

Roger Sullivan
Ethan Welder
Jinnifer Jeresek Mariman
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 First Avenue East
Kalispell, MT 59901
(406) 752-5566

Attorney for MHSL Plaintiffs

IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION, <i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694 PLAINTIFFS' OUTSTANDING ISSUES RE: PLAINTIFFS' AUGUST 24, 2018, MOTION TO COMPEL BNSF Applicable To: <i>Barnes, et al. v. State of Montana, et al,</i> Lincoln County Cause No. DV-16-111</p>
--	---

INTRODUCTION

Pursuant to the Court's directive at the November 20, 2018, hearing, Plaintiffs hereby submit this notice of the following outstanding issues regarding Plaintiffs' August 24, 2018, *Motion to Compel and for Sanctions* against BNSF. In short, Plaintiffs would like the Court to:

- 1) Compel the production of certain documents BNSF has still not produced despite this Court's August 28, 2018 oral ruling, and
- 2) Compel the production of subpoenaed Kennedy Jenks' documents (one of BNSF's cleanup contractors) to which BNSF has claimed an attorney client privilege and/or work product protection, or, alternatively, order that production for an *in camera* review so that any privilege asserted may be verified.

The documents sought relate to cleanup efforts and related testing of BNSF's Libby properties, which are directly relevant to this case. Likewise, communications about those efforts are relevant and any alleged privilege asserted must be verified.

ARGUMENT

I. Despite this Court's oral ruling, all of the documents sought in Plaintiffs' August 24, 2018, Motion to Compel and for Sanctions against BNSF have not been produced.

As the Court will recall, on August 24, 2018, Plaintiffs' filed their *Motion to Compel and for Sanctions*. The Court conducted an informal discovery conference on August 28, 2018. At the conclusion of that conference, the Court:

1. Granted the *Motion to Compel* in all respects except:
 - a. impeachment documents; and
 - b. prior litigation files to the extent those were not in BNSF's possession, custody, or control.
2. Denied the imposition of sanctions at this time.
3. Struck BNSF's 15 paragraphs of objections preceding BNSF's discovery responses.

Critical here, the Court ordered the production of the following documents:

1. Correspondence regarding the clean-up efforts.
2. Records of clean-up, modification, removal, and construction activities.
3. Entities consulted prior to 2015 regarding the clean-up or testing.

As Plaintiffs stated in the *Motion to Compel*, this critical information relates to testing, clean-up, and the toxicity of the BNSF's Lincoln County properties.

The Court advised BNSF that it could file a *Response* if it so chose. The time to file any such *Response* has long since passed.

Despite this Court's oral ruling, to date, Plaintiffs have not received:

1. Any internal BNSF correspondence regarding clean-up or testing efforts.
2. A complete production of documents and correspondence leading up to the entry of the Administrative Order on Consent, including any CERCLA investigation and enforcement action leading to that Administrative Order on Consent, for the EPA mandated cleanup of BNSF's Lincoln County properties.
3. Any meaningful summary of modification, removal, and construction activities taking place on BNSF Lincoln County properties since active vermiculite mining operations ceased in 1990 (BNSF again produced indecipherable charts).

Plaintiffs respectfully request the Court, again, order the production of the foregoing documents.

II. BNSF's alleged attorney-client privilege and/or work product protection to subpoenaed documents from their contractor Kennedy Jenks must be verified and missing documents must be produced.

Because Plaintiffs had not received cleanup documents from BNSF, on August 10, 2018, Plaintiffs subpoenaed Kennedy Jenks (BNSF's current cleanup contractor), and other contractors. The *Subpoena*, attached hereto as **Exhibit A**, compelled production by August 30, 2018.

On August 27, 2018, Plaintiffs received an "*Objections to Subpoena Duces Tecum Served upon Non-Party Kennedy Jenks*," attached hereto as **Exhibit B**. That was signed by Scott Carney as project manager for Kennedy Jenks and by Ms. Patrick of Knight Nicasastro as attorney for BNSF.

A month later, on September 28, 2018, Plaintiffs received copies of Kennedy Jenks' hard copy documents. However, that production was not made directly to Plaintiffs from Kennedy Jenks,

as required by Plaintiffs' subpoena. Rather that production was coordinated through Knight Nicastro, BNSF's attorneys. Knight Nicastro claimed these were "BNSF Documents," yet BNSF had never produced these documents previously in response to discovery requests. Accompanying that production was BNSF's Privilege Log to responsive Kennedy Jenks documents that BNSF was withholding. The privilege log, attached hereto as **Exhibit C**, claimed "attorney work product" protection and identified 18 documents with the following descriptors:

1. Kennedy Jenks' Project Manager Scott Carney's notes from meetings with BNSF litigation counsel Chad Knight,
2. Kennedy Jenks' Project Manager Scott Carney's notes from meetings with BNSF in-house counsel Brooke Kuhl,
3. Emails with BNSF in-house counsel Brooke Kuhl (other participant to the email is not identified), and
4. Memos from BNSF's in-house legal department to Kennedy Jenks.

Because the privilege log did not contain a date of the alleged documents nor any foundational basis for claiming the "attorney work product" protection, on October 2, 2018, Plaintiffs asked BNSF to provide it with privilege log containing that information. To date, no such privilege log has been produced. Also, based on the Bates numbering of the documents produced, it appears that 2,000 documents were missing/omitted from the Kennedy Jenks hard copy document production. Although Plaintiffs have inquired with BNSF about this discrepancy, Plaintiffs have not received a response.

On October 17, 2018, Knight Nicastro coordinated the production of Kennedy Jenks' electronically stored information. No privilege log accompanied that response. Plaintiffs separately requested a copy of any privilege log to determine if any additional documents were withheld. Plaintiffs finally received that privilege log on November 19, 2018. Indeed, that privilege log,

attached hereto as **Exhibit D**, identifies 69 documents for which BSNF is claiming attorney/client privilege and 2 documents for which BNSF is claiming work product protection.

However, based on the parties to those communications, it does not appear as though the attorney client privilege is applicable. The vast majority of the documents include non-BNSF individuals such as Kennedy Jenks Project Manager Scott Carney who is neither an attorney nor a represented “client.” Additionally, many of the documents are communications between Mr. Carney and BNSF’s Manager of Environmental Remediation Yueh Chuang, with no attorney involved in the communication.

Notably, BNSF has not asserted consulting expert protection under MRCP Rule 26(b)(4)(B). Regardless, MRCP Rule 26(b)(4)(B) allows discovery of consulting experts if such information cannot reasonably be obtained elsewhere. All sampling, analysis, and clean-up of BNSF properties has been performed under the control and direction of BNSF and they (or their contractors such as Kennedy Jenks) are the only apparent source for this information. In the present case, BNSF disclosed Kennedy Jenks Project Manager Scott Carney as a non-retained testifying expert to testify consistent with the report he prepared as part of Kennedy Jenks’ cleanup work in the Libby Railyard. So, it is clear no such MRCP Rule 26(b)(4)(B) protection would apply.

Plaintiffs respectfully request the Court order the production of the withheld documents. Alternatively, Plaintiffs respectfully request the Court order the production of the withheld documents for *in camera* review to verify the privilege asserted. Under either scenario, Plaintiffs respectfully

request the Court compel the production of (or order explanation of the discrepancy for) the apparently 2,000 pages of missing documents.¹

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to enforce its ruling of August 28, 2018, and again compel the production of information and documents from BNSF as set forth herein.

Respectfully submitted this 27th day of November, 2018.

McGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.

By: /s/ Jinnifer J. Mariman
JINNIFER JERESEK MARIMAN

Attorney for MHSL Plaintiffs

¹ While the Kennedy Jenks electronically stored documents were not produced in a manner that allows Plaintiffs to independently discern if documents are missing from that production, Plaintiffs' request for production extends to any such withheld documents as well.

CERTIFICATE OF SERVICE

I, Jinnifer Jeresek Mariman, hereby certify that I have served true and accurate copies of the foregoing Other - Other to the following on 11-27-2018:

Amy Poehling Eddy (Attorney)
920 South Main
Kalispell MT 59901
Representing: Amy Eddy
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Allan M. McGarvey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jon L. Heberling (Attorney)
345 First Ave E
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Ethan Aubrey Welder (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jeffrey R. Kuchel (Attorney)
305 South 4th Street East
Suite 100
Missoula MT 59801
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Danielle A.R. Coffman (Attorney)
1667 Whitefish Stage Rd
Kalispell MT 59901
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Gary M. Zadick (Attorney)
P.O. Box 1746
#2 Railroad Square, Suite B
Great Falls MT 59403
Representing: Honeywell International
Service Method: eService

Gerry P. Fagan (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103-2559
Representing: CNH Industrial America LLC
Service Method: eService

G. Patrick HagEstad (Attorney)
PO Box 4947
Missoula MT 59806
Representing: United Conveyor Corporation, Riley Stoker Corporation et al
Service Method: eService

Mark Andrew Thieszen (Attorney)
Poore Roth & Robinson, P.C.
1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Patrick M. Sullivan (Attorney)

1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Jennifer Marie Studebaker (Attorney)
210 East Capitol Street
Suite 2200
Jackson MS 39201
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Joshua Alexander Leggett (Attorney)
210 East Capitol Street, Suite 2200
Jackson MS 39201-2375
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Vernon M. McFarland (Attorney)
200 South Lamar Street, Suite 100
Jackson MS 39201-4099
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Jean Elizabeth Faure (Attorney)
P.O. Box 2466
1314 Central Avenue
Great Falls MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec
LLC, International Paper Co.
Service Method: eService

Jason Trinity Holden (Attorney)
1314 CENTRAL AVE
P.O. BOX 2466
Montana
GREAT FALLS MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec
LLC, International Paper Co.
Service Method: eService

Chad E. Adams (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore,
Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American
Inc.
Service Method: eService

Katie Rose Ranta (Attorney)
Faure Holden, Attorneys at Law, P.C.
1314 Central Avenue
P.O. Box 2466
GREAT FALLS MT 59403
Representing: Borg Warner Morse Tec LLC
Service Method: eService

John Patrick Davis (Attorney)
1341 Harrison Avenue
Butte MT 59701
Representing: Atlantic Richfield Company, et al
Service Method: eService

Stephen Dolan Bell (Attorney)
Dorsey & Whitney LLP
125 Bank Street
Suite 600
Missoula MT 59802
Representing: Ford Motor Company
Service Method: eService

Dan R. Larsen (Attorney)
Dorsey & Whitney LLP
111 South Main
Suite 2100
Salt Lake City UT 84111
Representing: Ford Motor Company
Service Method: eService

Kelly Gallinger (Attorney)
315 North 24th Street
Billings MT 59101
Representing: Maryland Casualty Corporation
Service Method: eService

Charles J. Seifert (Attorney)
P.O. Box 598
Helena MT 59624
Representing: Ford Motor Company, Maryland Casualty Corporation
Service Method: eService

Robert J. Phillips (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Emma Laughlin Mediak (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Daniel Jordan Auerbach (Attorney)
201 West Railroad St., Suite 300
Missoula MT 59802
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company
Service Method: eService

Leo Sean Ward (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

Robert B. Pfennigs (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Rick A. Regh (Attorney)
P.O. Box 2269
GREAT FALLS MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Mark Trevor Wilson (Attorney)
300 Central Ave.
7th Floor
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Robert M. Murdo (Attorney)
203 North Ewing
Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street

Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Ben A. Snipes (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Mark M. Kovacich (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Ross Thomas Johnson (Attorney)
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: A.W. Chesterson Company
Service Method: eService

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: A.W. Chesterson Company
Service Method: eService

M. Covey Morris (Attorney)
Tabor Center
1200 Seventeenth St., Ste. 1900
Denver CO 80202
Representing: FMC Corporation
Service Method: eService

Robert J. Sullivan (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Ingersoll-Rand, Co.
Service Method: eService

Dale R. Cockrell (Attorney)
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell MT 59904
Representing: State of Montana
Service Method: eService

Vaughn A. Crawford (Attorney)
SNELL & WILMER, L.L.P.
400 East Van Buren
Suite 1900
Phoenix AZ 85004
Representing: The Proctor & Gamble Company et al
Service Method: eService

Tracy H. Fowler (Attorney)
15 West South Temple
Suite 1200
South Jordan UT 84101
Representing: The Proctor & Gamble Company et al
Service Method: eService

Martin S. King (Attorney)
321 West Broadway, Suite 300
P.O. Box 4747
Missoula MT 59806
Representing: Foster Wheeler Energy Services, Inc.
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103
Great Falls MT 59403
Representing: Continental Casualty Company
Service Method: eService

Tom L. Lewis (Attorney)
2715 Park Garden Lane
Great Falls MT 59404
Representing: Harold N. Samples
Service Method: eService

Keith Edward Ekstrom (Attorney)
601 Carlson Parkway #995
Minnetonka MN 55305
Representing: Brent Wetsch
Service Method: eService

William Rossbach (Attorney)

401 N. Washington
P. O. Box 8988
Missoula MT 59807
Representing: Michael Letasky
Service Method: eService

Kennedy C. Ramos (Attorney)
1717 Pennsylvania Avenue NW
1200
wash DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Edward J. Longosz (Attorney)
1717 Pennsylvania Avenue NW
Suite 1200
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Chad M. Knight (Attorney)
929 Pearl Street
Ste. 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Anthony Michael Nicastro (Attorney)
401 North 31st Street
Suite 770
Billings MT 59101
Representing: BNSF Railway Company
Service Method: eService

Nadia Hafeez Patrick (Attorney)
929 Pearl Street Suite 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Kevin A. Twidwell (Attorney)
1911 South Higgins Ave
PO Box 9312
Missoula MT 59807
Representing: Libby School District #4
Service Method: eService

Stephanie A. Hollar (Attorney)
P.O. Box 2269

Great Falls MT 59403
Representing: Stimson Lumber Company
Service Method: eService

James E. Roberts (Attorney)
238 W Front Street
Suite 203
Missoula MT 59802
Representing: BNSF Railway Company
Service Method: eService

Jacy Suenram (Attorney)
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al
Service Method: eService

Electronically Signed By: Jinnifer Jeresek Mariman
Dated: 11-27-2018