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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PREEMPTION AND ABNORMALLY DANGEROUS ACTIVITY AND BRIEF IN SUPPORT Applicable to: *Barnes, et al. v. State of Montana, et al,* Lincoln County Cause No. DV-16-111

I. INTRODUCTION

Defendants BNSF Railway Company and John Swing (collectively "BNSF") have asserted the affirmative defense that "Plaintiffs' claims may be preempted or precluded by rules, regulations and laws." (BNSF's Amended Answer, p. 6.) As previously determined by the United States District Court,[1] and set forth below, Plaintiffs' claims are not preempted by the Hazardous Materials Transportation Act of 1975 ("HMTA"), the Federal Railway Safety Act of 1970 ("FRSA") or any other rules, regulations or laws. Also, BNSF's vermiculite related activities were the type of abnormally dangerous activities to which Montana law would attach strict liability for

[1] See Order of United States District Court Judge Brian Morris entered in *Murphy Fauth v. BNSF Railway Co.,* USDC Cause No. CV-17-79-GF-BMM-JTJ, 2018 WL 3601235 (D. Mont. July 27, 2018) granting Libby claimants' motion for partial summary judgement re: preemption, attached as Exhibit 65 to the Affidavit of Roger Sullivan.

any injury resulting therefrom. As discussed separately below, Plaintiffs respectfully request the Court find A) Defendants' preemption affirmative defense fails as a matter of law and B) BNSF is strictly liable for its abnormally dangerous activities relating to asbestos containing vermiculite.

II. APPLICABLE LEGAL STANDARDS

The party moving for summary judgment has the initial burden of showing that no genuine issues of material fact exist and that the moving party is entitled to a judgment in its favor as a matter of law. Mont. R. Civ. P. 56(c); *Stanton v. Wells Fargo Bank Mont., N.A.*, 2007 MT 22, ¶ 17, 335 Mont. 384, 152 P.3d 115. After the moving party has met its burden, the burden shifts to the party opposing the motion for summary judgment to present material and substantial evidence raising a genuine issue of material fact. *Hiebert v. Cascade County*, 2002 MT 233, ¶ 21, 311 Mont. 471, 56 P.3d 848. "The non-moving party must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Id*.

If no genuine issues of material fact exist, the district court must then determine whether the moving party is entitled to judgment as a matter of law. *Olympic Coast Inv., Inc. v. Wright*, 2005 MT 4, ¶ 20, 325 Mont. 307, 105 P.3d 743. Summary judgment promotes judicial economy, *Wagner v. Glasgow Livestock Sales* (1986), 222 Mont. 385, 389, 722 P.2d 1165, 1168, by eliminating the burden and expense of unnecessary trial. *Rosenthal v. County of Madison*, 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493. Here, no issues of material fact exist which preclude this Court from granting partial summary judgment in Plaintiffs' favor.

III. SUMMARY OF UNDISPUTED FACTS

Plaintiffs' Statement of Undisputed Facts ("SUF") is submitted and filed separately herewith. In deciding the present motion regarding preemption, the only factual inquiry the Court must undertake is an assessment of the nature of activities supporting Plaintiffs' allegations to assess whether Plaintiffs' claims run afoul of a federally sequestered subject matter. Thus, the

only material factual inquiry here is the alleged scope of BNSF's tortious activities and the resultant scope of Plaintiff's claims and allegations. In this spirit, the SUF cites to and summarizes the documentary record only to demonstrate the scope of BNSF's alleged vermiculite related activities supporting the negligence claims set forth in Plaintiffs' Third Amended Complaint and Jury Demand ("Complaint") and that those allegations are based in fact. As to BNSF's vermiculite related activities giving rise to an abnormally dangerous activity, those are detailed below.

IV. LEGAL ARGUMENT

A. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY FEDERAL LAW.

"Federal preemption is an affirmative defense upon which defendant bears the burden of proof." *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1134 (10th Cir. 2007) "It is important to begin any discussion of preemption with the recognition that both the United States Supreme Court and [the Montana Supreme] Court have consistently held that preemption is not easily favored." *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, ¶21 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).[2]

"In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (citations omitted). In the absence of explicit direction of Congress preempting state law, the analysis turns to whether a particular federal regulation so materially conflicts with or substantially subsumes the subject matter of the state law that compliance with the purpose of both state and federal law is impossible. If the proponent of preemption cannot establish these elements, the state action is allowed to proceed.

[2] Unless otherwise noted, all emphasis herein has been added.

As set forth below, BNSF's preemption argument must fail as: (1) the HMTA and (2) the FRSA do not evidence any clear and manifest congressional intent to preempt state common law claims involving exposure to asbestos containing materials, nor do they materially conflict with the subject matter of Plaintiffs' claims; and (3) Plaintiffs' claims cannot conflict with the federal laws to the extent the claims stem from alleged BNSF activities occurring prior to their enactment.

1. The HMTA does not preempt Plaintiffs' claims as it evidences no clear and manifest congressional intent to preempt, nor materially conflicts with, common law claims regarding asbestos containing materials.

a. Congress has not expressed any intent to preempt state common law claims regarding asbestos containing materials.

"The HMTA will not preempt a state common law claim unless the 'Federal Government has weighed competing interests … reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case … and implemented that conclusion via a specific mandate.'" *Waering*, 146 F.Supp.2d 675, 681 (M.D. Pa. 2001) (quoting *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 254 (3rd Cir. 1999), and *Medtronic*, 518 U.S. at 501). It is recognized that the HMTA "evidenced no intent to affect state regulation of tort liability." *S. Pac. Transp. Co. v. United States*, 462 F.Supp. 1193, 1225 (E.D.Ca. 1978). "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.* at 486. Thus, the HMTA preempts only in accordance with the specific terms of its preemption provision consisting of two subsections, (a) and (b), discussed below:

i. HMTA's General preemption provision- Subsection (a).

The operative language of the HMTA's "General" preemption provision provides:

> (a) General. … A requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

> (1) complying with a requirement of the State … and a requirement of this chapter [or] a regulation prescribed under this chapter … is not possible; or
>
> (2) the requirement of the State … , as applied or enforced, is an obstacle to accomplishing and carrying out this chapter [or] a regulation prescribed under this chapter...

49 U.S.C.A. § 5125(a). This provision plainly demonstrates the Congressional intent that all non-conflicting State laws be allowed to stand. In promulgating the HMTA regulations regarding asbestos the DOT made clear they were meant to apply only to pure crude asbestos "produced by an asbestos mill" referred to as "crude asbestos" or "commercial asbestos."[3] In contrast, the DOT clarified "there are certain mineral ores, ore concentrates and milled mineral products" "that contain certain amounts of asbestos" that is without "commercial value. The specific requirements for the control of asbestos fibers in transportation do not apply to such materials."[4] This determination is reflected in the current HMTA regulations which provide that asbestos containing materials including "mineral ore" "are not subject to the requirements of this subchapter." 49 C.F.R. § 172.102 (c)(1)(156). Thus, Plaintiffs' claims regarding asbestos containing mineral ore can neither conflict with, nor present any obstacle to accomplishing, the HMTA.

Further, applicable precedent demonstrates that this provision evidences no intent to preempt common-law claims. That the "General" preemption provision was intended to apply to conflicting state rules and regulations but not to common law claims is confirmed through explicit Congressional intent in enacting the provision, which explains § 5125(a) prohibits inconsistent state "requirements" with the purpose of "precluding a multiplicity of state and local regulation

[3] The DOT regulations previously relied upon by BNSF apply only "to the transportation of what are generally regarded as milled or crude asbestos fibers" (hereafter referred to as "pure crude asbestos") but not "asbestos contained in natural or artificial binding-material" (hereafter referred to as "asbestos containing materials"). Transportation of Asbestos, 43 Fed.Reg. 8,562-63 (Mar. 2, 1978);); 43 FR 22626; 49 C.F.R § 172.102 (c)(1)(156).

[4] 43 FR 56664-5.

and the potential for varying as well as conflicting regulation in the area of hazardous materials transportation." S.Rep. No. 93-1192, at 37.

The inapplicability of the "General" preemption provision to common law claims was further confirmed in *Roth v. Norfalco LLC*, 651 F.3d 367 (3d Cir. 2011), which involved a tort claim for injuries incurred by Roth when he was sprayed by sulfuric acid while attempting to unload a railway tank car. The *Roth* Court held:

> Under subsection (a)(1), a non-federal **regulation** is preempted if it "is not possible" to comply with both the HMTA and the non-federal requirement. Subsection (a)(2) preempts a non-federal requirement that "is an obstacle to accomplishing and carrying out ... a regulation prescribed under [the HMTA]." **Neither of these provisions is applicable to the case at hand**.

Id. at 374.

Directly on point is *Medtronic, Inc. v. Lohr*. There the U.S. Supreme Court interpreted Congressional intent of similar language, assessing whether the plaintiff's common-law negligence and strict liability claims were barred by the analogous preemption provision of the Medical Device Act of 1976 (MDA). That provision contained an even more restrictive preemption clause, which disallowed any State "requirement which is different from, or in addition to, any requirement applicable under the chapter … and which relates to the safety or effectiveness of the device or to any other matter included in a requirement … under this chapter." 21 U.S.C.A. § 360k(a). There, as here, the defendant argued "that any common-law cause of action is a 'requirement' which alters incentives and imposes duties 'different from, or in addition to,' the generic federal standards that the FDA has promulgated in response to mandates under the MDA." *Medtronic*, 518 U.S. at 486. Rejecting this argument, the Supreme Court held:

> Medtronic's argument is not only unpersuasive, it is implausible. Under Medtronic's view of the statute, Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device. … Medtronic's construction of § 360k would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that,

> in the judgment of Congress, needed more stringent regulation in order "to provide for the safety and effectiveness of medical devices intended for human use," 90 Stat. 539 (preamble to Act). It is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 251 (1984), and it would take language much plainer than the text of § 360k to convince us that Congress intended that result.

Medtronic at 487–89; *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 52 (2002) (holding FSBA preemption provision applying to "'a [state or local] law or regulation'–is most naturally read as not encompassing common law claims" because the use of "'a' implies a discreetness that is not present in common law" and use of "law" and "regulation" "indicate Congress only preempted positive enactments.").

In addition to finding the plain language of the preemption provision evidenced no specific congressional intent to preempt common law causes of action, *Medtronic* held that all of plaintiff's claims would be allowed to proceed as they were compatible with the stated purpose of the Act "to provide for the safety and effectiveness of medical devices intended for human use" and did not stand as an obstacle to the Act. *Id.* at 489-500.

Medtronic is equally applicable here, where: 1) the HMTA's "General" preemption provision indicates no clear intent to preempt state common law claims and only references "*a* requirement" of the State; 2) there is no evidence in the statute or legislative history demonstrating congressional intent that the "General" preemption clause apply to common-law causes of action; 3) and Plaintiffs' claims are compatible with the stated purpose of the HMTA "to protect the Nation adequately against risks to life and property which are inherent in the transportation of hazardous materials." 49 U.S.C.A. § 5101.

As previously held by Judge Morris of the United States District Court in rejecting BNSF's argument under the same circumstances, while "Section 5125(a) preempts State law if complying with the state requirement and HMTA requirements 'is not possible,' or when the requirement of

the state 'is an obstacle to accomplishing and carrying out' the HMTA," … "no conflict exists with any state law regarding vermiculite and the HMTA" and, thus, Plaintiffs' claims are not preempted. USDC Order, 2018 WL 3601235, at *3.

ii. HMTA's "Substantive Differences" preemption provision- Subsection (b).

Subsection (b) of the HMTA's preemption clause is explicitly limited to state laws and regulation regarding defined hazardous materials and does not preempt state law regarding materials not designated as hazardous materials. This subsection reads:

> (b) Substantive Differences.
>
> (1)… A law, regulation, order, or other requirement of a State … about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation … is preempted:
>
> (A) the designation, description, and classification of hazardous material.
>
> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
>
> (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
>
> (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident.
>
> (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

49 U.S.C.A. § 5125(b).

"Hazardous material" is a defined term under the HMTA: "(2) 'hazardous material' means a substance or material the Secretary designates under section 5103(a) of this title." 49 U.S.C.A § 5102(2) – Definitions. Significantly, asbestos containing materials, including Libby vermiculite,

are not designated hazardous materials having been specifically excluded from HMTA regulations regarding pure crude asbestos. Only such pure crude asbestos is defined as a hazardous material and subject to regulation under the HMTA. As such, Plaintiffs' claims do not fall within the clearly defined scope of subsection (b) of the HMTA's preemption provision.

The preemptive effect of subsection (b) as to common law claims regarding materials not regulated as a HMTA hazardous material was fully explored in *Waering v. BASF Corp.*, 146 F.Supp.2d 675 (M.D. Pa. 2001). There, the substance at issue, potassium metabisulfite, was not specifically regulated under HMTA. Nevertheless, BASF "argue[d] that common law claims springing from improper packing, handling or labeling of potassium metabisulfite would place requirements on regulated parties different from those imposed under the HMTA. Therefore, the argument goes, such common law claims are preempted." *Wearing*, 146 F.Supp.2d at 680. The *Wearing* Court rejected this argument, holding that because potassium metabisulfate was not a defined hazardous substance, the preemption provision of the HMTA was inapplicable and the absence of specific regulation did not equate with an affirmative decision that transporters of potassium metabisulfite should be free of all regulations and remedies for injury. *Id.* at 681. "By way of contrast, where the substance in question *has* been placed on the Hazardous Materials List, the extensive regulations … will typically preempt differing state laws." Here, as in *Wearing*, vermiculite is not a defined hazardous material and there are no HMTA regulations governing its shipment.

Moreover, even where a substance is designated as a hazardous material under the HMTA, state law claims will not be preempted unless there is a federal regulation addressing the specific subject matter of the claim. For example, in *The People v. UPRR*, 141 Cal.App.4th 1228 (2006) the court found state law claims for damages resulting from the release of calcium oxide, a designated hazardous material, from railcars into the environment were not preempted by the

HMTA. Although the material was regulated under HMTA in air transport, there were no regulations regarding its transport by rail so state remedies for injuries resulting from the release of calcium oxide during rail transport were allowed to proceed. *Id.* at 1254-5.

The United States District Court for Montana held on these same facts and argument that "the HMTA poses no regulatory effect based on the fact that immersed asbestos does not constitute a hazardous material" and, therefore, neither preemption provision of the HMTA is applicable to state law claims regarding vermiculite. USDC Order, 2018 WL 3601235, at *3.

b. Plaintiffs' claims do not materially conflict with, nor stand as an obstacle to, the accomplishment and execution of the full purposes and objectives of the HMTA.

Given the lack of any explicit clear and manifest congressional intent to bar Plaintiffs' claims, preemption is only appropriate upon a showing that Plaintiffs' claims materially conflict with or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the HMTA. Because the HMTA is limited to the regulation of defined hazardous materials and there are no regulations under the HMTA applicable to shipment of vermiculite, there can be no conflict between the HMTA and Plaintiffs' claims regarding the release of the vermiculite to the environment. *See e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995) (absent any specific federal safety standard for truck braking systems, a state common-law action seeking to impose liability for a failure to install antilock braking devices did not conflict with the NTMVSA). In the *Freightliner* Court's words, "it is not impossible for [defendants] to comply with both federal and state law because there is simply no federal standard for a private party to comply with, [and] a finding of liability against petitioners would undermine no federal objectives or purposes ... since none exist." *Id.*

Further, in *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011), the Supreme Court clarified the proper application of conflict preemption principles, instructing that the

determinative inquiry is not simply whether there is a statute or regulation dealing with the subject matter of the tort suit, but more specifically, whether the tort action "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law." The plaintiffs in *Williamson* sued Mazda for their daughter's death in an auto accident asserting that Mazda should have installed a lap-and-shoulder-belt in the middle seat of their minivan rather than just a lap-belt. Mazda argued that plaintiffs' tort claim was preempted by DOT regulation explicitly giving manufacturers the choice of whether to install lap-and-shoulder-belts or just lap-belts in middle seats. In examining the regulation at issue, the Court found that the DOT's underlying purpose in enacting the provision, based in part on "cost-effectiveness" judgments, was not a "significant regulatory objective." Thus, notwithstanding that the state common-law action dealt with a topic specifically covered by federal DOT regulation, the Court ruled:

> [E]ven though the state tort suit may restrict the manufacturer's choice, it does not "stan[d] as an obstacle to the accomplishment ... of the full purposes and objectives" of federal law. *Hines,* 312 U.S. at 67. Thus, the regulation does not pre-empt this tort action.

Id. at 336. Here, there is no regulation addressing asbestos containing materials such as vermiculite and, moreover, as in *Williamson*, Plaintiffs' tort claims do not stand as "an obstacle to the accomplishment of the full purpose and objectives" of the HMTA.

Given the obvious lack of material conflict or obstruction of a federal objective, BNSF's affirmative defense as to the HMTA is relegated to a contrived "negative" or "implied" preemption theory. However, implied preemption is only proper in the exceedingly rare circumstance where Congress, "after weighing and balancing the various considerations," expresses its "clear and manifest intent" "that an activity not be subject to any regulation or remedies, such that the activity becomes privileged under federal law." *The People v. Union Pac. R.R. Co*., 141 Cal.App. 4th 1228, 1251 (2006).

As made clear by *The People* court, neither the HMTA nor the FRSA preempt remedial actions for spillage of dangerous materials into the environment:

> We find nothing in HMTA clearly and manifestly establishing a congressional intent that transporters of material in commerce are to be wholly immune from state remedies for consequential injuries resulting from their activities.
>
> This is particularly true in view of the fact defendants claim immunity from state remedies, not because the federal government regulates the transport of calcium oxide by rail, but because it does not. …
>
> The federal Department of Transportation determined that the transportation of calcium oxide should be regulated under HMTA with respect to air transportation only. This represents a determination that it is unnecessary under HMTA to regulate the transportation of calcium oxide by rail or motor carrier. We do not perceive this to be an affirmative decision that transporters of calcium oxide must be totally immune from state remedies for consequential injuries caused during the transportation of calcium oxide. In this respect, we agree with the federal court in *Waering v. BASF Corp., supra,* 146 F.Supp.2d at pages 681 and 682, that the absence of regulation of a material under HMTA does not equate with an affirmative decision that transporters of such materials must be free of all remedies for injury. The remedial claims the People assert are not directed to regulation of the safety aspects of the transportation of calcium oxide; they are directed to providing remedies for consequential injuries caused by spilling calcium oxide into the environment. They are not preempted by the HMTA.

Id. at 1254.

In its discussion of federal preemption of state law, *The People* provided a laundry list of instances where state law was not preempted by related federal statutes. *Id.* at 1248-51. It also cited to *Freightliner v. Myrick*, 514 U.S. 280, 282 (1995), for the principle "that the absence of a federal standard cannot implicitly extinguish state common law." "Taken to its logical conclusion, [BNSF's inverse preemption] argument would mean that anyone transporting or causing the transportation of any material in commerce would have complete immunity from all state regulation or remedies for injury so long as the material is not regulated under HMTA. (*Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470, 487)."

Further, the factual record surrounding the DOT decision that the HMTA's asbestos regulations "would only apply" to pure crude asbestos but not asbestos containing materials[5] comes nowhere near demonstrating, or even hinting at, the requisite "clear and manifest intent" of Congress, "after weighing and balancing the various considerations," "that an activity not be subject to any regulation or remedies, such that the activity becomes privileged under federal law." *The People* at 1251. An examination of the DOT regulation at issue reveals that it is one among a list of 386 sub-provisions of a sub-part of the regulation governing the packaging and transport of hazardous materials, including a multitude of definitions, packaging specifications, and exceptions from the requirements. *See* 49 C.F.R § 172.102 (c)(1)(156). Any argument that this Court should regard any of these 386 provisions as evidence of a clear and manifest intent to establish a privileged activity is irreconcilable with existing precedent.[6]

In fact, the DOT commentary explaining the agency decision to exclude asbestos containing materials such as vermiculite from the regulations governing shipment of pure crude asbestos was based first and foremost on "the regulatory controls already in existence or under consideration" for such materials,[7] directly contradicting any argument that the DOT intended activities regarding asbestos contaminated mineral ore to be privileged. Instead it demonstrates that the DOT believed activities regarding such asbestos containing materials were sufficiently controlled by existing controls, necessarily including common law. This is a far cry from any clear

[5] Transportation of Asbestos, 43 Fed.Reg. 8,562-63 (Mar. 2, 1978).

[6] BNSF has previously proffered the contradictory expert opinion that, "This [provision] means that the vermiculite containing asbestos is not subject to billing/labeling/placarding requirements issued by the DOT." (Plaintiffs' Statement of Uncontested Facts ("SUF") ¶1.)

[7] Transportation of Asbestos, 43 Fed.Reg. 8,562-63 (Mar. 2, 1978).

and manifest intent of Congress to create a privileged area of activity. *The People* at 1251; *accord Medtronic*, 581 U.S. at 485.

The DOT commentary further provides, as to vermiculite containing materials, that, "until such time as the MTB has more specific and concrete information … the MTB does not believe their specific regulation is warranted" under the HMTA. In *Freightliner v. Myrick*, the U.S. Supreme Court ruled that the same finding was far from sufficient to support implied preemption argument. It held that the decision not to issue regulations regarding air brakes was based not on a reasoned determination that "there should be the absence of all standards both federal and state" but instead that "the agency had not compiled sufficient evidence to justify its regulations." 514 U.S. 280, 286-87.

Further dispositive to the implied preemption analysis is the U.S. Supreme Court's decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 52-53 (2004), which held that plaintiff's common-law claim regarding injuries resulting from the absence of a propeller guard on an outboard motor was not preempted by the Coast Guard's explicit decision not to regulate such propeller guards. The Coast Guard's decision "after an 18–month inquiry by an Advisory Council subcommittee, that available data did not support adoption of a regulation requiring propeller guards" involved substantially more "weighing and balancing of the various considerations" than was involved in the DOT decision not to issue regulations for asbestos containing materials. Still, the Court held:

> The Coast Guard's 1990 decision not to regulate propeller guards also does not pre-empt petitioner's claims... A Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending adoption of specific federal standards. … Although undoubtedly intentional and carefully considered, the 1990 decision does not convey an authoritative message of a federal policy against propeller guards, and nothing in the Coast Guard's recent regulatory activities alters this conclusion.
>
> Nor does the FBSA's statutory scheme implicitly pre-empt petitioner's claims. The Act does not require the Coast Guard to promulgate comprehensive regulations covering every aspect of recreational boat safety and design; nor must the Coast

> Guard certify the acceptability of every recreational boat subject to its jurisdiction. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, and *United States v. Locke,* 529 U.S. 89, distinguished. Even if the FBSA could be interpreted as expressly occupying the field of safety regulation of recreational boats with respect to state positive laws and regulations, it does not convey a clear and manifest intent to completely occupy the field so as to foreclose state common-law remedies.

Sprietsma, 537 U.S. at 52-53.

Similarly here, the DOT decision not to issue regulations for transportation of asbestos containing materials, based on "regulatory controls already in existence" and its lack of "specific and concrete information," is insufficient to convey an authoritative message of a federal intent that the HMTA completely occupy the field or create a privileged area of activity and is fully consistent with an intent to preserve state regulatory authority over this subject matter.

The exception of asbestos containing materials such as vermiculite from HMTA regulation can only serve as proof that the HMTA does not materially conflict with Plaintiffs' vermiculite exposure claim. As noted by the Montana Supreme Court, "Just as preemption will be found only in those situations where it is the clear and manifest purpose of Congress, it will not be found when there is a clear intent to the contrary." *Orr v. State*, 2004 MT 354, ¶¶ 48-52, 106 P.3d 100, 111. Moreover, the proposition that the cited DOT regulation preempts or precludes state common law claims is belied by the countless state common law claims regarding exposure to asbestos containing materials that have proceeded to trial unimpeded by any federal preemption in the more than 40 years since the promulgation of the HMTA's pure crude asbestos regulations.

As succinctly held by the U.S. District Court in specifically rejecting BNSF's inverse preemption argument, "The Court agrees with Judge Johnston's determination that no conflict exists with any state law regarding vermiculite and the HMTA." USDC Order, 2018 WL 3601235, at *3.

c. BNSF's tortious activities extended beyond transport activities.

Lastly, even assuming arguendo that the HMTA is at all applicable to Plaintiffs' claims, BNSF's tortious activities extended well beyond the type of transport activities regulated thereunder. BNSF not only transported practically all of the asbestos contaminated vermiculite into and out of downtown Libby (SUF ¶¶2-5), but also: owned, operated, and funded construction of portions of the Libby vermiculite facilities including the River Loading Facility at the base of the W.R. Grace mine (SUF ¶¶6, 9-14, 16, 21); engaged in extensive business dealings, contracts and property transactions with W.R. Grace and its predecessors (SUF ¶¶7-11, 13-16, 21); oversaw dust control, safety, construction, and modifications of the W.R. Grace loading, packaging, and export facilities (SUF ¶¶12, 16, 17); shared ownership of vermiculite facilities with W.R. Grace in other states (SUF ¶18); engaged in its own geo-chemical samplings/analyses of the vermiculite ore (SUF ¶¶19, 25, 26); played an early, in-depth role in developing Libby vermiculite operations (SUF ¶¶20, 21); performed economic analyses of the vermiculite operations in conjunction with W.R. Grace (SUF ¶22); assisted in marketing the vermiculite product to various customers (SUF ¶23); participated in developing new uses for vermiculite products (SUF ¶¶24, 25, 26); and funded multiple studies of the vermiculite deposit assessing its production potential and geo-chemical characteristics (SUF ¶27). These activities went well beyond those of a "common carrier" of freight and are not the type of transport activities regulated by the HMTA. Plaintiffs have asserted multiple occurrences of negligence stemming from these various activities (Complaint, ¶¶ 89-110), including working in concert with W.R. Grace, none of which conflict with the HMTA. Additionally, because substantial amounts of asbestos contaminated vermiculite material were present throughout BNSF's Libby properties (SUF ¶28), much asbestos contaminated vermiculite dust was generated by its various industrial activities not directly relating to vermiculite shipment.

BNSF's alleged tortious activities extend far beyond the purview of HMTA regulations. As such, they cannot materially conflict therewith. Plaintiffs' claims stemming from these alleged activities are not preempted.

2. The FRSA does not preempt Plaintiffs' claims as it does not *substantially subsume* the subject matter.

Preemption is a disfavored affirmative defense, and "FRSA preemption is even more disfavored than preemption generally." *S. Pac. Transp. Co. v. Pub. Util. Comm'n of State of Or.*, 9 F.3d 807, 813 (9th Cir. 1993) (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993)). The FRSA preemption provision only preempts state law directly conflicting with specific FRSA regulation. It specifically empowers "states to adopt or continue in force a law … until the Secretary of Transportation prescribes a regulation ... covering the subject matter of the State Requirement." 49 U.S.C.A. § 20106. It is not enough to show that a regulation "touches upon" or "relates to" that subject matter. *See Easterwood*, 507 U.S. 658, 664. Indeed, the term "'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations "substantially subsume the subject matter of the relevant state law." *Id*.

In addition to its clear intent to allow state common-law claims to proceed, Congress has codified this intent, in contravention of Federal court decisions preempting claims stemming from railroad hazardous material release/exposure, through its 2007 savings clause amendment to the preemption provision entitled, "Clarification regarding State law causes of action." The amendment specifically confirms the congressional intent to preserve all state common-law claims alleging failure A) to comply with federal standards of care, B) of a railroad to comply with its own plan, rule or standard created pursuant to federal regulation, or C) to comply with State law not incompatible with existing FRSA regulation. The amendment was specifically enacted to rectify Federal Court decisions preempting such claims and "clarif[ies] the intent and

interpretations of the existing preemption statute." H.R.Rep No. 110-259, § 1528 (2007). Plaintiffs' allegations,[8] as supported by the factual record (e.g. SUF ¶¶ 29-31), fall squarely within these areas, rendering inappropriate FRSA preemption.

BNSF's Amended Answer and prior briefing reference no specific FRSA regulation even touching upon the subject matter of Plaintiffs' claims. This comes as no surprise since no such federal regulations exist. As BNSF previously conceded, the "FRA has not promulgated any regulations that address exposure to asbestos in the railroad environment." (SUF ¶32). Given the admitted absence of any contrary regulation, the FRSA preemption analysis appropriately ends here.

Moreover, even where there is a FRSA regulation addressing the subject matter of allegedly negligent conduct, courts have uniformly refused to preempt claims unless the safety statute or regulation 1) specifically governs the allegedly negligent conduct, and 2) is meant to prevent the type of injury alleged. Thus, in *CSX Transp., Inc. v. Miller*, 858 A.2d 1025 (Md. App. 2004), the court held that FRSA ballast regulations did not preclude a claim stemming from a knee injury based on having to walk over large ballast in the railyard:

> Even a surface glance at the FRSA regulation relied on by CSX persuades us that it does not touch, let alone pervasively cover, the railroad yard conditions that allegedly fell short of the safe and healthy workplace environment that CSX was obligated to provide for its employees. The regulation is concerned with the track and its immediately adjoining area and not with railroad yards. The obvious concern, moreover, is with the safety of the train, the prevention of derailments, and not the quality of the work place provided for employees. That important distinction was noted in *Southern Pacific Transp. Co. v. Public Utilities Comm'n,* 647 F.Supp. 1220, 1225 (N.D.Cal.1986), *aff'd,* 820 F.2d 1111 (9th Cir.1987):
>
> > The ballast regulations ... are designed to ensure that tracks have adequate support. ... *No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks.*

[8] Complaint, ¶¶ 86-110.

Id. at 1050 (emphasis in original); *see also Bradford v. Union Pacific RR*, 491 F. Supp.2d 831 (W.D. Ark. 2007) (negligent operation claims of victims of an explosion and fire resulting from train collision were not preempted by FRSA regulation regarding the subject matter of negligent operations without substantially subsuming the same, and the federal regulation "fails to preempt Plaintiffs' claims of negligence in this case for another reason-the regulation does not seek to protect those in the place of Plaintiffs").[9]

While BNSF may attempt to contort Plaintiffs' claims to create the illusion that they somehow fall within the scope of general categories of hypothetical FRSA regulations regarding train speed or hazardous material packaging and labeling, an examination of the Complaint and SUF demonstrates that Plaintiffs' claims stem from BNSF's myriad of vermiculite related activities and sound primarily in discharge of dangerous materials to the environment, an area beyond the scope of any FRSA regulation. It is settled law that the "FRSA addresses a number of particular safety aspects of railroad activity but it does not speak to the transportation of dangerous materials or the discharge of such materials to the environment." *The People*, 141 Cal.App. 4th at 1261. Moreover, the FRSA cannot apply secondarily through HMTA regulation to preempt common law claims relating to vermiculite as "the transportation of [the substance] is not regulated under the HMTA, and the preemption provisions of FRSA does not preclude state law where there is no federal regulation covering the subject matter." *Id.*

[9] For further examples of cases denying preemption because the FRSA did not substantially subsume the specific allegations of the claim, s*ee also*: *MD Mall Assoc., LLC v. CSX Transp. Inc.*, 715 F.3d 479, 491 (3rd Cir. 2013) (FRSA regulation requiring that a railroad's drainage facilities "under or immediately adjacent to" the track "be maintained and kept free of obstruction" did not preempt neighboring landowners' claim based on water being diverted from trackside ditch into its parking lot as "the FRSA provides no express authorization for disposing of drainage onto an adjoining property"); *S. Pac. Transp. v. Public Utilities Comm'n of OR,* 9 F.3d 807, 813 (9th Cir. 1993) ("Applying a comparable level of specificity in our analysis [as applied by the US Supreme Court in *CSX v. Easterwood*], we conclude that FRSA § 229 does not preempt the Oregon regulations because the "subject matter" of § 229 is the sound-producing capacity of train whistles, a subject matter which does not substantially subsume the restrictions on use of whistles embodied in the Oregon regulations.").

Plaintiffs' claims based on "Montana state laws are not inconsistent with the FRSA regulations." USDC Order, 2018 WL 3601235, at *3. Absent specific FRSA regulations "substantially subsuming" the subject matter of Plaintiffs' claims, they must be allowed to proceed.

3. Neither the HMTA, FRSA, nor other federal law applies retroactively and, therefore, cannot preempt Plaintiffs' claims based on activities and exposure periods occurring before the enactment of referenced provisions.

Finally, Plaintiffs' complaint alleges injury from exposures to asbestos beginning in 1955, which resulted from BNSF's myriad of activities occurring in Libby between the 1920s and the present. (SUF ¶¶2-27.) However, the FRSA was not enacted until 1970. The HMTA was not enacted until 1975. The specific provisions previously relied upon by BNSF were enacted after most of the alleged actions and exposure periods occurred.[10]

"Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994). Absent clear Congressional intent, the provisions of the FRSA, HMTA, or other federal laws cannot be applied retroactively to periods prior to their effective dates. Because neither the HMTA nor the FRSA "apply retroactively to Plaintiff's claims," Plaintiffs' claims based on alleged activities and exposure periods occurring prior to the enactment of the referenced federal provisions are not preempted. USDC Order, 2018 WL 3601235, at *3.

B. BNSF IS STRICTLY LIABLE, AS A MATTER OF LAW, FOR DAMAGES CAUSED BY PLAINTIFFS EXPOSURE TO DEADLY ASBESTOS CAUSED BY BNSF'S ABNORMALLY DANGEROUS ACTIVITIES.

Plaintiffs allege BNSF is strictly liable to Plaintiffs for damages caused by Plaintiffs exposure to deadly asbestos resulting from BNSF's abnormally dangerous activities. Complaint, ¶¶ 123-128. BNSF denies those allegations. Amended Answer, p. 4. Plaintiffs ask this Court to

[10] The preemption provisions of the FRSA and HMTA were enacted in July 1994 and the DOT regulations regarding the shipment of pure commercial asbestos were not effective until April 1979.

find, as a matter of law, that BNSF is strictly liable for its abnormally dangerous activities relating to its transport of and other operations relating to asbestos containing materials.[11]

In Montana "everyone must use his property as to not injure that of his neighbor." *Dutton v. Rocky Mountain Phosphates* (1968), 151 Mont. 54, 67, 438 P.2d 674, 681. In *Dutton*, the Montana Supreme Court set forth the legal standard applicable to abnormally dangerous activities, adopting the rule from the seminal case of *Rylands v. Fletcher* (1866, Eng.), LR 1 Exch. 265, aff. LR 3 HL 330, 1 ERC.:

> [T]he true rule of law is, that the person who, for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape.

Dutton, 151 Mont. at 65, 438 P.2d at 680 (quoting *Rylands v. Fletcher*). In other words, those who carry out abnormally dangerous activities causing harm to neighboring people or properties are strictly liable for damages. *Dutton*, 151 Mont. 54, 438 P.2d 674; *Matkovic v. Shell Oil Co.* (1985), 218 Mont. 156, 707 P.2d 2; *Sunburst School Dist. No. 2 v. Texaco*, Cause No. CDV-01-179. "The maxim, one must so use his rights as not to infringe upon the rights of another, must be upheld by preserving the absolute right to recover judgment for damages wherever substantial injury is shown." *Dutton*, 151 Mont. at 67-68, 438 P.2d at 681.

In addition to the determination of abnormally dangerous activity under the *Rylands* and *Dutton* standard, the Montana Supreme Court looks to § 519 of the Restatement (Second) of Torts. *See Matkovic v. Shell Oil Co.* (1985), 218 Mont. 156, 707 P.2d 2; *Chambers v. City of Helena*, 2002 MT 142, 310 Mont. 241, 49 P.3d 587. Noting the similarities of the Restatement approach to that employed in *Dutton*, the *Matkovic* Court applied § 519, holding:

[11] The question of whether those activities caused Plaintiffs' damages, and the extent of those damages, should be left for the jury.

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Matkovic, 218 Mont. at 159, 707 P.2d at 3-4. If an operator elects to continue operation and receive the corresponding economic benefit, § 519 will require the operator rather than the effected bystander or landowner "to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character." § 519, comment d.

In making the determination as to whether a particular activity is abnormally dangerous, the *Chambers* Court has instructed that the factors set forth in § 520 of the Restatement (Second) of Torts ("§ 520") be considered:

> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
> (b) Whether the gravity of the harm which may result from it is likely to be great;
> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
> (d) Whether the activity is not a matter of common usage;[12]
> (e) Whether the activity is inappropriate to the place where it is carried on;[13] and
> (f) The value of the activity to the community.

Chambers, ¶ 16. The *Chambers* Court went on to say:

> In determining whether the danger is abnormal, the factors listed in clauses (a) to (f) of this section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case and ordinarily several of them will be required for strict liability. On the other hand it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay

[12] The Restatement explains "[a]n activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." § 520, comment on clause (d).

[13] As the Restatement points out in regards to this factor, the same activity carried on in two different locations may be appropriate in one place and inappropriate in another. For instance,

> a magazine of high explosives … does not necessarily create an abnormal danger if it is located in the midst of a desert area, far from human habitation and all property of any considerable value. The same is true of a large storage tank filled with some highly inflammable liquid such as gasoline … On the other hand, the same ... huge storage tank full of gasoline or the blasting operations all become abnormally dangerous as they are carried on in the midst of a city.

§ 520, comment on clause (e).

> of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. (Emphasis added.)

Chambers, ¶ 21, quoting § 520, Comment f.

"Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in [§ 520], and the weight given to each that it merits upon the facts and evidence." *Chambers*, ¶ 18, quoting § 520, Comment l. The Court explained that "courts look to the character of the activity in question, the place and manner in which it is maintained, its relation to its surroundings and customs of the community, and the natural fitness or adaptation of the premises for the purpose." *Chambers*, ¶ 21 citing *Dutton v. Rocky Mountain Phosphates* (1968), 151 Mont. 54, 438 P.2d 674 (emphasis added). For an activity to be abnormally dangerous, the abnormal dangers may arise either from activities that themselves are unusual, "or from unusual risks created by more usual activities under particular circumstances." § 520, Comment f (emphasis added).

The case at bar involves the following undisputed facts, upon which this Court is empowered to rule, as a matter of law, as to the abnormally dangerous nature of BNSF's activities. According to W.R. Grace, the average daily production from the mine and milling operation was between 500 and 1000 tons of finished vermiculite concentrate per day between the late 1960s and 1970s and between 800 to 1000 tons per day in the 1980s. (SUF ¶3.) The vermiculite concentrate was transferred by underground conveyor to the river and on a suspended conveyor belt over the Kootenai River where it was emptied into BNSF rail cars at the River Loading Facility. (SUF ¶5.) From there, the cars were pushed into downtown Libby to be weighed, switched, and stored until being shipped to various expanding plants across the country. *Id.* BNSF's Libby Railyard spanned the entire north end of downtown Libby and was surrounded by Libby's residential neighborhoods, businesses, and recreational areas. *Id.*

Asbestos contaminated materials were hauled and shipped through the railyard and spilled into the soil for decades. (SUF ¶33.) Soil sampling performed in the BNSF's Libby Railyard in 2002 demonstrated the presence of Libby asbestos throughout despite that it had been more than a decade since Grace had shut down its mining operations in Libby. (SUF ¶28.) Mapping of visible "biotite" (vermiculite) on the rail beds of the Railyard at that time demonstrated extensive visible vermiculite remaining throughout the rail beds, in which analytical results have shown asbestos levels in soil from 2-5%. (*Id.*; SUF ¶33.) Visible vermiculite was also identified and sampled at the River Loading Facility where asbestos was detected in a majority of the soil samples taken at levels of up to 4% Libby asbestos. (SUF ¶28.)

Activity based sampling in downtown Libby in 2000s, more than a decade after active mining operations ceased, demonstrated that BNSF activities in downtown Libby were still capable of producing airborne asbestos levels of up to 14 fibers per cubic centimeter, far in excess of permissible exposure limits for asbestos and the EPA's reference concentration of .00009 fibers per cubic centimeter for Libby Amphibole Asbestos. (SUF ¶33.) "Epidemiology studies demonstrate consistent results pertaining to the association between LAA exposure and various forms of respiratory effects, with effects seen in both occupationally exposed worker populations and in community populations with nonoccupational exposure." (SUF ¶34.)

Applying the undisputed facts to the § 520 factors: (a) BNSF's business activities created a high risk of contamination to Plaintiffs who resided in the community of Libby; (b) the asbestos contamination resulting from BNSF's business activities is great as evidenced by its continued presence more than a decade after shipping operations ceased; (c) the risk of exposure to asbestos due to BNSF's business activities cannot be reasonably eliminated for people living and working in close proximity to the Libby Railyard; (d) BNSF's vermiculite related activities were not a matter of common usage; (e) BNSF's business activities occurred in downtown Libby in close

proximity to residences, businesses, and recreational areas making the location inappropriate; and (f) the dangers of BNSF's business activities outweigh the value of those activities to the community. While not all factors must be present for the Court to find as a matter of law that BNSF's business activities were an inherently dangerous activity, those factors are present here.

BNSF's vermiculite related activities were the type of abnormally dangerous activities to which Montana law would attach strict liability for any injury resulting therefrom.[14] Plaintiffs ask this Court to find, as a matter of law, that BNSF is strictly liable for its abnormally dangerous activities relating to its transport of and other operations relating to asbestos containing materials.

V. CONCLUSION

"No conflict exists with any state law regarding vermiculite and the HMTA" or "with the FRSA regulations." USDC Order, 2018 WL 3601235, at *3. Moreover, no other federal law conflicts with Plaintiffs' claims. Finally, BNSF's vermiculite related activities were the type of abnormally dangerous activities to which Montana law would attach strict liability for any injury resulting therefrom. For the foregoing reasons, Plaintiffs respectfully request this Court grant their *Motion for Partial Summary Judgment*.

RESPECTFULLY SUBMITTED this 5th day of October 2018.

MCGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.
By:*/s/ Roger Sullivan*
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[14] In response to BNSF's motion to dismiss filed in a similar case in the United States District Court, the Court found "[e]ven though vermiculite is not considered a hazardous material under the HMTA as enacted by Congress, it could still be considered an abnormally dangerous activity." (USDC Order, pp. 4-5).

CERTIFICATE OF SERVICE

I, Roger M. Sullivan, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 10-05-2018:

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