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Florida Suit Asks Federal Judge to Block Train Bonds.

BRADENTON, Fla. — A Florida county asked a federal judge to block the issuance of $1.75 billion in tax exempt private activity bonds for the All Aboard Florida private passenger train project.

Indian River County filed the lawsuit Tuesday in the U.S. District Court for the District of Columbia. It contends that the bond allocation by the U.S. Department of Transportation violated the National Environmental Policy Act.

Also named as plaintiffs along with Indian River County are the county's emergency services district and a nonprofit archaeological group called Old Vero Ice Age Sites Committee Inc.

U.S. Transportation Under Secretary Peter Rogoff, who signed the bond allocation letter, is a defendant along with the USDOT.

Rogoff stipulated that the bonds must be issued by July 1, and that bond proceeds could not be expended until 45 days after the final environmental impact statement is issued.

USDOT spokesman Ryan Daniels said the agency doesn't comment on pending litigation.

Daniels also did not respond to questions asking if All Aboard Florida could lose its PAB allocation because of the lawsuit, or if there has ever been a previous legal challenge to a USDOT private activity bond allocation.

All Aboard Florida is not named in the suit, though an attorney not affiliated with the company said the train owners could intervene in the litigation.

AAF did not immediately respond to a request seeking comment about the lawsuit. The company is owned by Florida East Coast Industries, which is owned by Fortress Investment Group LLC.

Attorneys who spoke on the condition of anonymity said they do not believe there has ever been a legal challenge involving a USDOT bond allocation that was granted before a final environmental impact statement was issued, or a bond allocation stipulating that bond proceeds cannot be expended until after the final EIS is issued, as in the case of AAF.

All Aboard plans to run 32 passenger trains a day on a 235 mile route between Miami and Orlando.

The company has federal environmental clearance and most permits for phase 1 of the project in south Florida, where stations are planned in Miami, Fort Lauderdale, and West Palm Beach.

The lawsuit filed Tuesday involves phase 2, which runs from West Palm Beach to Orlando, where trains will pass through Martin, St. Lucie, Indian River, and Brevard counties though no stops or train stations are currently planned.

The lawsuit was filed Tuesday because Indian River County was concerned that All Aboard Florida would issue the bonds before the NEPA process was completed, according to County Attorney Dylan

Reingold.

The County Commission has approved spending up to $600,000 for the legal action, which will cover the costs for all three plaintiffs, he said. The lawsuit was filed by Bryan Cave LLP, the county's outside counsel.

"The National Environmental Policy Act does not allow a federal agency to authorize the sale of $1.75 billion of bonds to investors without an EIS, and then make the use of the investors' funds contingent on completing the EIS," Reingold said.

The Federal Railroad Administration, which is the lead USDOT agency for the NEPA review, has not released the final EIS. The agency had said that it received more than 12,000 comments on the draft EIS.

All Aboard applied for the private activity bonding last August, after the Florida Development Finance Corp. agreed to be the conduit issuer of the debt. Rogoff approved the allocation Dec. 22.

"One of the key purposes of an EIS is to inform the decision-making of the federal government," said Reingold. "That purpose was subverted here because the DOT approved the bonds before the EIS process was completed."

There has been no indication when the final environmental clearance will be given. Once that occurs, Reingold said, the county would review the document and examine its options.

In addition to the contention that USDOT could not allocate the bonding authority before completion of the environmental statement, the lawsuit said that the federal administrative procedures act was violated because the federal government failed to consult with Indian River County under Section 106 of the National Historic Preservation Act.

"The defendants acted in an arbitrary and capricious manner, in an abuse of discretion, and contrary to law in excluding Indian River County from the consultation on the basis that the project would not affect historic resources in the county," court documents said.

The county cited its conservation and recreation resources, and archeological sites that are being uncovered by the Old Vero Ice Age Sites Committee. Those sites were not assessed in the environmental review process to determine whether vibration from increased freight and new passenger operations could damage artifacts, or if expansion of rail operations would "foreclose or hinder future artifact recovery efforts," the suit
said.

The railway plans no new right-of-way in the county, but would add the passenger train service on the existing Florida East Coast freight rail corridor.

Indian River County has asked a federal judge to find that the USDOT violated the NEPA and to vacate the bond allocation. The suit also seeks temporary and permanent injunctions to require that the government comply with NEPA before considering a bond allocation.

All Aboard applied for the financing from the USDOT last August.

At the time, company president Michael Reininger said that the project was well under way and that the PAB financing was "a crucial factor in ensuring our project is financed and completed," according to a letter filed with court documents Tuesday.

The company said its financing plan would include returning $405 million in high-yield notes sold last year to creditors that are now held in escrow. AAF would use the private activity bond proceeds for the entire Miami-to-Orlando corridor.

“We believe the resulting simplified capitalization … is critical to the successful marketing of the private activity bonds necessary to complete our project,” said Reininger. AAF said it is also investing more than $400 million in cash equity and $600 million in land and easements toward construction of the project.

The PAB application included a draft bond counsel opinion letter from Greenberg Traurig PA, but it did not identify a financial advisor or underwriters.

The train company planned to issue the debt as early as last December, documents said.

Since that time, the Florida Development Finance Corp. has been in a state of flux after losing nearly all of its five board members, which prevented the board from giving final approval to AAF’s financing.

Gov. Rick Scott appointed three new board members on March 27. His office said this week that two additional board appointments are under consideration.

THE BOND BUYER

BY SHELLY SIGO

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