40731 SERVICE DATE – FEBRUARY 24, 2011
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SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32609[1]

CHESAPEAKE RAILROAD COMPANY–CERTIFICATE OF INTERIM TRAIL USE AND TERMINATION OF MODIFIED RAIL CERTIFICATE

Digest:[2] This decision denies the appeal of an earlier decision that denied the Maryland Transit Administration's (MTA) request to have the Board issue new certificates that would allow 2 state agencies, 1 in Maryland and 1 in Delaware, to enter into an agreement with MTA to operate a recreational trail on property that once contained an active rail line.

Decided: February 23, 2011

Invoking the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act), the Maryland Transit Administration (MTA) seeks to convert a dormant rail line into a recreational trail, subject to possible future reactivation for rail purposes. Consistent with the Board's regulations for "rail banking" the right-of-way, MTA earlier provided the Board with statements that it (and later, another Maryland agency) would assume financial responsibility for the line and would indemnify the line owner for any potential liability incurred during the period of interim trail use. Subsequently, MTA sought to substitute its prior statements with new statements by two different agencies. The Director of the Office of Proceedings (Director) denied this request because the new statements include language that qualified these agencies' willingness to indemnify the line owner. MTA appeals that decision to the full Board. Because the new statements fail to meet the applicable statutory and regulatory requirements, we deny the appeal.

BACKGROUND

The State of Maryland owns a 54.1-mile rail line called the Clayton-Easton line, which traverses parts of both Maryland and Delaware.[3] In 1993, MTA entered into an agreement with

[1] Under the Board's uniform system of citation, this docket number would normally be styled as FD 32609. However, because this docket number originated under the Interstate Commerce Commission (ICC), the Board will keep the format used by the ICC.

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[3] The line begins at milepost 00.0 at Clayton, Del., crosses the state line at milepost 13.5 and continues to milepost 45.3 at Easton, Md. The Maryland portion of the line consists of the

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Chesapeake Railroad Company (CHRR) allowing CHRR to operate the line if it were to obtain from the Board's predecessor, the Interstate Commerce Commission (ICC), a modified certificate of public convenience and necessity (modified certificate) under 49 C.F.R. pt. 1150, subpart C. In 1994, CHRR obtained such a certificate, but by 1998, CHRR concluded that, for the Clayton-Easton line to serve freight customers, it needed a substantial infusion of capital for rehabilitation. CHRR chose instead to cease operating over the line. By July 2005, MTA had terminated CHRR's operating agreement, and CHRR had ceased to exist as a corporate entity in the State of Maryland. Accordingly, MTA, on behalf of the State of Maryland, filed a notice on behalf of CHRR of its intent to terminate service under the modified certificate over the Clayton-Easton line.[4]

At the same time, MTA began the process of converting the right-of-way (ROW) into a recreational trail under the Trails Act and 49 C.F.R. § 1152.29. MTA filed a request for issuance of a certificate of interim trail use (CITU). Under our regulations implementing the Trails Act, a CITU allows the discontinuance of rail service and authorizes a 180-day period (which can be extended) for the line owner to negotiate an interim trail use/rail banking agreement. In addition, consistent with 49 C.F.R. § 1152.29(a), MTA submitted a statement of willingness to assume full financial responsibility (Statement of Willingness) for management of the ROW, for "any legal liability" arising out of the transfer and use of the ROW, and for the payment of any and all taxes that might be levied against the ROW. MTA also acknowledged that the use of the ROW for trail purposes would be subject to future reactivation for rail service. In January 2006, a decision and CITU was served, thereby providing time for MTA to negotiate an interim trail use/rail banking agreement for the Clayton-Easton line. See 49 C.F.R. §§ 1152.29(a) and (c).

In June 2006, MTA filed a motion to extend the negotiating period for an additional 180 days. In its motion, MTA stated that it was in the process of negotiating an agreement with another Maryland agency, the Maryland Department of Natural Resources (MDNR), under which MDNR would become the interim trail sponsor for the Clayton-Easton line. However, because MDNR did not file a Statement of Willingness, the Board asked MTA to supplement its motion. A few weeks later, MTA filed a supplemental motion, stating that it was instead negotiating with the Maryland Department of Transportation (MDOT) for MDOT to become the interim trail sponsor for the Clayton-Easton line. MTA submitted a statement by MDOT that MDOT was "willing to assume full responsibility for management of, and to indemnify [MTA] for any potential legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by MTA." In

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(. . . continued)
"Oxford Branch," from milepost 13.5 at Marydel to milepost 45.3 at Easton, and includes the "Denton Spur," between milepost 00.0 at Queen Anne and milepost 8.8 at Denton.

[4] Under 49 C.F.R. § 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate. Because CHRR had dissolved, the Board allowed MTA to file on CHRR's behalf.

July 2006, the Board granted MTA's motion to extend the CITU negotiating period an additional 180 days, until January 6, 2007. The Board granted 4 additional extensions of the negotiating period in 2007 and early 2008. During this time, the Board reopened the proceeding and partially vacated the CITU with respect to a portion of the ROW known as the "Easton Spur."[5]

On September 26, 2008, MTA filed a notice indicating that it had entered into interim trail use agreements on the remaining ROW: an interim trail use agreement with MDNR for the Maryland portion of the property, and a separate agreement with the Delaware Department of Natural Resources and Environmental Control (DNREC) for the Delaware portion. The MTA-MDNR license agreement contains a section purporting to be MDNR's Statement of Willingness:

> In order to establish interim trail use and rail banking under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, [MDNR] is willing to assume, under the provisions of the Maryland Torts Claims Act, responsibility for management of, and for any legal liability arising out of, [MDNR's] use of the [rail ROW] as a public recreational trail.

Another section of the MTA-MDNR agreement deals with indemnification and liability more generally and provides that, "[s]ubject to appropriations by the Maryland General Assembly and to the extent permitted by law (if at all), [MDNR] shall protect, indemnify, defend and hold harmless . . . [MTA]."

With regard to the Delaware portion of the ROW, MTA attached a Statement of Willingness by DNREC, in which DNREC made the required representation regarding management and liability, but then added that it was entitled to sovereign immunity and would indemnify MTA provided that such indemnification does not constitute an obligation of future appropriations of the Delaware General Assembly. In May 2009, MTA sought to amend its CITU by substituting a new Statement of Willingness by DNREC, consisting of a license agreement, dated September 25, 2008, between it and DNREC. The MTA-DNREC license agreement contains a provision dealing with DNREC's responsibilities under the Trails Act:

> In order to establish interim trail use and rail banking under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, subject to the requirements of Delaware law, DNREC is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify MTA against any potential liability), and for

[5] The Easton Spur consists of a parcel of approximately 5.514 acres on which is situated a spur track extending between the main ROW at approximately milepost 45.3, at Easton, and U.S. Route 50, a distance of approximately 1,645 feet.

> the payment of any and all taxes that may be levied or assessed against the right-of-way owned and operated by MTA.

The MTA-DNREC license agreement also contains the following language dealing with indemnification and liability generally:

> In the event the Delaware General Assembly does not provide funds in sufficient amounts to discharge any of its obligations under this Agreement, and despite the reasonable best efforts of [DNREC], and no other source of funds is available for this Agreement, then MTA may suspend or terminate this Agreement in its sole discretion.

MTA requested that the existing CITU be vacated and that new CITUs be issued for MDNR and DNREC.

In a decision served August 21, 2009, the Director denied MTA's request to vacate the CITU and issue new CITUs. Although MTA's notice and amended notice contain statements purporting to agree to "indemnify [MTA] against any potential liability" and to "pay[] . . . all taxes assessed against the right-of-way," the Director determined that DNREC's representations did not comply with the requirements of 49 C.F.R. § 1152.29(a)(2). The Director concluded that DNREC's Statement of Willingness contained a caveat that could negate the required indemnification. Similarly, the Director determined that MDNR's Statement of Willingness to assume financial responsibility, contained in the lease agreement with MTA: (1) did not indicate whether MDNR will be responsible for the payment of all taxes assessed on the Maryland segment; and (2) appeared to contain a limitation on liability by reference to the Maryland Torts Claims Act. Thus, the Director declined to issue the requested CITUs without the required Statements of Willingness from the prospective interim trail users. MTA has appealed the Director's decision to the full Board.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.7(b)(4), the Board has delegated to the Director the authority to determine, after a request for interim trail use/rail banking is filed, whether the Trails Act applies and, where appropriate, to issue a CITU. The Director determines whether or not the request for interim trail use is "complete," i.e., whether or not it contains all of the information required by the Trails Act and our regulations. See 49 C.F.R. § 1152.29(a).

The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director. See 49 C.F.R. §§ 1011.2(a)(7), 1152.25(e)(1)(iii). On appeal the Board considers whether the Director properly accepted or rejected the trail use request. Under 49 C.F.R. § 1152.25(e)(2)(ii), an appeal of the Director's decision will be granted only upon a showing that the prior action will be affected materially because of new evidence,

changed circumstances, or material error. Here, MTA argues that the Director materially erred in declining to issue the requested CITUs.

Congress, through the Trails Act, has sought to stem the loss of rail trackage caused by rail line abandonments by encouraging the conversion of unused rail ROWs to recreational trails to preserve them for future reactivation of rail service. Preseault v. ICC, 494 U.S. 1, 5 (1990). Toward that end, Congress provided that interim use of a railroad ROW as a trail shall not be treated for purposes of any law or rule of law as an abandonment, if the railroad agrees to allow the ROW to be used for a trail, and if a trail sponsor—a State, political subdivision, or qualified private organization—"is prepared to assume full responsibility for management of such [ROW] and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such [ROW]." 16 U.S.C. § 1247(d); see Citizens Against Rails-To-Trails v. STB, 267 F.3d 1144, 1149 (D.C. Cir. 2001).

In promulgating regulations to implement this requirement of the Trails Act, the ICC recognized that States and their political subdivisions frequently enjoy immunity from legal liability. The ICC examined § 1247(d) of the Trails Act and its legislative history and determined that immunity from tort liability did not bar an entity from becoming a trail sponsor.[6] It explained that the legislative history is clear that the focus of the liability condition is on incentivizing railroad participation in interim trail use agreements by making certain that railroads will be free from any legal responsibilities connected to trail activities.[7] Thus, although parties who are immune from tort liability do not become subject to such liability upon becoming trail sponsors, they must agree to protect the railroad from any liability, management, and tax obligations relating to the ROW.[8] The ICC added a clause to its liability regulations to reflect this interpretation of the statute.[9] The Board's current regulations provide that a State or one of its political subdivisions, rather than assuming full legal liability, may simply agree to "indemnify the railroad against any potential liability." 49 C.F.R. § 1152.29(a)(2). Under the Board's regulations, a Statement of Willingness must state that the prospective interim trail sponsor "is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the [ROW]." 49 C.F.R. § 1152.29(a)(3).

The Board's role in rail banking/interim trail use is essentially ministerial. Citizens Against Rails-To-Trails, 267 F.3d at 1152-53. That is, the Board only looks to see if the trail

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[6] See Rail Abans.–Use of Rights-of-Way As Trails (49 C.F.R. Parts 1105 and 1152), 2 I.C.C.2d 591, 607 (1986).

[7] Id. at 607-88.

[8] Id. at 608.

[9] Id.

sponsor meets the statutory and regulatory requirements to be a trail sponsor, that the railroad agrees to trail use, and that nothing occurs that would preclude a railroad's right to reassert control over the ROW at some future time to reactivate rail service. See Ga. Great S. Div.—Aban. & Discon. Exemption—Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Ga., 6 S.T.B. 902, 907 (2003); Idaho N. & Pac. R.R.—Aban. & Discon. Exemption—In Washington & Adams Counties, Idaho, et al., 3 S.T.B. 50, 59 (1998); Iowa S. R.R.—Exemption—Aban. in Pottawattamie, Mills, Fremont & Page Counties, Iowa, 5 I.C.C.2d 496 (1989), aff'd sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990).

Here, the Director determined that DNREC failed to satisfy the requirements of 49 C.F.R. § 1152.29(a)(2) because additional language in its Statement of Willingness could potentially negate the directive that the trail sponsor indemnify MTA against any potential liability. Likewise, the Director rejected MDNR's Statement of Willingness in the lease agreement with MTA because (1) the reference to the Maryland Tort Claims Act appeared to limit the MDNR's agreement to indemnify MTA; and (2) the statement included no reference to MDNR's responsibility for the payment of any and all taxes assessed on the Maryland segment.

MTA challenges the Director's decision on 4 grounds. First, MTA argues that the limitations of liability in the statements of MDNR and DNREC conform to the Trails Act, which requires that a potential trail sponsor agree to be responsible for "any liability" arising out of the transfer of the property and its use as a trail. MTA contrasts this with the requirement in the Board's regulation requiring that a prospective trail sponsor agree to assume "full responsibility" for legal liability, which MTA construes as a requirement to accept "unlimited liability." According to MTA, MDNR's and DNREC's Statements of Willingness satisfy the Trails Act, if not the agency's regulations, because MTA's potential liability "is limited by the same fiscal limitations as MDNR, that is, to the extent of appropriations by the legislature. As a result, both MDNR and DNREC (which is subject to similar limitations under Delaware law) are agreeing to assume 'any liability' that MTA might incur."

We find MTA's argument unpersuasive. The Trails Act requires an interim trail sponsor to assume full responsibility for "any legal liability" arising out of the transfer of the ROW or its use as a trail. 16 U.S.C. § 1247(d). The Trails Act expressly contemplates that States and political subdivisions may be trail sponsors, but it does not address the fact that most, if not all, States and their political subdivisions enjoy some form of legal immunity from liability. To fill in this gap in the statute, the Board's regulations permit an entity with legal immunity to serve as an interim trail sponsor, but only if it agrees to, among other things, indemnify the railroad against "any potential liability" the railroad might face 49 CFR § 1152.29(a)(2), and only if that agreement is indicated by the use of particular language in its Statement of Willingness. This indemnification requirement protects the railroads from liability arising out of trail use, as

intended by the Trails Act, but still allows entities with immunity to serve as trail sponsors if they are able and willing to indemnify in lieu of accepting liability themselves.[10]

The submissions of MDNR and DNREC do not satisfy the straightforward requirements of the Board's regulations. MDNR's Statement of Willingness (contained in the MTA-MDNR license agreement) qualifies MDNR's willingness to indemnify MTA by saying that MDNR will do so "under the provisions of the Maryland Tort Claims Act." The license agreement also acknowledges that MDNR's promise to indemnify is "[s]ubject to appropriations by the Maryland General Assembly," and that indemnification will occur "to the extent permitted by law (if at all)." Moreover, as the Director noted, contrary to the Board's regulations, the statement does not indicate that MDNR agrees to be responsible for the payment of taxes that may be assessed on the Maryland segment.[11] The DNREC Statement of Willingness (contained in the MTA-DNREC license agreement) is also deficient. It makes DNREC's indemnification promise "subject to the requirements of Delaware law." And the license agreement specifically acknowledges the possibility that the Delaware General Assembly might "not provide funds in sufficient amounts to discharge its obligations under this Agreement." Although state law may have dictated the inclusion of these caveats, their inclusion does not comport with the Board's regulations. As discussed above, the Board's regulations already acknowledge a limitation on a potential trail sponsor's liability. The MDNR and DNREC statements conflict with that limitation because they offer the possibility of no indemnification for the abandoning railroad.

Nor do we find persuasive MTA's suggestion that, even with the references to state law limitations, MDNR's and DNREC Statements of Willingness satisfy the requirement that they

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[10] In a recent decision the Board acknowledged that concerns have been raised about the indemnification requirement by state entity trail sponsors seeking to qualify their statements of willingness to indemnify the railroad. The Board's decision invites interested parties to submit comments on what, if any, change in our Trails Act rules could accommodate these concerns. See Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Feb. 16, 2011).

[11] MTA argues that MDNR, by virtue of its status as a state governmental agency, has no tax liability to the State of Maryland. But both the Trails Act and the Board's regulations contemplate situations where there may be no taxes on the ROW, yet still require the trail sponsor—including States and their political subdivisions—to assume responsibility for taxes. See 16 U.S.C. 1247(d) (specifically requiring States and political subdivisions "to assume full responsibility for . . . the payment of any and all taxes that may be levied against such rights-of-way"); 49 C.F.R. § 1152.29(a)(3) (providing in the form Statement of Willingness that the trail sponsor "must" state that it is willing to assume full responsibility for "any and all taxes that may be levied or assessed against the right-of-way"). In any event, the fact that a prospective trail sponsor may be exempt from taxes should not prevent it from making the required statement given that there will be no tax liability if that is the case. Moreover, regardless of MDNR's own tax situation, we are not prepared to assume that no state agency in the country could ever have a tax liability under similar circumstances.

agree to indemnify MTA for "any potential liability" that MTA may incur, because MTA's liability is limited by the same (or similar) state law limitations that apply to MDNR and DNREC. To fulfill our ministerial role under the Trails Act, we need not parse the intricacies of Maryland and Delaware immunity law. Rather, we merely verify that the prospective trail sponsor has submitted the required documentation to comport with the statute and regulations. That ministerial role would be unduly expanded and complicated were we required to analyze the effect under state law of nonconforming language in Statements of Willingness.

In any event, MTA's position appears logically flawed. If MTA's liability is limited by the same (or similar) laws referenced in MDNR's and DNREC's Statements of Willingness, then those references would be superfluous, as they would not further limit the scope of MDNR's and DNREC's indemnification agreements. If, however, that is the case, then it is hard to see why those two agencies chose to depart from our regulations to include these references in their Statements of Willingness. MDNR and DNREC's deliberate decision to include these state law references in their Statements of Willingness suggests that, contrary to MTA's claim, the qualifications would in reality limit the indemnification responsibilities that MDNR and DNREC would otherwise be incurring pursuant to Congress' intent in the Trails Act.

MTA's second argument is that state law limitations will apply whether or not a State so indicates in its Statement of Willingness. MTA contends that MDNR and DNREC should not be penalized for identifying state legal limitations that apply to their statements. MTA contrasts the Statements of Willingness here, which it claims are forthright, with those made by another state agency in a similar case. In Beaufort Railroad–Modified Rail Certificate, FD 34943 (STB served May 20, 2009), the Board granted the request of the Beaufort-Jasper Water & Sewer Authority (BJWSA) that it issue a trail condition for a line of railroad controlled by the State of South Carolina Division of Public Railways. MTA contends that BJWSA submitted a Statement of Willingness in compliance with our regulations and the Trails Act, even though, under South Carolina law, BJWSA is immune from liability. MTA argues that it is being punished for its honesty about DNREC's and MDNR's limitations against assuming full responsibility for any liability, while agencies like BJWSA are rewarded.

This argument, too, is unpersuasive. As previously stated, our role in implementing the Trails Act is ministerial. Once a potential trail sponsor makes the representations required by the statute and our regulations and the railroad voluntarily agrees to negotiate a Trails Act arrangement, we are required to impose a trail condition. Idaho, 3 S.T.B. at 58; La. & Delta R.R.—Aban. Exemption—In LaFourche & Assumption Parishes, La., AB-318 (Sub-No. 4X), slip op. at 2 (STB served Aug. 4, 1998). Should a state agency provide a Statement of Willingness that conflicts with state law, the remedy is not for the Board to shed its ministerial role under the Trails Act and to analyze independently the State's particular law to predict the effectiveness of such a statement before issuing a trail condition. Rather, the remedy for an allegedly ineffectual Statement of Willingness is to revoke the trail condition if an interested party is able to show that the trail sponsor is not meeting its responsibilities for the property (including indemnification) or is not properly managing the trail. See Jost v. STB, 194 F.3d 79

(D.C. Cir. 1999) (affirming Board's use of rebuttable presumption of financial fitness); Idaho, 3 S.T.B. at 58; T & P Ry.—Aban. Exemption—In Shawnee, Jefferson & Atchison Counties, Kan., 2 S.T.B. 36, 45-6 (1997); 49 C.F.R. § 1152.29(a)(3) (requiring prospective trail sponsor to acknowledge that interim trail use is subject to the user's continuing to meet its responsibility for any legal liability arising out of the use of the right-of-way).

Third, MTA argues that the Director's decision is contrary to Board precedent. MTA cites 2 recent Director decisions where the trail sponsor's Statement of Willingness contained language that appeared to limit its liability. In Nebkota Railway–Abandonment Exemption–In Dawes & Sheridan Counties, Nebraska, AB-988 (Sub-No. 1X) (STB served Oct. 1, 2007), the Board issued a trail condition where the Statement of Willingness of the prospective trail sponsor (Nebraska Game and Parks Commission, or NGPC) stated that NGPC was willing "to the extent permitted by law" to assume full responsibility for any legal liability. Also, in Union Pacific Railroad–Abandonment Exemption–In Fulton & Peoria Counties, Illinois, AB-33 (Sub-No. 262X) (STB served Nov. 13, 2008), the Statement of Willingness of the trail sponsor (Illinois Department of Natural Resources, or IDNR) stated that IDNR would assume full responsibility for any legal liability, but that it "should be immune from liability and in which case will only indemnify the railroad for potential liability under current statutory authority."

MTA also concedes that, in at least 1 decision, the Director denied a trail use request that contained limiting language of the sort at issue here. In Florida West Coast Railroad–Abandonment Exemption–In Alachua & Gilchrist Counties, Florida, AB-347 (Sub-No. 3X) (STB served Aug. 15, 2007), the Director denied the request of the Florida Department of Environmental Protection, Office of Greenways and Trails (FDEP), for a trail condition. The Director stated that FDEP failed to satisfy the requirement that a prospective trail sponsor include a Statement of Willingness for any legal liability arising from the transfer or use of the ROW. FDEP's Statement of Willingness included the caveat that it would assume full responsibility "to the full extent permitted under the laws governing the State of Florida's sovereign immunity." The limiting language used by DNREC and MDNR is not substantively different than the language used by FDEP.

None of these 3 decisions was appealed to the full Board, nor did any of them discuss in depth the issue that is now squarely before us. Because these cases do not all point in the same direction, we cannot simply "follow precedent." Instead, we must consider whether Nebkota and Union Pacific or Florida West Coast Railway best comports with what the Trails Act and our regulations require. As explained above, the Trails Act requires a prospective trail sponsor to assume "full responsibility" for the management of the ROW, for "any legal liability" arising out of the transfer or use of the ROW, and for the payment of "any and all taxes that may be levied or assessed" against the ROW. Recognizing that many States and their subdivisions enjoy sovereign immunity, the Board's regulations allow them to satisfy the Trails Act by agreeing to indemnify the railroad against "any potential liability." 49 C.F.R. § 1152.29(a)(2). Here, however, MDNR has agreed to do so only "under the provisions of the Maryland Torts Claims Act," "subject to appropriations by the Maryland General Assembly," and "to the extent

permitted by law (if at all)." Similarly, DNREC has made its indemnification agreement "subject to the requirements of Delaware law," and has acknowledged that the Delaware General Assembly may "not provide funds in sufficient amounts" to discharge its indemnification obligation. We conclude that the Statements of Willingness executed by MDNR and DNREC and the related license agreements do not satisfy the requirements of the Trails Act and our regulations. To the extent that Nebkota and Union Pacific point to a different conclusion, we overrule the rationale underlying them.

Finally, MTA claims that requiring state entities wishing to be trail sponsors to adhere to the requirements of the Trails Act undermines the national policy of preserving established railroad ROWs for possible future reactivation. We disagree. That policy does not exist in isolation. It is subject to a prospective interim trail sponsor—whether a State, political subdivision, or qualified private organization—agreeing to assume full responsibility "for any legal liability arising out of such transfer or use." Nothing about this requirement blocks MTA from converting the ROW here into a recreational trail. If Maryland and Delaware law bar MDOT and DNREC from satisfying the requirements of the Trails Act, those States have various options: they may modify their laws governing sovereign immunity; or they may arrange for a qualified private organization to assume the responsibilities of being the trail sponsor.

To that effect, MTA may also proceed outside of the Trails Act altogether. We have determined that the Clayton-Easton line is not currently needed for continued rail service. As the ROW owner, MTA may cease all negotiations under the Trails Act, abandon the line, and convert it into a trail outside of the statutory framework of the Trails Act. To the extent MTA lacks a full ownership interest in the underlying property, the States of Maryland and Delaware could consider whether to use their powers of eminent domain to acquire the necessary property interests to convert the ROW into a recreational trail. We recognize that, without the benefit of a trail condition under the Trails Act, taxpayers of Maryland and Delaware, rather than the Federal government, would be potentially liable if a takings case were brought under the Tucker Act, 28 U.S.C. § 1491(a)(1). See Preseault, 494 U.S. at 13 (holding that Tucker Act remedy is available for claims that Trails Act impairs reversionary property interests). While that is a factor that the states may consider, the fact is that today's decision does not prevent this ROW from being converted into a recreational trail.

In sum, MTA's arguments are unpersuasive. In the Trails Act, Congress sought to ensure that a carrier that otherwise would abandon a rail line would be protected from "any legal liability" arising out of the use of a ROW for interim trail purposes. Our regulations implementing this provision are specific as to the necessary contents of the Statement of Willingness in a trail use request. In a clear and concise manner, the Director explained the deficiencies of the statements submitted by DNREC and MDNR. MTA has not provided any new evidence or changed circumstances that materially affect the Director's decision, and MTA has not persuaded us that the Director's decision involved material error.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MTA's appeal is denied.

2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.