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MEMORANDUM

April 30, 2021

SUBJECT: SJR 5; deposits into the CBR (Work Order No. 32-GS1664A)

TO: Senator Jesse Kiehl
Attn: Cathy Schlingheyde

FROM: Marie Marx 
Legislative Counsel

SJR 5, introduced this session by the governor, proposes amending art. IX, sec. 17(a) of the Alaska Constitution by inserting the word "directly" before the phrase "involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses[.]" You have asked how this addition may impact deposits into the constitutional budget reserve fund (CBR).

Article IX, sec. 17(a) of the Alaska Constitution requires that certain revenue be deposited into the CBR. This provision provides:

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under Section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court *involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses*, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.¹

Under SJR 5, art. IX, sec. 17(a) would only require that revenue *directly* "involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses" be deposited into the CBR. The addition of the word

¹ Emphasis added.

"directly" to modify "involving" may have the effect of narrowing the categories of revenue deposited into the CBR.

For example, it may impact whether taxes and royalties received as a result of Federal Energy Regulatory Commission (FERC) disputes regarding the pipeline tariff rates must be deposited in the CBR. Historically, additional production taxes or royalties received by the state due to the adjustment of the value of oil following the settlement of litigation involving pipeline tariff disputes were deposited into the CBR. This practice continued until 2017. Recently, these additional revenues have been deposited into the general fund, instead of the CBR. The State of Alaska, Single Audit for the Fiscal Year Ended June 30, 2019, states "During prior tax years 1997 through 2017, amounts paid to the State of Alaska as a result of [FERC] disputes were erroneously deposited into the CBR. As determined by the Alaska Attorney General,² a FERC case is not an administrative proceeding or litigation involving production tax or royalty for the purposes of the CBR fund amendment."³

The Alaska Supreme Court has not addressed interpretation of the phrase "involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses[.]" If this issue is litigated under the current provisions of sec. 17(a), a court may decide that the additional production taxes or royalties received by the state due to the adjustment of the pipeline tariff as a result of settlement of litigation revenues must be deposited into the CBR. Article IX, sec. 17(a) currently requires deposit of settlement revenues that "involve" state production taxes and royalties, and makes no distinction between direct and indirect involvement. Therefore, a court may find that the current language of sec. 17(a) requires deposit of such revenue, even if the additional production taxes or royalties are not the center of the dispute – particularly in cases where the state production taxes and royalties are an integral part of the settlement and result in the kind of windfall revenue the CBR amendment was intended to capture.⁴ SJR 5's

² There does not appear to be a formal Alaska Attorney General opinion on this issue.

³ See State of Alaska, Single Audit for the Fiscal Year Ended June 30, 2019, at p. I-53 (February 26, 2020), <http://legaudit.akleg.gov/docs/audits/single/statewide/SWSA-19-Final-WEB.pdf>.

⁴ *Hickel v. Halford*, 872 P.2d 171, 178 (Alaska 1994) (noting that statement in support of the 1990 amendment relating to sources of revenues to be deposited in the CBR refers to windfall revenues "that result from pending litigation and tax disputes."). The view that the CBR was designed to receive "windfall revenue" appears to also have historical support from the Department of Law. See, e.g., 1992 Inf. Op. Att'y Gen. April 24; file nos. 663-91-0298; 663-92-0189; 663-92-0256; 663-92-0107), 1992 WL 528586 (internal citations omitted) (noting that supporters of the budget reserve amendment argued in an authored statement that "[i]f approved, the Budget Reserve Fund will help hold down spending by removing from the table the oil and gas revenue 'windfalls' that result from pending litigation and tax disputes.").

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proposed amendment to add "directly" to modify "involving" would make it more likely that a court would find such additional production taxes and royalties are not required to be deposited in the CBR.

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

MYM:mjt

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