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Fla. Counties' Rail Bonds Challenges Moot, DOT Says

By **Dani Kass**

Law360, New York (November 28, 2016, 7:47 PM EST) -- The U.S. Department of Transportation on Monday urged a D.C. federal court to dismiss lawsuits from two Florida counties challenging its approval of \$1.75 billion in tax-exempt bonds for a Miami-to-Orlando passenger railroad, claiming it has since removed that approval so the action is moot.

Indian River County and Martin County's suits aim to block that 2012 allocation for private activity bonds, which would fund the first phase of the All Aboard Florida Project. The federal government said that approval was officially withdrawn on Nov. 22 and was replaced with another approval for up to \$600 million in such bonds, reliant on the project's compliance with environmental analyses.

"A court cannot vacate or enjoin an allocation that no longer exists," the motion to dismiss states. "Accordingly, relief, in the form of an injunction or otherwise, would not redress an injury to plaintiffs. With the controversy gone, any decision granting the relief plaintiffs seek would amount to nothing more than an advisory opinion."

The suits allege the DOT violated the National Environmental Policy Act, the National Historic Preservation Act and the Department of Transportation Act by approving the bonds without the required reviews.

The Nov. 22 allocation is reliant on six conditions, including that phase one of the railroad be completed in compliance with an environmental assessment and finding of no significant impact the Federal Railroad Administration had conducted following a related loan application, the motion states.

The court can't vacate, nullify or otherwise block the since-withdrawn allocation nor provide any other kind of meaningful relief, so the suits should be dismissed for lack of jurisdiction, the feds said.

Philip E. Karmel of Bryan Cave LLP, who is representing Indian River County, pointed Law360 to a Nov. 1 opposition he filed against the DOT's motion to delay summary judgment. In that filing, Indian River says the feds wrongfully kept knowledge of the new application — then in limbo — away from the court, counties and public. Had it not been for the DOT's October motion for **summary judgment**, the government wouldn't have disclosed the application until after it was approved, the opposition states.

In that filing, Indian River said a potential revocation of the original application — which has since happened — wouldn't moot the case. While this application only involved \$600 million, AAF is going to ask for an additional \$1.15 billion for the next phase, bringing the

parties right back to where they started.

"Accordingly, just as DOT violated the nation's environmental laws by approving \$1.75 billion in PABs financing for the project in 2014 without first considering the environmental and historic resource impacts of the project, its piecemeal approval of the first tranche of [private activity bonds] for the project now would be unlawful for the same reason," the opposition states.

The counties initially asked the court for a preliminary injunction to block the project, a request the court denied in June 2015 after finding that the plaintiffs didn't have standing, according to court documents. The court reasoned that even if the tax-exempt status for the bonds were scrapped, the project would still proceed, rendering the lawsuits impotent to address the counties' grievances.

The suits then proceeded to jurisdictional discovery, which revealed documents that showed the importance of the bonds to the success of the project, according to U.S. District Judge Christopher R. Cooper's **August ruling** denying a motion to dismiss the case.

Judge Cooper said "the call is a close one," but reasoned that if the court were to invalidate the DOT's decision to authorize the bonds, the move would significantly decrease the likelihood that the project's second phase would proceed to completion. He therefore ruled that the counties had standing to challenge the bond authorization.

The case then turned to whether the DOT's bond authorization counted as a "major federal action," which would require environmental and historic preservation analyses. Even though the government wasn't writing a check for the project, Judge Cooper wrote, the county has still "adequately alleged" the existence of a major federal action based on forgone tax revenue and the DOT's level of control over the project.

Counsel for Martin County declined to comment Monday.

Indian River County is represented by Philip E. Karmel and Daniel C. Schwartz of Bryan Cave LLP.

Martin County is represented by Stephen M. Ryan, Amandeep S. Sidhu and Jacob Hollinger of McDermott Will & Emery LLP and County Attorney Michael Durham.

The DOT is represented by Alison D. Garner, Molly J. Moran, Paul M. Geier, Christopher S. Perry and Charles E. Enloe of the U.S. Department of Justice.

Intervenor defendant AAF Holdings LLC is represented by David H. Coburn and Cynthia L. Taub of Steptoe & Johnson LLP and by Matthew W. Buttrick, Eugene Ernest Stearns and Ryan T. Thornton of Stearns Weaver Miller Weissler Alhadeff & Sitterson PA.

The cases are Indian River County et al. v. Peter M. Rogoff et al., case number 1:15-cv-00460, and Martin County, Florida et al. v. Department of Transportation et al., case number 1:15-cv-00632, in the U.S. District Court for the District of Columbia.

--Additional reporting by Stan Parker, Adam Lidgett and Michael Macagnone. Editing by Kelly Duncan.