

Testimony of Tom Ebzery for the Tongue River Railroad in opposition to HB 422 (Cohenour) Additional requirements for Railroads only in the Eminent Domain Code

Mr. Chair and members of the Committee. For the record I am Tom Ebzery, Billings Attorney representing the Tongue River Railroad Company of Billings who has spent several decades attempting to permit and construct a short line railroad from Miles City south which will connect with the Spring Creek Mine and two Decker mines. In addition this railroad will open up nearly 10 billion tons of low sulfur compliance coal including the over 600 million tons of coal owned by the State of Montana known as Otter Creek.

The people testifying for this bill are not new with one or two major exceptions. I know first hand as I was project manager and counsel for nearly 15 years and steered the project through the significant hurdles leading to a certificate of public convenience and necessity by the Interstate Commerce Commission and its successor the Surface Transportation Board. These are federal agencies responsible for regulating railroads that move a commodity, in this case coal across state lines. A representative of the railroad will discuss the procedures including at least 3 environmental impact statements which were necessary including a demonstrated showing and need for the project. He will show that the public was involved and in fact many of the folks here have either submitted oral or written comments on every aspect of this project. This bill is a "hail mary" attempt by representatives of a relatively new and wealthy landowner who has demonstrated a willingness to do what it takes to stop mineral development in southeastern Montana. The result is a bill which is clearly intended to delay or stop the rail line from moving forward for at least two years and likely more. Let me take you through the bill.

HB 422 would revise Montana's eminent domain law so as to add numerous new hurdles for the exercise of eminent domain FOR RAILROADS ONLY, including the client I represent who has a federal certificate of public convenience and necessity. By attempting to set up a new state approval process for ALL railroads to construct new lines, spurs, extension or facilities in the state the bill will give rise to significant legal challenges by railroads who will rightly claim with strong legal support that the measure far exceeds the proper scope of state regulation in this unique area. Why on the 36th legislative day would this committee move a bill forward so flawed and unworkable and certain to be challenged for what purpose? Simply to delay this project and every other one proposed in Montana needing rail service. As you will hear this will affect ALL railroads whether it is a spur to haul grain, coal and other commodities. They all would be subject to these provision.

Possible amendment to HB 422 by Sponsor: The sponsor of the bill, whose request was made in October and now we see the bill on the 36th day may be suggesting an amendment which would exempt rail spurs of less than 10 miles. 10 miles---purely an arbitrary number. The amendment is designed to have BNSF, MRL, UPRR, cease their opposition to the bill. I guess the eloquent words about protecting

private property rights only apply to those who have an arbitrary number designed to a particular project and that doesn't apply to the rest. I think this committee can see right through this amendment and I urge you to reject it along with the bill.

Currently there is no regulatory division for railroads in the Montana Department of Transportation. FTE's would be required to be hired and even though it says the applicant is required to pay all fees, who is responsible for paying for the employees who have two years to develop rules on how to administer the program.

Let's look at the bill. Once two years pass and rules are developed based on criteria in this bill which look like requirements for a site specific surface coal mine the applicant would have to submit a variety of information such as whether the rail project is consistent with state and local government comprehensive plans. Just what are those? It is questionable how a decision maker could evaluate a project and as a result no project would ever be approved.

One of the more egregious provisions of the bill is on page 4, lines 1-3. It states "A railroad or railroad corporation may not take or acquire by condemnation any land, property, easement, or other interest belonging to the state or any authority or instrumentality of the state OR ANY CONSERVATION EASEMENT OWNED BY A NON PROFIT ENTITY." (Emphasis mine) First if there is a state section there and is right in the path of the rail alignment you are kings X'd regardless of how much negotiation occur. Even more outrageous is the conservation easement. This would make it easy for a wealthy landowner or any landowner to just look at the alignment as it passes through the property, create a conservation easement and tell the company to drop dead. This is a terrible abuse and should this be employed there will be no projects developed. If I were representing those with conservation easements I would be alarmed because that is not the intent of a conservation easement and this will lead to a tremendous backlash against this use of property. This is a barrier that is in direct conflict with a federal agency who has given you authority to build the rail project.

Montana has had a long history of eminent domain and as recently as 2001 thoroughly explored eminent domain by the Montana Environmental Quality Council. I have first hand knowledge of this as I served as a public member of that body when the study was done. There were changes made, clearly not enough to satisfy this landowner but it has worked and contrary to the assertions made to make this a private property rights issue it simply will not work.

Currently in an eminent domain proceeding control lies with the district court and that is a good and sufficient check on the abuse of the process whether it be a pipeline, a transmission line for wind development, a railroad or other use. Creating an entirely new bureaucracy that would simply repeat the work already done in a previous environmental review is wasteful and achieves nothing.

Eminent domain will only be used as a last resort. I believe no matter how many negotiations or concessions made to the landowner if he or she says NO and that's final, and you are worth \$14 billion you have this bill if passed and that's it. This bill will turn the eminent domain code in this state on its head for railroads only to benefit one landowner.

I am submitting a legal memorandum for your review from Washington DC counsel for TRRC showing the flaws in this bill and how they conflict with the exclusive jurisdiction of the Surface Transportation Board to approve construction projects like they have with the Tongue River Railroad project. I am not going to sit here and tell you this bill is unconstitutional as I am a lawyer with 25 years experience up here that you don't tell a committee that or the bill you hate like this one might go right on through just on that statement alone.

It appears that the advocate of this bill would love to have TRR expend more resources to challenge this statute if it makes it that far. Delay is the name of the game here.

I urge you to intercept the "hail mary" pass and let projects move forward such as Otter Creek and new ones to come. Thank you

INTERNATIONAL
Herald Tribune

Submitted by
Tongue River RR
in opposition to
HB 422

Candy billionaire fights energy industry push in Montana

The Associated Press

Tuesday, January 8, 2008

BILLINGS, Montana: A reclusive billionaire whose family owns the Mars candy empire is emerging as a formidable opponent to the energy industry's plans to expand development of some of America's most productive coal and gas deposits.

Forrest E. Mars Jr., the former chief executive of Mars Inc., owns a sprawling ranch along Montana's Tongue River □ directly in the sights of companies hoping to tap the area's extensive coal and natural gas reserves.

Through his previously undisclosed ownership of the 82,000-acre (33,185-hectare) Diamond Cross ranch, Mars is bringing his \$14 billion (□9.5 billion) fortune to bear on the side of ranchers and conservationists trying to curb the companies' ambitions.

"The perception that it's the big guy (energy companies) versus the little guy (ranchers). In this instance that's not the case," said Bruce Williams, vice president of Fidelity Exploration and Production, a defendant in one of several lawsuits brought by Diamond Cross over natural gas drilling.

The Mars family has a long-standing reputation for secrecy, and Forrest Mars' name is not listed as a party in any of the lawsuits pitting Diamond Cross against coal and natural gas developers. His ownership in the ranch was revealed in a Dec. 28 court affidavit reviewed by The Associated Press.

Mars did not respond to requests for interviews made through his son-in-law, Lonnie Wright, and through Diamond Cross attorney Loren O'Toole.

O'Toole said Mars' opposition to energy development stemmed from the vast amounts of water such projects can consume. In America's arid West, water is essential to keeping working cattle ranches such as Diamond Cross alive.

The ranch sits on the northern end of the Powder River Basin, an area with some of the most productive coal and natural gas fields in the United States. Development of those resources was concentrated over the last decade in the southern portion of the basin, in Wyoming.

However, in recent years, exploration began pushing north into Montana. And Mars' ranch soon began to push back, with lawsuits against the companies involved.

Mars' influence on the rolling plains of southeastern Montana could be put to the test by state and federal laws favoring oil and gas development.

Under a property regime known as split estates, landowners in many Western states do not necessarily control the minerals beneath their property. In the Diamond Cross case, Fidelity and another company, Pinnacle Gas Resources, have oil and gas leases on the ranch that predate Mars' ownership, according to public records and company officials.

State law gives the companies the right to enter Mars' land to drill on those leases. So far, however, he's held them at bay.

"Forrest has a lot of money but he's in the same boat as anybody else," said Beth Kaeding,

chairwoman of the Northern Plains Resource Council, a conservation group of which Mars is a member.

"If you don't own the mineral rights, it doesn't matter how huge your ranch is, how politically powerful you are, how much money you have," Kaeding said. "Mineral rights trump surface rights."

Mars, Inc. □ maker of Snickers, the Mars bar, M&Ms and a variety of other food products □ is one of the largest U.S. family-held companies, with an estimated 40,000 employees and \$21 billion (□14.26 billion) in annual revenues.

Public records show the billionaire began to amass property in southeastern Montana as early as 2003 □ just as natural gas production in the area was booming.

Since then, Mars has launched or joined multiple court fights through Diamond Cross. The lawsuits have challenged the industry's depletion of water reserves, a proposal to build a new coal railroad through the ranch and, most recently, efforts to drill on Diamond Cross itself.

Ranch manager Denise Wood said Mars had kept the property as a working cattle ranch and his concerns about energy development mirrored those of many long-time residents, particularly the practice of pumping out underground water reserves to access trapped pockets of natural gas.

Those reserves are depended on by farmers and ranchers to water their fields and livestock. Energy companies sometimes capture the water and hold it in stock ponds that ranchers can use, but often it is lost as runoff.

Mars attorney O'Toole said the lawsuits were not meant to block development.

"That's not the point," he said. "The point is we can't lose all that water and at the same time have no provision to put it back."

In the most recent legal case involving Diamond Cross, Wyoming-based Pinnacle Gas Resources is attempting to begin drilling on a lease it holds to more than 10,000 acres (4,047 hectares) of Mars property.

When the company notified Diamond Cross last month that it planned to begin drilling on the ranch by early January, O'Toole responded with a letter barring Pinnacle employees from the ranch. Pinnacle sued, demanding access. The first hearing in the case is scheduled Tuesday, in state district court.

"As a lawyer it should come down to the facts and the law, but there's no denying that money talks," said Pinnacle attorney Chris Mangan.

A Mars victory would mark "a significant change in the interpretation of state law that says you do have access," said Tom Richmond, administrator for the Montana Board of Oil and Gas Conservation. That agency is a defendant in a separate Diamond Cross lawsuit, over its approval of some of Pinnacle's drilling plans.

Richmond offered another solution to the dispute: Pointing to the gas company's size □ its stock is worth about 1 percent of Mars' estimated personal fortune □ he suggested the billionaire could simply buy the publicly traded company if he was determined to keep it off his land.

Correction:

Notes:



Forbes
 .com

The World's Billionaires
#46 Forrest Mars Jr

03.05.08, 6:00 PM ET

< **Previous:** Carl Icahn

Next: Jacqueline Mars >

Age: 76

Fortune: inherited and growing

Source: candy, pet food

Net Worth: \$14.0 bil ▲

Country Of Citizenship: United States

Residence: McLean, Virginia , United States, North America

Industry: Food

Marital Status: married, 4 children

Education: Yale University, Bachelor of Arts / Science

Grandfather Frank Mars began making chocolates from his kitchen in Tacoma, Wash. 1911. Father, Forrest Sr. (d. 1999), introduced malt-flavored nougat, which became foundation of candy bar line: Milky Way, Snickers, 3 Musketeers. Also: M&Ms, Twix, Skittles. Added pet food (Whiskas, Pedigree), Uncle Ben's Rice. Today Mars world's largest confectioner. Sales: \$21 billion; pet food division now larger than candy by sales.

< **Previous:** Carl Icahn

Next: Jacqueline Mars >

Distribution of Billionaires by Residence

Diameter of disc reflects size of fortune. The red disc indicates Forrest Mars Jr

*Submitted by
 Tongue River
 Railroad in
 opposition to
 HB 422*

STEPTOE & JOHNSON ^{LLP}
ATTORNEYS AT LAW

David H. Coburn
Avenue, NW
202.429.8063
20036-1795
dcoburn@steptoe.com
202.429.3000
202.429.3902

1330 Connecticut
Washington, DC
Tel
Fax

HB 422 SHOULD NOT BE ENACTED

Tongue River Railroad Company, Inc., through its above counsel, hereby submits that HB 422 should not be enacted. House Bill No. 422 will not survive judicial challenge, provides landowners with no protections not already available through the courts, requires the formation of a new bureaucracy that will serve no useful purpose and will threaten important economic development in the state.

- The bill would revise Montana's eminent domain law so as to add numerous new hurdles for the exercise of eminent domain by railroads, including the federally-authorized Tongue River Railroad Company, Inc. (TRRC). By effectively setting up a new state approval/environmental process for TRRC and other railroads to construct new lines or facilities in the state, the bill will give rise to significant legal challenges by railroads which will claim that the measure far exceeds the proper scope of state regulation in this unique area.
- The railroads have strong legal support for their position in opposition to the bill. It is directly in conflict with federal law at 49 U.S.C. § 10501(b), which expressly grants *exclusive jurisdiction* over rail construction projects to the federal Surface Transportation Board, which approved construction of the TRRC line. To the extent that the bill purports to give the Montana DOT approval authority that could impair or delay a federally approved rail project, it could not survive challenge.
- Federal courts have consistently held that a state cannot apply its environmental or other regulatory laws to effectively approve or disapprove a railroad project in view of the exclusive federal jurisdiction over such projects. *See, e.g., Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (Vermont pre-construction environmental permit requirement preempted where application of state law would give a local body the right block rail carrier operations); *Norfolk Southern Ry. Co. v. City of Austell, Georgia*, No. CIV A1:97-CV-1018-RLV, 1997 WL 1113647, at *6 (N.D. Ga. Aug. 18, 1997) (City's application of its laws to regulate construction of rail facility preempted by federal law.)

- Courts explicitly have held that states cannot use eminent domain powers as a means to regulate either economic or environmental aspects of railroads because of the federal government's exclusive regulatory rights over railroads. *See Dakota, Minnesota & Eastern v. South Dakota*, 236 F.Supp.2d 989 (D.S.D. 2002), *aff'd* at 362 F.3d 512 (8th Cir. 2004) (striking down provisions in South Dakota eminent domain law requiring state to assess and approve detailed railroad construction plans); *Burlington Northern and Santa Fe Ry. Co. v. City of Houston*, 171 S.W.3d 240 (Tex.App.-Houston (14th Dist. 2005) (state cannot impose conditions on eminent domain powers that effectively prohibit railroad from taking property needed to build STB-approved rail line).
- Construction of common carrier rail lines by new railroads requires STB approval, which cannot be obtained absent extensive STB environmental review of the exactly the same matters (air quality, wetlands, etc.) that the bill would require the MDOT to consider. STB environmental review, conducted under the National Environmental Policy Act, allows for the participation of state agencies and landowners. All of these matters were intensively studied (with Montana's active participation and that of landowners) in the TRRC proceeding at the STB. TRRC is already bound by over 90 carefully designed mitigation measures.
- Montana's existing eminent domain statute is more than adequate to the task of protecting the interests of landowners. The courts already ensure due process and just compensation and that any property taken be put to an appropriate public use. The proposed MDOT process would, at best, offer no protections to landowners not already offered by the courts.
- The bill strikes directly against job creation and economic development. Were the bill enacted, it would not only threaten TRRC's ability to exercise the right of eminent domain, should that be needed, but would likewise threaten development of the significant coal resources in the Otter Creek area, thereby potentially depriving the state of the financial benefits of such development and of the jobs that it will bring to Eastern Montana.
- Enactment of the bill would invest the MDOT with responsibilities for which it is ill-equipped. That agency has no expertise in assessing the impacts of rail projects, which have already been fully assessed with State of Montana participation through the intensive STB environmental review. Creating a costly new bureaucracy within the MDOT to re-do what the STB has already done simply makes no sense.

-- David H. Coburn, Counsel to Tongue River Railroad Company, Inc.