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MEMORANDUM

August 20, 2024

SUBJECT: Alaska Railroad Corporation authority to obtain commercial loans to finance replacement of passenger dock in Seward, Alaska (Work Order No. 34-LS0033)

TO: Representative Kevin McCabe
Attn: Angela Stephl

FROM: Ian E. Walsh 
Legislative Counsel

You asked if the Alaska Railroad Corporation (Railroad) may finance replacement of the Railroad's passenger dock in Seward, Alaska without legislative approval by obtaining a loan instead of issuing revenue bonds.

In summary, in addition to providing authority for the Railroad to issue revenue bonds with legislative approval, the statutes governing the Railroad authorize it to otherwise borrow money in some circumstances. The Railroad probably does not need legislative approval for this other borrowing, and there is no explicit monetary limit on the amount. However, the Railroad obtaining commercial loans to fund this project would likely be unconstitutional under the state debt restrictions in the Alaska Constitution.¹

Background. On August 1, 2024, the Railroad Board of Directors approved a series of resolutions authorizing the Railroad to pursue agreements to facilitate replacement of the Railroad's passenger dock in Seward, Alaska.² To finance the transaction, the Railroad plans to use existing funds, up to \$60,000,000 in revenue bonds previously approved by

¹ The financing arrangement for the Railroad's dock replacement funding proposal is apparently not yet finalized. This analysis assumes the Railroad intends to obtain loans that allow the lender to seek repayment from Railroad assets or revenue (in other words, government assets); it does not address other hypothetical arrangements that might not require the Railroad to use government assets to repay the loans.

² Alaska Railroad Corporation Board of Directors Resolution Nos. 2024-19, 2024-20, 2024-21, and 2024-22 (Aug. 1, 2024); Alex DeMarban, *Alaska Railroad approves \$137 million cruise port for Seward*, Anchorage Daily News (Aug. 3, 2024), <https://www.adn.com/business-economy/2024/08/02/alaska-railroad-approves-137-million-cruise-port-for-seward/>.

the legislature in 2022, and "additional funds in the form of a bank loan."³ "Debt service on the bonds and loans" will be "sourced from improvement fees paid by vessels using the New Facilities."⁴ While it is clear from the initial financing proposal that the Railroad intends to repay the commercial loans using revenue from the new facilities, it is not clear what assets the lender can look to for repayment in the event the Railroad defaults.

The Railroad originally sought legislative approval to issue a substantially higher amount in revenue bonds to finance the dock replacement project. The 33rd Legislature passed HB 122, which would have allowed the Railroad to issue up to \$135,000,000 in revenue bonds for the project, an increase from the previously approved amount of \$60,000,000. However, the governor vetoed the bill.⁵ The Railroad thus has not received legislative approval to issue more than \$60,000,000 in revenue bonds for the project.

The Railroad's statutory authority to borrow. The Railroad is a public corporation that "is an instrumentality of the state" but with a "legal existence independent of and separate from the state."⁶ The Alaska Supreme Court has recognized that the Railroad "enjoys a considerable degree of autonomy in running the railroad and managing its assets," but it is nonetheless subject to the Alaska Constitution.⁷

The Railroad has the statutory authority to issue revenue bonds.⁸ The Railroad is liable for this debt, as an independent legal entity, but the state itself is not.⁹ In addition to bonding authority, the Railroad is also empowered by statute to

borrow money, including the amounts necessary to establish reasonable reserves, and pay financing charges and interest on bonds for a reasonable period after which the corporation estimates other money will be available to pay the interest, consultant, advisory, and legal fees, and other expenses

³ Ex. A, Alaska Railroad Corporation Board of Directors Resolution No. 2024-19 (Aug. 1, 2024).

⁴ *Id.*

⁵ *See* Governor Mike Dunleavy, HB 122 Veto Transmittal Letter (July 30, 2024).

⁶ AS 42.40.010.

⁷ *Laverty v. Alaska R. R. Corp.*, 13 P.3d 725, 733 (Alaska 2000) ("[P]ublic corporations, particularly those significantly controlled by the state, must meet constitutional mandates, but may be regulated by statute separately from other government entities.").

⁸ AS 42.40.250(21); *see also* AS 42.40.285(2); AS 42.40.600(a).

⁹ AS 42.40.690(a).

necessary or incident to borrowing^[10] [and] . . . do all things necessary or desirable to carry out the powers and duties of the corporation granted or necessarily implied in [the] laws of the state or the laws or regulations of the federal government.¹¹

In a 1999 opinion, the attorney general stated that the Railroad interprets these statutes "as providing express authority for it to borrow money separately from its authority to issue bonds."¹² Assuming the Railroad's interpretation is correct, the Railroad's borrowing authority is still constrained by the Alaska Constitution.¹³ Therefore, the Railroad may borrow to the extent permitted by the Alaska Constitution, including (as discussed below) by issuing revenue bonds,¹⁴ pursuing interim borrowing,¹⁵ and entering into lease-purchase agreements.¹⁶

Some permissible forms of borrowing, such as interim borrowing and lease-purchase agreements, likely do not require legislative approval. The governing statutes only require legislative approval to "issue bonds."¹⁷ The term "bonds" is defined in AS 42.40.980(2) as "bonds, bond anticipation notes, notes, refunding bonds, or other obligations."¹⁸ In the 1999 opinion, the attorney general concluded that "while broadly defined to include 'other obligations,' the term 'bonds' defined in AS 42.40.980(2) refers to the borrowing of money through the issuance of debt securities in registered or coupon form," not other forms of borrowing.¹⁹ The attorney general opinion's reasoning essentially interprets "other obligations" as "things of a like class with those particularly

¹⁰ AS 42.40.250(26).

¹¹ AS 42.40.250(30).

¹² 1999 Inf. Op. Att'y Gen. (Sept. 3; 663-00-0036).

¹³ *See Laverty*, 13 P.3d at 733.

¹⁴ Art. IX, sec. 11, Constitution of the State of Alaska.

¹⁵ Art. IX, sec. 10, Constitution of the State of Alaska.

¹⁶ *See Forrer v. State*, 471 P.3d 569, 590 - 93 (Alaska 2020) (citing *Carr-Gottstein Properties v. State*, 899 P.2d 136 (Alaska 1995)).

¹⁷ AS 42.40.285(2); *see also* AS 42.40.250(21); AS 42.40.600(a).

¹⁸ AS 42.40.980(2).

¹⁹ 1999 Inf. Op. Att'y Gen. (Sept. 3; 663-00-0036).

described," and this interpretation is consistent with Alaska Supreme Court decisions.²⁰ However, the attorney general acknowledged that there could be "perceived ambiguity in the definition of 'bond' set out in AS 42.40.980(2)" because of the inclusion of "other obligations" in the definition of "bond."²¹ Despite potential ambiguity, the most persuasive interpretation of the governing statutes is that the Railroad must receive legislative approval to issue bonds and debt similar to bonds, but legislative approval is not required for other forms of permissible borrowing, such as lease-purchase agreements and interim borrowing.

Assuming the governing statutes permit the Railroad to borrow money without legislative approval in certain circumstances, there is no explicit monetary limit on the amount it may borrow.²² However, the constitutional debt restrictions²³ and availability of assets as collateral for loans may impose other limits on the Railroad's borrowing power.

Constitutional limitations. Despite the Railroad's statutory authority to borrow money, obtaining traditional forms of commercial loans to finance the dock replacement likely violates the state debt restrictions in the Alaska Constitution.

Article IX, sec. 8, of the Alaska Constitution states:

SECTION 8. State Debt. No state debt shall be contracted unless authorized by law for capital improvements or unless authorized by law for housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question. The State may, as provided by law and without ratification, contract debt for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective.

Article IX, sec. 10, provides a limited exception to these state debt restrictions for interim borrowing, allowing the state to "borrow money to meet appropriations for any fiscal year in anticipation of the collection of the revenues for that year" if the debt is "paid before the end of the next fiscal year." Article IX, sec. 11, provides another limited exception that allows a public corporation to issue bonds "when the only security is the revenues of the . . . corporation."

²⁰ *Fairbanks Gold Mining, Inc. v. Fairbanks N. Star Borough Assessor*, 488 P.3d 959, 966 (Alaska 2021) ("[W]hen particular words are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described.").

²¹ 1999 Inf. Op. Att'y Gen. (Sept. 3; 663-00-0036), at n.1.

²² See AS 42.40.250(26), (30).

²³ Art. IX, secs. 8 - 11, Constitution of the State of Alaska.

In *Forrer v. State*, the Alaska Supreme Court interpreted these constitutional provisions as "form[ing] a cohesive whole, with sections 10 and 11 providing narrow exceptions to the blanket restriction in section 8."²⁴ The court explained that "state debt" is understood broadly, including debt incurred by a public corporation, even if the state's "full faith and credit" does not secure the debt.²⁵ *Forrer* identified two primary characteristics of 'debt' under the Alaska Constitution: "(1) the debt must be 'contracted,' implying a volitional act, potentially involving a contract or other promise of repayment; and (2) it must be for a specific 'purpose,' only a handful of which are permissible."²⁶ However, *Forrer* did not "formulate a bright-line test to delineate 'debt' from 'nondebt' in this instance."²⁷ The court ultimately held that, unless one of the narrow exceptions applies, art. IX, sec. 8, of the Alaska Constitution only allows the state, including public corporations, to borrow for a permissible purpose, with voter ratification if necessary.²⁸

Forrer also identified one specific arrangement that does not constitute state debt under the Constitution of the State of Alaska. Interpreting prior precedent in *Carr-Gottstein Properties v. State*, the court in *Forrer* held that an arrangement does not create state debt if (1) the contract or legislation has a subject-to-appropriation clause; (2) recourse under the contract or legislation is "constrained to an identifiable asset that is not government-owned"; and (3) there is "no long-term obligation on the legislature to make annual appropriations."²⁹ A lease-purchase agreement was at issue in *Carr-Gottstein*, but *Forrer* stated that this reasoning may extend to other arrangements.³⁰

Commercial loans obtained by the Railroad to finance the Seward dock replacement project do not fit neatly into any category of constitutionally permissible state borrowing. The Railroad cannot rely on art. IX, sec. 8, of the Alaska Constitution to obtain these loans because the purpose of the loans is not related to invasion, insurrection, war, natural disasters, or indebtedness outstanding in 1959, and although the dock replacement is a capital improvement—a permissible purpose for borrowing under art. IX, sec. 8—voter ratification and authorization by law are required to incur debt for that purpose.³¹

²⁴ 471 P.3d 569, 587 (Alaska 2020).

²⁵ *Id.* at 586 - 89.

²⁶ *Id.* at 586.

²⁷ *Id.* at 589.

²⁸ *Id.* at 590, 598.

²⁹ *Id.* at 590 - 93 (citing *Carr-Gottstein Properties v. State*, 899 P.2d 136 (Alaska 1995)).

³⁰ *Id.* at 591.

³¹ Art. IX, sec. 8, Constitution of the State of Alaska.

Commercial loans for the project are also not interim borrowing under art. IX, sec. 10, of the Alaska Constitution, because they are not obtained "in anticipation of the collection of the revenues for that year" and will not be "paid before the end of the next fiscal year."

Nor can commercial loans be considered "revenue bonds" under art. IX, sec. 11, of the Alaska Constitution. *Forrer* is clear that revenue bonds are a particular form of debt issued by a public entity.³² While the commercial loan proposal appears to be debt payable from project revenues,³³ the loans are not debt in the form of bonds issued by a public agency. Indeed, the Railroad Board of Directors resolution that approved the financing proposal itself distinguishes between bonds and commercial loans.³⁴ The commercial lender also may require additional assets beyond project revenues from the Railroad as collateral for the loans, likely further distinguishing them from revenue bonds. More fundamentally, and perhaps critically, the Railroad cannot argue the loans are revenue bonds because the governing statutes unambiguously require the Railroad to obtain legislative approval to issue revenue bonds,³⁵ and the Railroad has not obtained legislative approval for these commercial loans.

Finally, the commercial loans are likely not constitutionally permissible under the *Carr-Gottstein* test. If the financing agreement contains a "subject-to-appropriation clause," it will satisfy the first prong of *Carr-Gottstein*.³⁶ However, while it is unclear what assets the commercial lender will require as collateral for the loan, if the collateral will be assets of the Railroad, the loan would violate the second *Carr-Gottstein* prong.³⁷ On the other hand, if the Railroad negotiates a loan agreement in which recourse is "constrained to an identifiable asset that is not government-owned," the agreement might satisfy this prong.³⁸ Still, the arrangement likely violates the third prong of *Carr-Gottstein*

³² See *Forrer*, 471 P.3d at 596.

³³ Ex. A, Alaska Railroad Corporation Board of Directors Resolution No. 2024-19 (Aug. 1, 2024) ("Debt service on the bonds and loan to be sourced from improvement fees paid by vessels using the New Facilities.").

³⁴ See Alaska Railroad Corporation Board of Directors Resolution No. 2024-19 (Aug. 1, 2024), at 2 (distinguishing between bonds "approved by the Alaska Legislature" in 2022 and "funds to be obtained . . . [from] a third-party lender").

³⁵ AS 42.40.250(21); AS 42.40.285(2); AS 42.40.600(a).

³⁶ *Forrer*, 471 P.3d at 591 - 92.

³⁷ *Id.* at 592.

³⁸ See *id.* ("The second prong requires the challenged arrangement to "limit[] recourse to the leased property." (alteration in original)).

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because it creates a long-term obligation that extends beyond the fiscal year.³⁹

In summary, the state debt restrictions in the Alaska Constitution likely prohibit the Railroad from taking out commercial loans to finance the dock replacement project as proposed by the Railroad. However, only the Alaska Supreme Court can authoritatively interpret the Alaska Constitution and the court's decisions in *Carr-Gottstein* and *Forrer* as applied to this financing arrangement.

Conclusion. The Railroad likely has the authority to borrow money using commercial loans in some circumstances, probably without legislative approval and with no explicit monetary limit on the amount the Railroad may borrow. However, the Railroad obtaining traditional forms of commercial loans to finance the Seward dock replacement project would likely violate the state debt restrictions in the Alaska Constitution. The Railroad could seek legislative approval to issue revenue bonds in the next legislative session. Revenue bonds issued by the Railroad with legislative approval and in the form required by the governing statutes undoubtedly comply with the law.⁴⁰

Please let me know if I may be of further assistance.

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³⁹ *Id.* ("The third prong finally asks whether there exists a long-term obligation."). In this prong, the court considers "whether failing to appropriate subjects the lessee to suit where 'government assets' can be seized." *Id.* Applying this aspect of the *Carr-Gottstein* test is confounding in the particular context of the Railroad because the Railroad itself—not the legislature—manages the Railroad's revenues. *See* 45 U.S.C. 1207(a)(5) ("Revenues generated by the State-owned railroad . . . shall be retained and managed by the State-owned railroad for railroad and related purposes."); AS 42.40.530 ("Revenue generated by or appropriated to the corporation shall be retained and managed by the corporation for railroad and related purposes . . ."). For this reason, it may not be a failure to appropriate that would lead to the seizure of government assets owned by the Railroad, but a failure of the Railroad to use its revenues to satisfy its obligations under the commercial loan agreement. Nonetheless, the arrangement likely violates this prong of *Carr-Gottstein* because the Railroad's failure to spend its revenues to repay the loan could presumably subject the Railroad to suit where government assets can be seized.

⁴⁰ Art. IX, sec. 11, Constitution of the State of Alaska ("The restrictions on contracting debt do not apply to debt incurred through the issuance of revenue bonds by a public enterprise or public corporation of the State or a political subdivision, when the only security is the revenues of the enterprise or corporation."); AS 42.40.285(2) (requiring legislative approval for the Railroad to issue bonds); AS 42.40.600(b) (establishing requirements for bonds issued by the Railroad).