4(f).

⁶ Exec. Order 94-3, 1 CMC § 2001 cmt. (Aug. 23, 1994).

⁷ *See* PL 10-57 (Board of Public Lands under the Department of Lands and Natural Resources), PL 12-33 (Board of Public Lands as an independent agency), PL 12-71 (Marianas Public Lands Authority).

⁸ PL 15-2, *codified at* 1 CMC §§ 2801–2810.

⁹ PL 10-57, § 3, *codified at* 1 CMC § 2674(i); PL 12-33, § 3, *codified at* 1 CMC § 2805(h); PL 12-71, § 2(c), *codified at* 1 CMC § 2805(h).

of the corporation shall be submitted to the legislature for information purposes only.¹⁰

Section 2803(c), the current iteration of this policy, provides:

(c) There is hereby established a fund to be known as the “DPL Operations Fund” which shall be maintained by the Department of Finance. The bank account(s) for the DPL Operations Fund shall be separate and apart from the General Fund Bank Account(s) and other funds of the Commonwealth Government. All records and accounts shall be maintained in connection herewith.

- (1) All revenues received by the Department, from whatever source shall be deposited in the DPL Operations Fund bank account(s) in banks located in the Commonwealth that are insured by the FDIC.
- (2) All appropriations by the Commonwealth shall be allotted for authorized disbursement of expenditures as approved in the budget.
- (3) All debts, liabilities, obligations and operational expenses of the Department including land compensation judgments shall be paid from the DPL Operations Fund bank account(s).
- (4) No expenditures not included in the approved budget, and no debt, obligation, or liability shall be incurred or created in any fiscal year, in excess of the amounts specified therein for each purpose.¹¹

Section 2803(c)(1) requires all revenue received by DPL, irrespective of source, to be deposited into the DPL Operations Fund. This necessarily includes revenues received from public lands,¹² but the language “from other sources” anticipates additional revenues separate and apart from public land.

In 2009, the legislature passed Public Law 16-31, which mandated that DPL pay land compensation judgments rendered against the central government using revenues generated from the DPL Operations Account.¹³ The Attorney General and DPL certified a question to the Supreme Court under Commonwealth Constitution Article IV, Section 11¹⁴ regarding whether not PL 16-

¹⁰ NMI CONST. art. XI, § 5(g) (emphasis added).

¹¹ 1 CMC § 2803(c)(1)–(4).

¹² 1 CMC § 2803(a).

¹³ PL 16-31.

¹⁴ Article IV, Section 11 provides:

Certified Legal Questions. Whenever a dispute arises between or among Commonwealth officials who are elected by the people or appointed by the governor regarding the exercise of their powers

31's mandate violated Article XI, Section 5(g). The Supreme Court ruled that while Article XI, Section 5(g) was no longer operative,¹⁵ Public Law 16-31 violated MPLT's constitutional right and duty to collect and invest the revenues generated from public lands.¹⁶ In dicta, the Court noted that the provisions of 1 CMC § 2803(c) may also violate MPLT's right to the revenue from public lands, but that it lacked jurisdiction to decide the issue because the parties had not certified that question to the Court.

B. DPL Operations Fund

1. Appropriation of the Fund

Since the passage of PL 15-2 (DPL's enabling statute) and the establishment of the DPL Operations Fund, the Legislature has identified for each fiscal year the estimated revenue to be deposited into the fund and has fully appropriated the estimated revenue amount as follows:

Table 1

Public Law (FY)	Personnel	Operations	MPLT	TOTAL
PL 15-28 (FY 2007)	\$2,029,266	\$1,189,591 ¹⁷	\$500,000	\$3,718,857
PL 16-32 (FY 2009) ¹⁸	\$1,962,034	\$631,840	\$500,000	\$3,093,874
PL 17-21 (FY 2011)	\$1,765,104	\$1,055,782	-0-	\$2,820,886
PL 17-55 (FY 2012)	\$2,120,855	\$845,161	-0-	\$2,966,016
PL 17-85 (FY 2013)	\$1,850,647	\$1,283,763	-0-	\$3,134,410
PL 18-18 (FY 2014)	\$2,018,750	\$3,242,046 ¹⁹	-0-	\$5,260,796
PL 18-66 (FY 2015)	\$1,991,910	\$1,407,528	-0-	\$3,399,438
PL 19-8 (FY 2016)	\$2,177,917	\$1,454,270	-0-	\$3,632,187
PL 19-68 (FY 2017)	\$2,186,405	\$2,997,971	-0-	\$5,184,376
PL 20-11 (FY 2018)	\$2,672,042	\$2,182,002	-0-	\$4,854,044
PL 20-67 (FY 2019)	\$2,884,136	\$1,666,317	-0-	\$4,550,453

or responsibilities under this constitution or any statute, the parties to the dispute may certify to the supreme court the legal question raised, setting forth the stipulated facts upon which the dispute arises. The supreme court may deny the request to rule on the certified legal question. If the request is accepted, then the ruling of the supreme court shall be binding upon the parties before the court.

¹⁵ *Dep't of Pub. Lands*, 2010 MP 14 ¶ 23.

¹⁶ *Id.* ¶ 30.

¹⁷ The Operations budget includes \$1.12 million for "homestead planning/infrastructure."

¹⁸ There was no approved budget appropriation act for FY 2008 and thus, the Commonwealth Government was funded through continuing appropriation based on FY 2007 budget appropriation act.

¹⁹ From Operations, \$2 million was allocated for "homestead development" and \$99,360 for "utilities."

As illustrated above, beginning FY 2011, the annual budget appropriation for DPL did not include any funding for MPLT. The entire estimated revenue to be generated from public lands was appropriated to DPL for its operational expenses.

2. DPL Revenue and Expenditures from financial audits of FY 2011 to 2017

A review of the financial audits of DPL from FY 2011 to 2017²⁰ shows that the actual revenues collected and the expenditures for DPL differed significantly from the estimated and appropriated amounts set forth in the annual budget acts. The table below reveals that DPL has consistently underspent below its approved funding level. Except for FY 2014, the estimated revenues were below the actual revenues collected from public lands.

Table 2

Fiscal Year	Approved Estimated Revenues	Audited Actual Revenues	Approved Expenditures	Audited Actual Expenditures
2011	\$2,820,886	\$3,961,746	\$2,820,886	\$2,694,812
2012	\$2,966,016	\$3,485,472	\$2,966,016	\$2,933,931
2013	\$3,134,410	\$3,559,246	\$3,134,410	\$2,775,158
2014	\$5,260,796	\$4,014,484	\$5,260,796	\$2,986,980
2015	\$3,399,438	\$5,476,188	\$3,399,438	\$2,968,612
2016	\$3,632,187	\$7,162,004	\$3,632,187	\$2,563,836
2017	\$5,184,376	\$7,967,041	\$5,184,376	\$4,052,297

DPL's underspending and lowballing of revenue estimates has resulted in a growing fund balance for the DPL Operations Fund as illustrated below. In six years, the year-end fund balance grew by more than 100% from \$4,966,016 in FY 2011 to \$10,975,000 in FY 2017.

Table 3

Fiscal Year	Year-end Fund Balance
2011	\$4,966,016
2012	\$5,134,410
2013	\$5,242,046
2014	\$4,819,530
2015	\$4,467,773
2016	\$7,019,860
2017	\$10,975,000

²⁰ No earlier financial audits of DPL were found on the website of the CNMI Public Auditor, only those for FY 2011-2017.

3. Transfers to MPLT from financial audits of 2011 to 2017

As stated, beginning FY 2011, the annual budget appropriation act for the Commonwealth Government did not include a specific appropriation from the DPL Operations Fund for MPLT. Notwithstanding the absence of such a provision, from 2011 to 2016, DPL has transferred funds to MPLT as shown below:

Table 4

Date	Funds transferred to MPLT
Nov. 1, 2011	\$1,000,000
Dec. 31, 2013	\$307,109
Dec. 29, 2014	\$5,000,000
Mar. 28, 2016	\$800,334

C. DPL's fiscal practices

As stated, DPL has spent less than the funding level approved in the annual budget appropriation acts from FY 2011 through 2017. In addition, except for FY 2014, DPL has collected far more in revenues than the estimated sums identified in the annual budget appropriation acts. With a lowball budget estimate and underspending, the fund balance in the DPL Operations Fund has more than doubled in six years. As of September 30, 2017, the fund balance was \$10,975,000. DPL justifies maintaining such a significant balance to fund a reserve for homestead development, the subsequent year's approved budget, and other matters to be funded in the future. Any amounts due MPLT will then equal what DPL has determined to be its "unreserved fund balance." DPL has recorded that it owes MPLT for FY 2016 the sum of \$866,339; and for FY 2017, the sum of \$1,501,174.

IV. ANALYSIS

A. DPL is not entitled to supplemental funding because 4 CMC § 2803 is unconstitutional

The legal basis for DPL's use of public land revenues to pay for its operating expenses is derived from 4 CMC § 2803. Applying the Supreme Court's reasoning in *Dep't of Pub. Lands*, section 2803 violates Article XI of the Commonwealth Constitution by depriving MPLT of the revenue generated from public lands. The Supreme Court held that the "fundamental policies" set forth in Article XI, Section 5 expired when MPLC was dissolved and its functions transferred to the executive branch.²¹ However, the Court held that MPLT's right to receive the revenues generated from public lands pursuant to Article XI, Section 6 survived MPLC's dissolution.²² Therefore, absent authorization from elsewhere in the Constitution, the legislature's attempt to require DPL to pay land compensation judgments from the revenues generated from public lands violated the

²¹ *Dep't of Pub. Lands*, 2010 MP 14 ¶ 23.

²² *Id.* ¶ 30.

Constitution.²³ Applying *Dep't of Pub. Lands'* reasoning to DPL and the legislature's current interpretation of Section 2803(c) leads to the same result: the expenditure of revenues generated from public lands on DPL's operating expenses is not authorized by any portion of the Constitution and therefore violates Article XI, Section 6.

1. The Fundamental Policies in Article XI, Section 5 Are No Longer Operative.

The first step in the analysis is to consider the Supreme Court's reasoning for its holding that Article XI, Section 5's "fundamental policies" are no longer operative. This step is vital because Article XI, Section 5(g) is the only possible source of authority for withholding operating expenses from the revenue generated from public lands before it is transferred to MPLT. The *Dep't of Pub. Lands* Court supported its holding that Article XI, Section 5's "fundamental policies" were no longer constitutionally operative by considering the Constitutional text and drafting history.

The Court reasoned that Article XI's use of the terms "responsibility" and "functions" on the one hand and "policies" on the other supported the conclusion that Article XI, Section 5 was no longer operative. Article XI, Section 3 provides: "The management and disposition of public lands except those provided for by section 2 shall be the *responsibility* of the Marianas Public Land Corporation."²⁴ Article XI, Section 4(f) provides: "After this Constitution has been in effect for at least twelve years, the Corporation shall be dissolved and its *functions* shall be transferred to the executive branch of government."²⁵ Finally, Article XI, Section 5 provides, in relevant part: "The Marianas Public Land Corporation shall follow certain fundamental *policies* in the performance of its *responsibilities*."²⁶ Reading Sections 3, 4, and 5 as a whole, the Court explained: "it is clear that the fundamental policies contained in Section 5 were intended by the drafters to be particularized tools to be used by the Corporation to fulfill its constitutional functions set forth in Section 3."²⁷ Therefore, the "functions" that were transferred to the executive branch were "the management and disposition of public lands," whereas the "policies" contained in Section 5 expired upon MPLC's dissolution.²⁸

The Committee Reports for the First Constitutional Convention and Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands ("Analysis")²⁹ supported the holding that

²³ *Id.* ¶ 30.

²⁴ NMI CONST. art. XI, § 3 (emphasis added).

²⁵ NMI CONST. art. XI, § 4(f) (emphasis added).

²⁶ NMI CONST. art. XI, § 5 (emphasis added).

²⁷ *Dep't of Pub. Lands*, 2010 MP 14 ¶ 18.

²⁸ *Id.*

²⁹ "The Analysis is a memorandum, approved by the Constitutional Convention following the adoption of the constitution in 1976, that provides an explanation of each section in the Commonwealth Constitution and summarizes the intent of the Convention in approving each section." *Dep't of Pub. Lands*, 2010 MP 14 ¶ 7. The Supreme Court

the “fundamental policies” contained in Article XI, Section 5 expired. First, the Court cited the portion of the Committee on Personal Rights and Natural Resources’ report concerning Article XI, Section 4(f):

*The Committee believes that much of the work with respect to the public lands may be completed within 10 years. Much of the land available for homesteading may have been transferred by that time; other portions of the land may be under long-term leases that will not be renegotiated for some years; and public uses for parks and other recreational, historic preservation, and scenic uses will have been established. The Committee recommends that a Corporation structure be used, in part, because it is easier to dismantle when it is no longer needed.*³⁰

The Court noted that the long-term leases and homesteading mentioned in the quoted text were both part of the “fundamental policies” in Section 5 that “would eventually run their course.” Similarly, the Court explained that “the Analysis indicates that when the Corporation is dissolved and a successor entity is created to take on the mantle of administering the public lands, the legislature will have a choice whether to continue the program.”³¹ The Supreme Court therefore held that the fundamental policies in Section 5 were no longer constitutionally operative.³²

Because Article XI, Section 5 is no longer constitutionally operative, its provisions cannot be used as authorization to deprive MPLT of the revenue generated from public lands. In so holding, the Court cautioned: “The legislature and executive branch are . . . free to set the policies for the body tasked with the management and disposition of public lands as they see fit, *provided that they do so within their constitutional limitations.*”³³

2. Any Diversion of Revenues Generated from Public Lands that Is Not Authorized by the Constitution Violates Article XI, Section 6.

The second step in the analysis is to consider the constitutional duties and functions of MPLT, and how the enumeration of those duties and functions bind the legislature and executive branch. Article XI, Section 6 vests MPLT with “receiving and investing the revenues from public lands for the benefit of people of Northern Marianas Descent.”³⁴ This binds the legislature and executive branch in two important respects. First, the legislature cannot pass a law that conflicts with the

has described the Analysis as “is extremely persuasive authority when one is called upon to discern the intent of the framers when the language of the Constitution presents an ambiguity.” *Rayphand v. Tenorio*, 2003 MP 12 ¶ 71.

³⁰ *Dep’t of Pub. Lands*, 2010 MP 14 ¶ 22 (quoting COMM. RECOMMENDATION NO. 5, (Nov. 4, 1976), reprinted in 2 JOURNAL OF THE N. MAR. CONST. CONVENTION 523 (1976)) (emphasis added).

³¹ *Id.* ¶ 22 (citing Analysis of the Constitution at 152).

³² *Id.* ¶ 23.

³³ *Id.* (emphasis added).

³⁴ *Dep’t of Pub. Lands*, 2010 MP 14 ¶ 35.

Constitution.³⁵ Second, neither the legislature nor the Governor can delegate or transfer the functions of constitutional institutions to another government entity.³⁶

The reasoning in the body of *Dep't of Pub. Lands* compels the conclusion that Section 2803(c) violates Article XI, Section 6. The legislature cannot pass a law that conflicts with the mandates of the Constitution. The Constitution mandates that MPLT receive, hold, and invest “the revenues generated from public lands in perpetuity absent constitutional amendment.”³⁷ As explained by the Supreme Court:

If one of the functions of the Public Land Trust is to receive the funds from public lands then any attempt by the legislature to appropriate those funds before they reach the Trust would infringe Article XI § 6 and frustrate the intent of the framers to utilize the public lands in the best interest of the people of the Commonwealth who are of Northern Marianas descent.³⁸

Therefore, if Section 2803(c) appropriates funds generated from public lands before those funds reach MPLT, then Section 2803(c) violates Article XI, Section 6.

Section 2803(c) violates Article XI, Section 6 by impermissibly appropriating revenue generated from public land away from MPLT. Section 2803(c) requires DPL to place all revenue it collects, including revenue from public lands, into the “DPL Operations Fund,” and further requires that DPL pay “[a]ll debts, liabilities, obligations and operational expenses” from the DPL Operations Fund.³⁹ This interpretation is bolstered by the fact that the legislature has identified revenues generated from public lands as a source of revenue that can be appropriated.⁴⁰ Section 2803 violates the Constitution by requiring the expenditure of revenue from public lands on DPL’s “debts, liabilities, obligations and operational expenses,” effectively appropriating those funds away from MPLT in violation of Article XI, Section 6’s mandate. Given the clear application of *Dep't of Pub. Lands*, there is no question that this practice violates Article XI, Section 6.

The current practice of appropriating revenue generated from public lands for DPL’s operations violates Article XI, Section 6 by impermissibly diverting such revenue away from MPLT. The requirement that MPLT receive all revenues generated from public lands is enshrined in the

³⁵ *Id.* ¶ 24 (citing *Commonwealth v. Tinian Casino Gaming Control Comm'n*, 3 NMI 134, 147–48 (1992)).

³⁶ *Id.* (citing *Josephs v. Douglass*, 110 P. 177, 180 (Nev. 1910), *overruled on other grounds by Harvey v. Second Judicial Ct.*, 32 P.3d 1263 (Nev. 2001); *see also, e.g., Torres v. Commonwealth Utils. Corp.*, 2009 MP 14 ¶ 14 (Governor’s reorganization power under Article III, Section 15 of the Commonwealth Constitution cannot interfere with the constitutional functions of another government entity); *Sonoda v. Cabrera*, 1997 MP 5 ¶ 7 (same)).

³⁷ *Id.* ¶ 30 (citing NMI CONST. art. XI, § 6).

³⁸ *Dep't of Pub. Lands*, 2010 MP 14 ¶ 30.

³⁹ 1 CMC § 2803(c)(1), (3).

⁴⁰ PL 19-68, §§ 201, 701, 703; PL 20-11, §§ 201, 701, 703.

constitution, whereas the purported authorization for DPL fund its operations from revenue generated from public lands is entirely statutory. When a statute comes into conflict with the Constitution, the statute must fall.

B. The holding in *Dep't of Pub. Lands* decision may be limited to the issue of whether land compensation judgments may be paid from public land revenues.

Importantly, the broad reading of *Dep't of Public Lands* may not be correct. Although the reasoning for striking down PL 16-31 is expressed in broad language, the Court purposefully left unanswered the question of whether the remainder of Section 2803 was unconstitutional, even with full knowledge that DPL's operating expenses were being paid from the DPL Operations Fund. If indeed, post-MPLC, the revenues from public lands are to be remitted in its entirety to MPLT, the Court would have so stated in unmistakable terms. But nowhere in the Opinion is there any determination or finding that DPL's operating expenses could not be paid from the DPL Operations Fund. A close review of the discussion in footnote 5 in the Opinion shows that the Court was concerned of DPL's practice of withholding funding, without legislative appropriation, from the DPL Operational Fund to pay its operational expenses prior to transferring money to MPLT. The Court viewed the practice as a possible violation of the non-delegation doctrine which prohibits the legislature from delegating its appropriations power to DPL. The Court also observed that other executive branch departments were funded through legislative appropriation, implying that as an executive branch department, DPL must be funded through the annual appropriation process.⁴¹ Other than DPL's practice of withholding funds to pay for its expenses without legislative appropriation, the Court stopped short of determining that DPL's operating expenses cannot be paid from public land revenues.

The foregoing suggests that the holding in *Dep't of Pub. Lands* is a narrow one confined to the specific question presented of whether the legislature could appropriate revenues generated from public lands proceeds to pay land compensation judgments.⁴² As such, *Dep't of Pub. Lands* should not be interpreted as to prohibit the payment of DPL's operational expenses relating to the management and disposition of public land from public land revenues. The discussion in footnote 5 suggests that legislative appropriation is required to pay DPL's operating expenses from public land revenues. Limiting the holding to the fate of PL 16-31 would be consistent with Article XI of the Constitution and the dual-agency system established to administer public lands as co-trustees.⁴³ MPLC and its successor agency would be in charge of management and disposition of public lands and MPLT with the investment of funds received from revenues generated from public lands.⁴⁴ Although MPLC was a temporary constitutional entity, its functions relating to the management and disposition of public lands are constitutional in origin. Just as the Constitution was interpreted by the Supreme Court to allow MPLT to continue to receive the proceeds generated from public lands after the dissolution of MPLC, the Constitution could be construed similarly to permit the

⁴¹ *Dep't. of Pub. Lands* at ¶ 30 n. 5.

⁴² See *Dep't of Pub. Lands* ¶¶ 33 and 34 (the legislature cannot tap into the funds derived from public lands to pay land compensation judgments).

⁴³ See *id.* ¶ 3.

⁴⁴ *Id.*

use of public land revenues to pay DPL's operating expenses provided the funds were approved through the legislation appropriation process.

The Supreme Court has recently endorsed using context as a backdrop to constitutional interpretation finding it helpful in addressing textual ambiguity.⁴⁵ Contextual analysis of Article XI would not completely bar the use of public land revenues for expenses incurred by DPL in performing its functions to manage and dispose of public land.

1. Section 2803 is susceptible to an interpretation which complies with the non-delegation doctrine

As stated, the Supreme Court in *Dep't of Pub. Lands* acknowledged DPL's fiscal practice "to withhold operating expenses from the money generated through the management and disposition of public lands before transferring the money to [MPLT]" bypassing legislative appropriation. DPL's practice prompted the Court to state that "[i]f DPL is continue this practice, authority for doing so must exist. . . ." The Court went on to discuss the non-delegation doctrine and the prohibition against the legislature delegating its legislative power, like the appropriation of public funds, to another branch of government. The Court then raised the possibility that PL 15-2, through Section 2803, contravenes the non-delegation doctrine by allowing the DPL practice.⁴⁶

As a general rule, statutes are presumed to be constitutional unless a clear constitutional violation is shown.⁴⁷ "The Court will not impute to legislature an intent to pass unconstitutional legislation."⁴⁸ A statute or a regulation would not be held unconstitutional merely because it could have been better written.⁴⁹

Before examining Section 2803(b) and (c), several principles of statutory construction provide guidance in reviewing its language. The initial step is to consider the basic canon of statutory construction that the statutory language be given its plain meaning, where the meaning is clear and unambiguous. Another principle calls for the reading of two sections together in *pari materia* whereby the meaning and application of a specific statute or portion of a statute is determined by looking to statutes which relate to the same person or thing and which have a purpose similar to that of the statute being construed.⁵⁰ One provision should not be construed to make another

⁴⁵ See *Manibusan v. Larson*, 2018 MP 7 ¶ 33 ("contextualizing the meaning and purpose of a CPI provides guidance as to the drafters' intent in requiring its consultation during the enactment of salary increases").

⁴⁶ *Id.* n. 5.

⁴⁷ *Northern Marianas Hous. Corp. v. Marianas Pub. Land Trust*, 1998 MP 1 ¶ 9.

⁴⁸ *Estate of Faisao v. Tenorio*, 4 N.M.I. 260 (1995).

⁴⁹ *King v. Board of Elections*, 2 N.M.I. 398 (1991).

⁵⁰ *Marianas Eye Institute v. Moses*, 2011 MP 1 ¶ 11.

inconsistent or meaningless; the statute must be read as a whole, and not as isolated words contained therein.⁵¹

With these guiding principles in mind, we examine Section 2803(b) and (c) and conclude that legislative intent and directive is clear that DPL's budget is subject to legislative approval. Subsection (c) states that DPL must follow "the budgeting and planning procedures applicable to all department of the Executive Branch" and that no expenditures may be disbursed in excess of the amounts included in the approved budget."⁵² The subsection further provides that "[a]ll appropriations. . . shall be allotted for authorized disbursement of expenditures as approved in the budget."⁵³ To settle any doubt that as used in subsection (c) the term "budget" refers to DPL's annual budget submission, Subsection (b) makes clear that such a submission is a "proposed annual budget" which every department and agency submits under the Planning and Budgeting Act; it is not the "approved budget" referred to in subsection (c).⁵⁴ Subsection (c)'s "approved budget" refers to the annual budget appropriation to fund the operations of the Commonwealth Government including DPL as set forth in the Constitution and in the Planning and Budgeting Act, as amended.

Settling the Supreme Court's concerns expressed in footnote 5, Section 2803 is not an impermissible delegation of legislative appropriation authority because the legislature retained the power of appropriation over DPL's budget. Indeed, after PL 15-2's approval, each of the annual budget appropriation acts for FY 2007 through FY 2019, contain appropriations of the estimated public revenues to DPL. The appropriation acts for FY 2007 and FY 2009 further authorize the transfer of \$500,000 to MPLT for FY 2007 through 2009.⁵⁵

2. Section 2803 requires DPL to comply with the annual appropriation act for each fiscal year

The annual appropriation acts govern DPL's expenditure of public land revenues for each fiscal year.⁵⁶ Section 2803(c)(4) specifically provides that any expenditure, "debt, obligation or liability "shall not be incurred or created in any fiscal year" unless included in the approved

⁵¹ *Saipan Achugao Resort Members Assoc. v. Yoon*, 2011 MP 12 ¶ 23.

⁵² 1 CMC § 2803(c).

⁵³ *Id.*

⁵⁴ *See* 1 CMC § 2803(c) and 1 CMC § 7201.

⁵⁵ No budget appropriation act was approved for FY 2008 and thus the funding of the Commonwealth Government for that fiscal year remained at the levels approved for FY 2007. *See* 1 CMC § 7204(d). However, continuing appropriations are no longer constitutional with the approval of House Legislative Initiative 16-11 which amended the Constitution to require the enactment of an annual appropriation act before the beginning of the fiscal year to avoid a mandatory government shutdown. *See* N.M.I. Const. art. III, § 9(a).

⁵⁶ *See* 4 CMC § 2803(c)(4) (expenditure from the DPL Operations Fund must be included in the approved budget); *see also* 1 CMC § 7204(a) (appropriation acts authorize the expenditure of public funds) and 1 CMC § 7401 (no expenditure of funds may be made unless the funds are appropriated in a duly enacted appropriation act); *see generally* NMI Const. art. II, § 5(a).

budget for that fiscal year. As the Supreme Court made clear in *Dep't of Pub. Lands*, DPL is not MPLC and therefore lacks the autonomy that the Constitution gave MPLC from legislative interference in the management of public lands and expenditure of its funding.⁵⁷ While “[t]he legislature and the executive branch are. . . free to set policies for [DPL] as they see fit. . . they must do so within their constitutional limitations.”⁵⁸

3. Public land revenues in excess of DPL’s actual expenditures must be transferred to MPLT

Even though the last annual budget appropriation act to authorize an MPLT transfer was for FY 2009, the Supreme Court in *Dep't of Pub. Lands* puts to rest the notion that DPL or the legislature does not have any obligation to ensure that the funding in excess of DPL’s approved budget ultimately reaches MPLT. To its credit and consistent with its fiduciary duties, DPL has remitted funding to MPLT notwithstanding the absence of legislative appropriation as shown in Table 4. But more funding must be transferred as the balance in the DPL Operations Fund has grown substantially with more revenues collected (except for FY 2014) than what was estimated and appropriated for FY 2011 through 2017. DPL has no legal authority to retain the excess revenue. On the other hand, MPLT has every right to the funds remaining pursuant to *Dep't of Pub. Lands*. Failure to turn over the fund balance each fiscal year is a clear violation of DPL’s fiduciary duty under 1 CMC § 2802, as co-trustee, with MPLT, of public lands and revenues and may subject the Secretary of Public Lands, as the expenditure authority, to personal liability.⁵⁹ Based on the foregoing reasons, a supplemental appropriation to DPL is not allowed under Section 2803.

4. DPL must abide by its responsibilities as co-trustee

Section 2801 of DPL’s enabling statute expressly states that DPL is “to manage and administer the Commonwealth’s public lands under the provisions of Article XI of the Constitution.” The statute also defines the nature of the Secretary’s duties and that he or she is to be “held to strict standards of fiduciary care.”⁶⁰ Indeed, DPL is required to include in its annual *proposed* budget, the estimated sum to be transferred at the end of the fiscal year to the Marianas Public Land Trust.

The statutory designation of the Secretary as a fiduciary is rooted in the origins and purpose of Article XI of the Constitution. By assuming the functions of its original predecessor, DPL became a trustee for public lands and public funds collected therefrom.⁶¹ Holding the DPL Secretary to the same standard of fiduciary care as the MPLT Board of Trustees is wholly

⁵⁷ *Dep't of Pub. Lands* ¶ 30 n.5.

⁵⁸ *Id.* ¶ 23.

⁵⁹ *See Dep't of Pub. Lands* ¶ 3.

⁶⁰ 1 CMC § 2802.

⁶¹ *See Dep't of Pub. Lands* ¶ 32.

consistent with the special obligation and relationship that both agencies have to the management and disposition of public lands and the investment of funds received therefrom. Both have a fiduciary responsibility to carry out their respective functions of land management and money management for the benefit of the Commonwealth people who are of Northern Marianas descent.

That overarching purpose is what defines and distinguishes our constitutional policy toward public land use and management from other jurisdictions. As the Supreme Court explained in *Dep't of Pub. Lands*, the distinction is important one.⁶² Amply discussed in the constitutional history of Article XI § 6, MPLT was established for the sole purpose of holding and investing the proceeds from leases and other transfers of public land made by the public entity tasked with the management and disposition of public lands for the benefit of the CNMI people of Northern Marianas descent. The Supreme Court has made it clear that MPLT will receive funds generated from public lands even after the dissolution of MPLC.

Although there is ample authority in Article XI § 6 of the Constitution and the 1976 Analysis to guide DPL and MPLT in carrying out their respective duties, the common law principles of trust administration illustrate the special relationship of entities holding fiduciary duties. As stated, both DPL and MPLT remain co-trustees in the constitutional enterprise provided in Article XI. As such, they must participate and cooperate with the other in carrying out their respective duties.⁶³ As fiduciaries, they are required to act in good faith and in a manner consistent with the purposes of the trust and the interest of beneficiaries.⁶⁴ They must do so impartially in the interest of protecting the trust estate.⁶⁵ It stands to reason under those principles that DPL as manager of the public lands and the initial recipient of money generated from public lands may not engage in conduct or take actions that would undermine the trust. In fact, it is required to act in good faith and cooperate with MPLT.

V. CONCLUSION

The Supreme Court's decision in *Dep't of Pub. Lands* is subject to two competing interpretations on whether public land revenues may be used to fund DPL's operating expenses. Under either analysis, the same conclusion is reached: supplemental appropriation to DPL may not be made from unobligated and unencumbered prior fiscal year balances. Those balances are public land funds that must be transferred to MPLT. DPL's continued retention of the funds constitutes a violation of the Secretary's fiduciary duties which may likely subject the Secretary to personal liability.

As to the larger question of how much, if any, and for what may the legislature appropriate from public land revenues to DPL, a definitive answer must be sought from the Supreme Court to clarify its holding in *Dep't of Pub. Lands*. A certified question is the proper approach to bring the

⁶² *Id.* ¶ 31.

⁶³ RESTATEMENT (THIRD) OF TRUSTS § 81, cmt. a.

⁶⁴ *Id.* § 70, cmt. d.

⁶⁵ *Id.* § 79.

issue to the Court. MPLT and now DPL have been embroiled continuing disputes over the proper transfer of public land revenues to MPLT. Both parties should bring the issue of the use of public land revenue before the Supreme Court

A handwritten signature in black ink, appearing to read "Edward Manibusan", with a long horizontal flourish extending to the right.

EDWARD MANIBUSAN
Attorney General