

*Joe*  
*2/4/04*

# ALASKA RAILROAD CORPORATION

Corporate: P.O. Box 107500, Anchorage, AK 99510 • 327 Ship Creek Avenue, Anchorage, AK 99501



## FACSIMILE COVER SHEET

**TO:** Mike Martin  
First National Bank of Anchorage  
Fax No. 777-3029

**FROM:** William R. Hupprich  
Alaska Railroad Corporation

**DATE:** February 4, 2004

**RE:** Locomotive Financing

**NUMBER OF PAGES** (including cover sheet): 13

OUR PHONE NUMBER IS (907) 265-2455  
OUR FAX NUMBER IS (907) 265-2443

Mike, per our phone conversation this afternoon, attached are copies of some legal opinions that discuss ARRC's authority to borrow money for equipment purchases without legislative approval. Please call me at the above number if you have any questions.

William R. Hupprich  
Associate General Counsel

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
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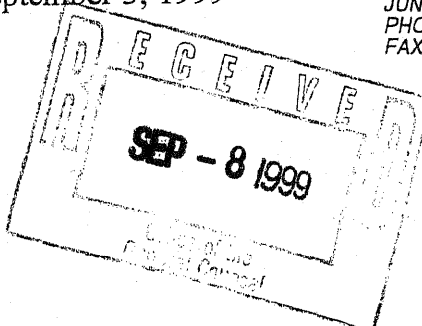
KEY BANK BUILDING  
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# DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

September 3, 1999



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Governor Bill Sheffield  
President, Alaska Railroad Corporation  
P.O. Box 107500  
Anchorage, Alaska 99510-7500

Re: Authority of the Alaska Railroad Corporation to enter into conditional sales contract

Dear Governor Sheffield:

You asked our opinion whether the Alaska Railroad Corporation (ARRC) is authorized to finance the acquisition of property (specifically locomotives) by entering into a conditional sales contract or a lease/purchase agreement constituting an unconditional general obligation secured by a security interest in the financed property. You are asking this question because the lender who is proposing to finance the purchase has made it a condition of the financing that the attorney general render an opinion on the authority of the ARRC to enter in the agreement in the absence of specific legislative approval of the transaction. The enabling statute of the ARRC states:

Unless the legislature approves the action by law, the corporation may not

.....

(2) issue bonds;

AS 42.40.285(2). The term "bonds" is defined to mean "bonds, bond anticipation notes, notes, refunding bonds, or other obligations . . .". AS 42.40.980(2). The bonding provisions are located in Article 7 of the Alaska Railroad Corporation Act (the Act).

The general provisions section of Article 7 (bonds) specifically refers to the legislative approval required in AS 42.40.285 and implies that it is limited to a

transaction covered by Article 7 of the Act. AS 42.40.600(a). From the context, it appears that, while broadly defined to include "other obligations," the term "bonds" defined in AS 42.40.9890(2) refers to the borrowing of money through the issuance of debt securities in registered or coupon form. See AS 42.40.600(b)(4)(requirements for bonds issued by ARRC).

The ARRC has interpreted AS 42.40.250(26) and (30) as providing express authority for it to borrow money separately from its authority to issue bonds. While we acknowledge that these provisions appear to provide express authority to finance the acquisition of equipment, we believe there is another possible source for this authority. Other public agencies are authorized under their general procurement authority to enter into installment sales agreements so long as the agency has available sufficient money to cover the first period of the contract. Subsequent installments are binding on the agency only to the extent that money is available and appropriated for the period. This authority is provided in AS 36.30.390. While the procurement code is not directly applicable to the ARRC it is authorized to implement a procurement process that is "substantially equivalent." AS 36.30.015(e). It would be reasonable to assume that the ARRC at least has the substantially equivalent power to procure equipment in the same manner as other executive branch agencies which are constrained by the constitutional debt limitation. The non-appropriation risk would not be present for the ARRC so long as the legislature has exempted it from the budget process, and without the power to impair valid existing contracts. In other words, there would be no risk that a separate branch of government, not a party to the agreement, could intervene to eliminate the ability to repay the installment sales obligation.

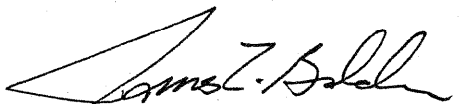
In addition, we think that it would not be consistent with Alaska's separation of powers doctrine to extend the legislative approval process to a secured installment sale agreement. There may be a legitimate legislative concern that a bond issuance by a public corporation of the state may reflect negatively on the state's credit rating. This interest is present when a public corporation issues debt certificates marketed as securities eligible for investment by fiduciaries and other persons. This interest does not appear to be present in a conditional sale transaction between a lender and the ARRC to be secured by the equipment purchased. A reservation of approval power by the legislature would be considered a supervisory act which is an executive, not law-making function. See, e.g., Bradner v. Hammond, 553 P.2d 1 (Alaska 1976)(legislature's ability to exercise executive power will not be extended beyond express delegations of powers made in the state constitution).

Since the ARRC has acted consistent with an earlier opinion of this office on this matter and nothing has occurred in the interim that would give us cause to change

our opinion, we reaffirm the opinion expressed on this matter in an Informal Opinion of the Attorney General dated March 7, 1985 (no file number).<sup>1</sup> Based on that opinion and for the reasons set out in this letter, we conclude that the ARRC has sufficient authority to finance the acquisition of locomotives without the approval of the legislature.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

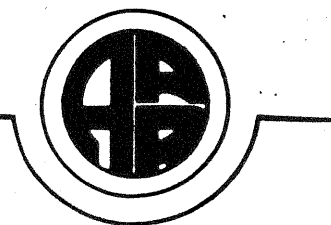
By:   
James L. Baldwin  
Assistant Attorney General

JLB:jn

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<sup>1</sup> Any perceived ambiguity in the definition of "bond" set out in AS 45.40.980(2) could be clarified by amendment. This office will provide testimony in support of the ARRC if it determines to request such an amendment from the legislature.

# ALASKA RAILROAD CORPORATION



P.O. Box 107500 • Anchorage, Alaska 99510-7500

September 20, 1989

National Bank of Alaska Leasing Corporation  
Attn: James Cloud  
Vice President  
P. O. Box 100600  
Anchorage, Alaska 99510-0600

Dear Mr. Cloud:

We are in-house counsel for the Alaska Railroad Corporation ("ARRC"). In connection with the execution and delivery of an Equipment Financing Agreement in favor of National Bank of Alaska Leasing Corporation ("NBALCO"), dated September 20, 1989, we have been asked to give our opinion that ARRC has the power to borrow without the legislative approval required by AS 42.40.250(21) and AS 42.40.285(2).

ARRC was created by the Alaska Railroad Corporation Act ("ARCA"), 1984 Alaska Sess. Laws, Ch. 153, codified at AS 42.40.010-.990. AS 42.40.285(2) states that ARRC may not issue bonds unless the legislature approves the action by law. Counsel for NBALCO has expressed its concern that AS 42.40.285(2) requires legislative approval of all ARRC borrowing due to the definition of "bonds" contained in AS 42.40.285(2). In that section, "bonds" are defined as "bonds, bond anticipation notes, notes, refunding bonds, or other obligations." In spite of these provisions, it is our opinion that ARRC may borrow money without legislative approval.

## I. ARCA MAKES ARRC EXCLUSIVELY RESPONSIBLE FOR THE MANAGEMENT OF THE ALASKA RAILROAD

The purposes clauses of ARCA state that ARRC was established to create a viable economic entity with the powers and duties necessary to operate and manage the Alaska Railroad pending eventual transfer of the railroad to the private sector. 1984 Alaska Sess. Laws, Ch. 153, Section 1(b)(1). ARCA ensures that ARRC will be exclusively responsible for the management of the financial and legal obligations of the Alaska Railroad, have the ability to raise capital by issuing bonds upon approval of the legislature, carry out its responsibilities on a self-sustaining basis, and provide for the prudent operations of the Alaska Railroad according to sound business management practices. 1984 Alaska Sess. Laws, Ch. 153, Section 1(b)(3). These statements of purpose serve as important guides in

understanding the intended effects of operative provisions in ARCA. See Houston v. Washington State Game Comm'n, 532 P. 2d 614 (Wash. 1975).

ARRC's power to borrow is derived from two sources. AS 42.20.250(26) states that ARRC may:

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 necessary or incident to borrowing;....

AS 42.20.250(6) states that ARRC may "make contracts and execute instruments necessary and convenient in the exercise of its powers and duties."

While the provisions of AS 42.40.250(26) are not clear, we believe that this section, when read in pari material with other provisions in ARCA, demonstrates the legislature's intent that ARRC have the power to borrow without express legislative approval. It would be incongruous for the Alaska legislature to give ARRC sole responsibility for management of the financial obligations of the Alaska Railroad yet restrict ARRC's ability to borrow.

## II. PROVISIONS OF ARCA MUST BE READ TOGETHER TO GIVE EFFECT TO EACH SECTION

The provisions of ARCA must be read in light of the rule of statutory construction that all sections of an act are to be construed together so that all have meaning and no section conflicts with another. See Matter of Hutchinson's Estate, 577 P. 2d 1074 (Alaska 1978). AS 42.40.250(21) gives ARRC the power to "issue its bonds upon approval of the legislature and provide for and secure their payment, provide for the rights of their holders and hold or dispose of them." As stated above, AS 42.40.250(26) gives ARRC the power 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 necessary or incident to borrowing;....

If the definition of "bonds" in AS 42.40.980 is read to include all notes and obligations which evidence an ARRC debt, thereby requiring legislative approval for all ARRC borrowing, then the provisions in AS 42.40.250(21) and (26) are duplicative. Consequently, one of the provisions would have no effect, thus violating the rule of statutory construction set forth above. We believe that these two provisions are distinct and provide ARRC with two separate powers: one to execute instruments evidencing a commercial debt and one to issue instruments which could be traded on the public securities markets.

### III. THE LEGISLATIVE APPROVAL PROVISIONS OF ARCA ONLY APPLY TO INSTRUMENTS WHICH ARE SECURITIES

AS 42.40.250(6) authorizes ARRC to "make contracts and execute instruments necessary and convenient in the exercise of its powers and duties." Unlike "bonds," "instruments" is not defined in ARCA. It is a well established rule of statutory interpretation that words are to be construed in accordance with their common usage unless they have acquired a particular meaning by virtue of statutory definition or judicial construction. See Wilson v. Municipality of Anchorage, 669 P.2d 569 (Alaska 1983).

"Instrument" is commonly defined as "a formal legal document, as a contract, promissory note, deed, grant, etc." Random House Dictionary of The English Language 737 (Random House 1973). "Instrument" is also defined as:

A written document; a formal or legal document in writing, such as a contract, deed, will, bond, or lease. A negotiable instrument (defined in U.C.C. § 3-104), or a security (defined in U.C.C. § 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment. U.C.C. § 9-105(1).

Black's Law Dictionary 719 (rev. 5th ed. 1979).

Alaska's version of the Uniform Commercial Code ("UCC"), Alaska Statutes Title 45, Chapters 1 through 9, defines "instrument" to mean a "negotiable instrument," AS 45.03.102(1)(5), which may be a draft, a check, a certificate of deposit or a note. AS 45.03.104. While Chapter 3 of Title 45 describes the operation of instruments, including notes, its provisions do not apply to "investment securities". AS 45.03.103(a).

We believe that the definition of "bonds" to include "notes and other obligations" in AS 42.40.980(2) refers only to "investment securities." The Alaska Securities Act of 1959 defines "security" as a "note; stock; treasury stock; bond...." AS 45.55.130(12). AS 45.08.120(a)(1) defines a "security" as an instrument which:

- (A) is issued in bearer or registered form;
- (B) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;
- (C) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
- (D) evidences a share, participation, or other interest in property or in an enterprise or evidences an obligation of the issuer.

ARCA contains ample evidence that the Alaska legislature intended that "bonds" as used in ARCA means bonds, notes, and other obligations which are securities and not notes and other obligations which are commercial paper governed by Article 3 of the UCC. For example, AS 42.40.620 states that "bonds issued under this chapter are securities...." A comparison of the bond provisions in ARCA with the definition of "security" in AS 45.08.120(a)(1), shows that ARRC bonds are "securities". ARRC bonds are:

- (A) issued in bearer [coupon] or registered form (AS 42.40.600(b)(4));
- (B) of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which they would be issued or dealt in as a medium for investment (see AS 42.40.620 and AS 42.40.650);
- (C) either one of a class or series or by their terms are divisible into a class or series of instruments (AS 42.40.600(b)); and
- (D) evidence an obligation of the issuer (AS 42.40.630 and AS 42.40.680).

The fact that ARRC bonds fit the definition of "securities" in AS 45.08.120(a)(1) and AS 45.55.130(12), and that there is a specific reference to "securities" in AS 42.40.620, evidences



the Alaska legislature's intent that the legislative approval restriction only apply to bonds, notes, and other obligations which are securities.

IV. ARRC HAS THE POWER TO BORROW WITHOUT LEGISLATIVE  
APPROVAL BECAUSE ARRC HAS OTHER POWERS  
WHICH AMOUNT TO BORROWING

A conclusion that ARCA requires legislative approval for all bonds, notes, and other obligations results in an anomaly. AS 42.40.250(7) gives ARRC the power to acquire personalty or realty by purchase or lease. Based upon this provision, the Alaska Attorney General has opined that ARRC has the power to acquire personality by installment sales contract. See Exhibit A. We agree with this opinion.

Installment sales contracts, indeed even leases, could be construed as "obligations," and, therefore, subject to legislative approval under AS 42.40.285(2). However, "obligation," as used in the definition of "bond" in AS 42.40.980(2), must be read restrictively to avoid the conclusion that ARRC must receive legislative approval to execute any legal document.

Even if "obligation" is read restrictively to refer to certain types of legal documents, and if it assumed that ARRC may not borrow without legislative approval, then one must conclude that ARRC is authorized to acquire personalty by lease with a purchase option, or by installment sales agreement, but not by execution of a note with a purchase money security interest. We believe that there is, in reality, no commercial difference between a purchase by installment sales agreement and execution of a note with a pledge of a purchase money security interest. This result creates a meaningless distinction of form over substance. Such conclusions are not favored by Alaska courts. See Sherman v. Holiday Const. Co., 435 P.2d 16 (Alaska 1967). Consequently, one must conclude that ARRC may borrow in some cases without legislative approval.

V. CONCLUSION

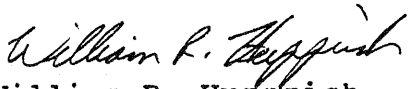
We believe that AS 42.40.600-.700 contains the provisions relating to issuance of notes which are securities and that AS 42.40.250(6) and AS 42.40.250(26) give ARRC the power to

National Bank of Alaska Leasing Corporation  
Attn: James Cloud  
September 20, 1989  
Page 6

execute commercial notes which are not securities. Therefore, it is our opinion that ARRC may borrow money and execute certain notes without legislative approval.

Very truly yours,

OFFICE OF THE GENERAL COUNSEL

  
William R. Hupprich  
Senior Attorney

4359L

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

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100 CUSHMAN ST.  
SUITE 400  
FAIRBANKS, ALASKA 99701  
PHONE: (907) 462-1568

☒ POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

465-3603

March 7, 1985

DELIVER TO: BRUCE TENNANT LOCATION ARR-ANCHORAGE  
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TELEPHONE/TELECOPIER 465-2469 TOTAL NUMBER OF PAGES 2  
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COMMENTS  
PROJECT NAME ACCOUNT CODE

Bruce Tennant  
Acting Chief Counsel  
Alaska Railroad Corporation  
Pouch 7-2111  
Anchorage, AK 99510

Re: Authority of the Alaska Railroad Corporation to enter into conditional sales contracts

Dear Bruce:

AS 42.40.250(6) of the Alaska Railroad Corporation Act (Act) authorizes the Alaska Railroad to "make contracts and execute instruments necessary or convenient in the exercise of its powers and duties."

AS 42.40.250(7) of the Act authorizes the Corporation to acquire personal property by "purchase, lease . . . or otherwise." These two sections of the Act, in our opinion, authorize the Alaska Railroad to enter into conditional sales contracts.

It is true that AS 42.40.285 requires legislative approval before the Alaska Railroad can issue bonds. Article 7 of the Act specifies the format, negotiability, security and range of permissible terms for general obligation bonds issued by the Railroad. "Bonds", in turn, are defined by AS 42.40.980 to mean "bonds, bond anticipation notes, notes, refunding bonds, or other obligations."

Though there has been no judicial or administrative ruling interpreting the definition of "bonds" as used in the Alaska Corporation Act, it is difficult to see how a conditional sales agreement can construed to be a "bond" within the meaning of AS 42.40.285. Such an interpretation would ignore the authority granted to the Alaska Railroad by AS 42.40.250(6) and (7) and would ignore the well established rule of statutory interpretation that all parts of a statutory scheme are to be

Bruce Tennant  
Acting Chief Counsel  
Alaska Railroad Corporation

March 7, 1985  
Page 2

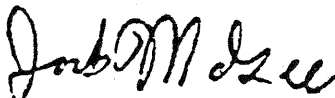
interpreted harmoniously. See Matter of Hutchinson's Estate, 577 P.2d 1074 (Alaska 1978); Hotel, Motel, Restaurant, Const. Camp Emp. and Bartenders Union Local 879 v. Thomas, 551 P.2d 942 (Alaska 1976).

On the basis of the above, it is our opinion that a conditional sales agreement for the purchase of a physical asset by the Alaska Railroad does not violate the bond provisions of the Alaska Railroad Corporation Act (AS 42.40.285 and AS 42.-40.600 -- 42.40.700).

Sincerely,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:



Jack B. McGee  
Assistant Attorney General

JBM:ebc

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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☒ POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3600

465-3603

December 20, 1984

Mr. Mark S. Hickey  
Secretary, Alaska Railroad  
Corporation  
Pouch 7-2111  
Anchorage, AK 99510

Dear Mark:

You have requested our opinion on whether the Alaska Railroad Corporation has authority to enter into lease/purchase agreements involving railroad cars. Our answer is yes. AS 42.-40.250(7) of the Alaska Railroad Corporation Act authorizes the Corporation to acquire personal property by "purchase, lease ... or otherwise."

In addition, we also certify the following:

- 1) that the Alaska Railroad Corporation is an instrumentality of the State of Alaska;
- 2) that the operation of the Alaska Railroad by the Alaska Railroad Corporation is an essential government function of the State of Alaska;
- 3) that the equipment that is the subject of the attached proposal will be used in the operation of the Alaska Railroad and that the use of this equipment by the Alaska Railroad Corporation is important for the efficient and economical operation of the Alaska Railroad.

Sincerely,

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:

*Jack B. McGee*  
Jack B. McGee

Assistant Attorney General

JBM:ebc

DELIVER TO: <u>Mark Hickey</u>	LOCATION <u>Juneau</u>
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