

Roger Sullivan  
Allan M. McGarvey  
John F. Lacey  
Jinnifer Jeresek Mariman  
Ethan Welder  
Dustin Leftridge  
McGARVEY LAW  
345 First Avenue East  
Kalispell, MT 59901  
(406) 752-5566

*Attorneys for MHS� Plaintiffs*

IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION,</p> <p><i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694</p> <p>MHS� PLAINTIFFS' COMBINED MOTION FOR ORDER OF CONTEMPT, SANCTIONS HEARING &amp; PROTECTIVE ORDER RE: BNSF'S IMPROPER FILINGS &amp; DISCOVERY SOUGHT IN 17 STAYED CASES</p> <p><i>Applicable to 17 Cases<sup>1</sup></i></p>
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<sup>1</sup> This *Combined Motion* is applicable to the following cases:

- 1) *Adamson v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-18-0080 (Kutzman)
- 2) *Backen v. BNSF Rwy. Co. et al.*, Cascade County Cause No. CDV-17-0172 (Kutzman)
- 3) *Ball v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-16-0060 (Parker)
- 4) *Breeden v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-17-0261 (Parker)
- 5) *Brown v. BNSF Railway Co. et al.*, Cascade County Cause No. ADV-18-0183 (Pinski)
- 6) *Burkett v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-17-0634 (Parker)
- 7) *Collins v. BNSF Railway Co. et al.*, Cascade County Cause No. BDV-15-429 (Parker)
- 8) *Greenough v. BNSF Railway Co. et al.*, Cascade County Cause No. CDV-17-0464 (Parker)
- 9) *Haas v. BNSF Railway Co. et al.*, Cascade County Cause No. CDV-14-0144 (Best)
- 10) *Haines v. BNSF Railway Co. et al.*, Cascade County Cause No. ADV-18-0025 (Pinski)
- 11) *Judd v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-16-0061 (Parker)
- 12) *Larson v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-16-0378 (Parker)
- 13) *McPherson v. BNSF Railway Co. et al.*, Cascade County Cause No. BDV-17-0487 (Parker)
- 14) *Morrill v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-17-0519 (Parker)
- 15) *Richardson v. BNSF Railway Co. et al.*, Cascade County Cause No. DDV-16-0132 (Parker)
- 16) *Sago v. BNSF Railway Co. et al.*, Cascade County Cause No. ADV-19-0582 (Pinski)
- 17) *Stickney v. BNSF Railway Co. et al.*, Cascade County Cause No. CDV-15-478 (Kutzman)

MHS� PLAINTIFFS' COMBINED MOTION FOR ORDER OF CONTEMPT,  
SANCTIONS HEARING, & PROTECTIVE ORDER RE: BNSF'S IMPROPER  
FILINGS & DISCOVERY SOUGHT IN 17 STAYED CASES

## INTRODUCTION

Standing Orders of the Montana Supreme Court and the Asbestos Claims Court have stayed all litigation and discovery in these 17 cases, and all other non-lead Libby asbestos cases. The stays were imposed because of the “enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis.” **Exhibit A** (11/28/17 Mont. Sup. Ct. Order) p. 1. To avoid that impact, the Asbestos Claims Court is controlling orderly litigation of discovery and representative issues common to this large body of related asbestos cases through complex litigation mechanisms. Pursuant to the need for non-duplicative litigation of common issues, and useful “test” verdicts which inform case valuation, the Asbestos Claims Court has established a lead case paradigm and systems to manage discovery.

In violation of the stay and discovery orders, BNSF is attempting to disrupt the Asbestos Claims Court’s orderly flow of trials and force discovery and active litigation on an individual basis. BNSF has filed motions seeking a scheduling order in the above 17 different cases and served 65 discovery requests in each of those cases along with demanding the depositions of each plaintiff. MHSL Plaintiffs bring this *Combined Motion for Order of Contempt, Sanctions Hearing & Protective Order Re: BNSF’s Improper Filings in and Discovery Sought in 17 Stayed Cases* (“Combined Motion”), to preserve the carefully crafted systems for case management, including the Asbestos Claims Court’s prerogative to authorize which cases should be advanced to trial or dispositive rulings and the attendant discovery pertaining thereto.

Pursuant to Mont. R. Civ. P. Rule 26(c)(1), the undersigned has in good faith attempted to confer with BNSF regarding the *Motion for Protective Order* portion of this *Combined Motion*

to resolve that dispute without further Asbestos Claims Court action. That conferral was not successful.

### **ASBESTOS CLAIMS COURT's COMPLEX LITIGATION PROCEDURES**

In establishing the Asbestos Claims Court, the Montana Supreme Court noted “the extraordinary complexity and cost of these cases, and the enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis.” **Exhibit A** (11/28/17 Mont. Sup. Ct. Order), p. 1. All cases involving Libby asbestos-related claims were “consolidated into the above-captioned matter [i.e. the Asbestos Claims Court] for pretrial purposes only.” *Id.*, pp.1-2. Importantly, the Montana Supreme Court ordered:

With the exception of the notices of appearances referenced above and service of process and filing of the pleadings identified in M. R. Civ. P. 7(a), all further action in the cases identified on Exhibit A, attached hereto, is STAYED pending further ruling by the Asbestos Claims Judge.

*Id.*, p.2.

Accordingly, on January 9, 2018, the Asbestos Claims Court reaffirmed that stay in the following *Order*:

All proceedings in state district courts are STAYED pending further order of this Court.

**Exhibit B** (1/9/18 ACC Order), p. 3.

On February 7, 2018, the Asbestos Claims Court explained a limited exception to that stay when it entered the following *Order*:

IV. DISTRICT COURT PROCEEDINGS: The stay of district court proceedings is lifted as of the date of this *Order* to the extent necessary to allow the parties to effectuate service, file notices of appearance and answers, and exercise their respective rights of judicial substitution.

**Exhibit C** (2/7/18 ACC Order), p. 2.

Following the February 20, 2018, Asbestos Claims Court hearing, the Asbestos Claims Court entered the following *Order* in furtherance of its use of complex litigation mechanisms:

Selection of Lead/Test Cases: The purpose of the parties identifying lead/test cases is for the Court to be able to select cases to set for trial. The Court expects the selection of cases identified to encompass a variety of types of Plaintiffs, types of exposure, types of diagnosis, legal issues, and Defendants...

**Exhibit D** (2/21/18 ACC Order), p. 2.

On March 20, 2018, the Asbestos Claims Court entered the following *Order* regarding discovery in non-lead cases:

IV. Defendants' Master Discovery Requests to Plaintiffs: With the exception of the individual lead cases the Court has set for trial, the Defendants are not permitted to serve discovery requests on the individual Plaintiffs pending further order of this Court.

**Exhibit E** (3/20/18 ACC Order), p. 2<sup>2</sup>. The Asbestos Claims Court then set five (5) lead cases for trial, none of which are the above seventeen (17) cases at issue here. *Id.*

The Asbestos Claims Court has previously advised the parties, including BNSF, that attempts to proceed with litigation of Asbestos Claims Court cases without specific approval and direction of the Asbestos Claims Court would be considered contempt of court:

I will advise counsel, though, if I have somehow missed a notice of opt out I will apologize, I do not see one in the file, nor did the Defendants. I consider it contempt of court for there to be any active district court proceedings without notifying this Court of an opt out. There's too much to do for multiple judges to be working on the same issues.

**Exhibit F** (9/18/18 ACC Transcript), pp. 9:22-10:4.

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<sup>2</sup> Unless otherwise noted, emphasis is added.

Because the Asbestos Claims Court had previously told the parties that it did not want the parties presenting cases that the parties would like set for trial, the following exchange occurred at the November 20, 2018, hearing with the Asbestos Claims Court:

MR. KOVACICH: . . . I believe it would be appropriate now to set a few more cases for trial at some point later next year.

THE COURT: We're going to. . . . So I would anticipate in January we'll start setting cases for September or October of next year. . . . Any questions about that?

MR. KNIGHT [counsel for BNSF]: Your Honor, do you want us to be prepared to present cases that we would like to set for trial?

THE COURT: Um, I don't know that you're going to have that option, to tell you the truth . . . . And then you're not going to have much say on the cases that you try because I'm going to look at the body of cases in front of me and my calendar here and I'm just going to start setting cases.

Anything else? I can't guarantee that, other judges might view that differently, but it's sort of a lot of extra work, frankly, to try to come to some agreement on which cases we're going to try and which ones we're not. Okay?

**Exhibit G** (11/20/2018 ACC Transcript) pp. 25:12-28:9.

On December 11, 2018, the Montana Supreme Court appointed additional Asbestos Claims Court Judges “in order to more equitably and efficiently meet the demands of this litigation.” **Exhibit H** (12/11/18 Mont. Sup. Ct. Order), p. 1.

The only exception to the Asbestos Claims Court’s exercise of control over the lead cases proceeding to trial was a FELA case (which did not present the same issues as were being addressed by the Montana Supreme Court) where *both* sides agreed that they desired the case to go forward on the FELA claim:

THE COURT: And the claims against the Railroad are the same types of claims as are pending before the Supreme Court in the Barnes case?

MR. JOHNSON: Is the Barnes case a --

THE COURT: It's a strict liability for abnormally dangerous activity.

MR. JOHNSON: The Coyle case is a FELA case, Your Honor.

THE COURT: All right, I understand. All right. Well, with that, Judge Pinski has jurisdiction over the case, if you want to set it for trial and go try it it's fine with me, I don't have any problems with that.

MR. JOHNSON: Okay.

THE COURT: The point of this is just that the Asbestos Court judges are not going to be actively setting cases for trial against Maryland Casualty or BNSF in the Asbestos Claims Court pending resolution of the Writs of Supervisory Control, we just don't believe that's a good use of resources at this time. But if you want to request a case to be set, by all means.

**Exhibit I** (2/19/2019 ACC Transcript) pp. 6:4-7:1.

On June 17, 2020, the Asbestos Claims Court entered an *Order Re: Case Reassignment*.

**Exhibit J** (6/17/20 ACC Order). “To better manage and conduct the business of the [Asbestos Claims Court],” the Asbestos Claims Court created a new database and filing system for all asbestos cases, which is referred to as the Twenty-Third Judicial District. *Id.*, p. 1. This *Order* merely migrates cases for administrative purposes to the Twenty-Third Judicial District for filing. The *Order* does nothing to retract the over two years of direction from the Montana Supreme Court and the Asbestos Claims Court as to the stay in effect in all Libby asbestos cases, discovery prohibition therein, and the lead case paradigm governing how lead cases will proceed.

Importantly, no Montana Supreme Court or Asbestos Claims Court Order has lifted the stay imposed in these seventeen (17) cases. Likewise, the Asbestos Claims Court has not entered any further orders allowing discovery in these seventeen (17) cases.

### **BNSF's IMPROPER FILINGS IN STAYED CASES**

Despite the stay in place and the discovery prohibition in the above-referenced seventeen (17) cases, in July 2020, BNSF filed and served the following virtually identical documents in the above-referenced seventeen (17) cases:

- 1) *Motion for Status Conference* (“in order to obtain a scheduling order and trial date for this case”) signed by or on behalf of Chad Knight or Anthony Nicastro.
- 2) *First Discovery Requests* (containing 65 requests with 41 requests for production, 23 interrogatories, and 1 request for admission) signed by Nadia Patrick or Anthony Nicastro.

In a cover letter with the above documents, BNSF also stated its intent to notice depositions of the Plaintiffs in each of these stayed cases, asking for a date within fourteen days otherwise BNSF will proceed with filing notices of deposition.

### **ARGUMENT**

**I. BSNF’s attempt to force litigation of these 17 cases undermines the Montana Supreme Court’s and Asbestos Claims Court’s complex litigation procedures and is in direct violation of court orders.**

It cannot be disputed these cases are STAYED. **Exhibit A** (11/28/17 Mont. Sup. Ct. Order), p. 2 (All cases are “STAYED pending further ruling by the Asbestos Claims Judge.”); **Exhibit B** (1/9/18 ACC Order), p. 3 (“All proceedings in state district courts are STAYED pending further order of this Court.”). It is also undisputed that, apart from the managed discovery procedures for collection of medical records, such stay includes a prohibition on discovery. **Exhibit E** (3/20/18 ACC Order), p. 2 (“the Defendants are not permitted to serve discovery requests on the individual Plaintiffs pending further order of this Court.”).

The Asbestos Claims Court later warned the parties that litigating in district court without Asbestos Claims Court permission would constitute contempt:

I consider it contempt of court for there to be any active district court proceedings without notifying this Court of an opt out. There's too much to do for multiple judges to be working on the same issues.

**Exhibit F** (9/18/18 ACC Transcript), pp. 9:22-10:4. The Asbestos Claims Court’s concern of having multiple judges working on the same issues is consistent with the Montana Supreme Court’s rationale for the creation of the Asbestos Claims Court in the first instance: “the extraordinary complexity and cost of these cases, and the enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis.”

**Exhibit A** (11/28/17 Mont. Sup. Ct. Order), p. 1. That is why all cases are stayed and the Asbestos Claims Court has implemented a lead case paradigm. **Exhibit D** (2/21/18 ACC Order), p. 2. (“The purpose of the parties identifying lead/test cases is for the Court to be able to select cases to set for trial.”).

BNSF’s improper filings (both in the form of motions seeking scheduling orders and serving discovery requests in stayed cases) are circumventing the system created by the Montana Supreme Court and employed by the Asbestos Claims Court. These filings are an attempt by BNSF to avoid the established lead case paradigm and unilaterally choose which cases should move toward trial, contrary to the Asbestos Claims Court’s direction to the contrary. *See Exhibit G* (11/20/2018 ACC Transcript) pp. 25:12-28:9. In addition, BNSF’s attempt to activate seventeen (17) cases at once appears to be an effort to overwhelm the courts and parties alike.

**II. The Asbestos Claims Court should hold BNSF in contempt for violating the Montana Supreme Court’s and the Asbestos Claims Court’s respective Orders staying these cases and violating the Asbestos Claims Court’s Order barring discovery in these cases.**

Montana Code Annotated § 3-1-501 defines contempt as, *inter alia*, “[d]isobedience of the lawful orders or process of a judicial officer.” In general, the definitions include “the same kinds of acts or omissions which tend to interrupt the orderly flow of trials or proceedings before courts or to abuse their authority.” *In re Gravely* (1980), 188 Mont. 546, 556, 614 P.2d 1033, 1039. Courts have the authority to enforce their orders “through their power of contempt,” as



conferred by Article VII, Section 1 of the Montana Constitution, when there is sufficient evidence to support the contempt order. *Gillispie v. Sherlock* (1996), 279 Mont. 21, 24, 929 P.2d 199, 201.

In violation of the stay and discovery prohibition orders, BNSF filed motions in 17 different individual cases and served 65 discovery requests in each of those cases. This is not only disobedience of binding orders, but it thwarts the very purpose and design of the complex litigation procedures which are directed specifically at the unmanageability of litigation of individual cases. The Asbestos Claims Court's very purpose is to avoid "the enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis." **Exhibit A** (11/28/17 Mont. Sup. Ct. Order), p. 1.

BNSF could have filed a motion seeking additional proposals for efficient litigation of common issues. At a minimum, BNSF was required to file a motion for relief from the controlling stay orders and provide rationale for why litigation of issues in those cases required both priority and exceptional reason for deviation from the established procedures. BNSF made no such motions or showing; rather, it chose to usurp the Asbestos Claims Court's control (and overwhelm individual district courts and parties) in an attempt to force individual litigation in cases of BNSF's choosing.

Moreover, much of the discovery is directed at the question of whether each plaintiff has a valid medical diagnosis, an issue that is presented in a pending lead case (MacDonald) as well as the subject of a pending motion before the Asbestos Claims Court for a case management procedure for all similarly situated claims. Litigation of the same issues in multiple individual cases before multiple judges is exactly the untenable tangle for which the Asbestos Claims Court

case management system is needed and is indisputably what the stay and discovery orders prohibit.

All parties were given a warning that these types of filings would be viewed as a contempt of court. Plaintiffs respectfully request the Asbestos Claims Court enter an order of contempt.

**III. Rule 26(g) sanctions are mandatory for discovery served in violation of the Asbestos Claims Court's Order prohibiting discovery in these cases.**

BNSF issued 65 discovery requests in each of the 17 cases at issue here. By signing those discovery requests, BNSF and its counsel certified that they were complying with rules of discovery and existing law – including the procedural order specifically stating that “Defendants are not permitted to serve discovery requests on the individual Plaintiffs pending further order of this Court.” **Exhibit E** (3/20/18 ACC Order), p. 2. There has been no such further order.

Mont. R. Civ. P. Rule 26(g) makes *mandatory* that the court “impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both” for improperly certifying through their signature on a discovery request that it is “consistent with these rules and warranted by existing law.” Mont. R. Civ. P. 26(g)(1)(A), (3). “[C]ourts may consider a party’s disregard of the court’s orders and authority when imposing sanctions.” *Kraft v. High Country Motors*, 2012 MT 83, ¶37, 364 Mont. 465, 276 P.3d 908. Sanctions, including default judgment, have been held to be appropriate where “counsel or a party has acted willfully or in bad faith. . . or they have acted in flagrant disregard of those rules.” *Id.*, ¶¶ 37, 39. Moreover, discovery requests must also not be “interposed for any improper purpose, such as...cause unnecessary delay, or needlessly increase the cost of litigation,” and may be neither “unreasonable nor unduly burdensome or expensive.” Mont. R. Civ. P. 26(g)(1)(B), (C).

BNSF's service of 65 improper discovery requests in 17 separate cases, all of which are stayed, violates the Asbestos Claims Court's March 20, 2018 *Order*. Mont. R. Civ. P. 26(g). *Kraft*, ¶ 37. *No* court order has lifted the discovery prohibition, and BNSF has not sought to lift the stay of litigation and discovery for any of its 17 chosen cases. There simply is no arguable basis for disregarding the Asbestos Claims Court's explicit prohibition and needlessly increasing the cost of litigation in these 17 cases.

As a result, several judges have been tasked with identical motions in 17 (so far) different cases, and Plaintiffs must file motions for protective orders. Plaintiffs respectfully request the Asbestos Claims Court enter an order which "must impose an appropriate sanction." Mont. R. Civ. P. 26(g)(3).

**IV. The Asbestos Claims Court should enter a protective order pursuant to Mont. R. Civ. P. Rule 26(c) to protect Plaintiff from answering these discovery requests and being subject to depositions in violation of the Asbestos Claims Court's orders.**

The 65 improper discovery requests made in 17 separate cases, when the Asbestos Claims Court has explicitly required BNSF to make *zero* requests, creates an undue burden and expense. Moreover, it is a transparent attempt to push the 17 cases chosen by BNSF toward trial which will not only place a "detrimental impact" on the court's and parties' resources, but also blatantly undermine the Asbestos Claims Court's clearly stated direction that the Asbestos Claims Court judges would choose which of the hundreds of cases are appropriate for litigation under the Asbestos Claims Court lead case paradigm. Despite the fact BNSF's request for leave to identify "cases that we would like to set for trial" was rejected<sup>3</sup>, BNSF activated litigation and discovery in these 17 cases to force the Asbestos Claims Court's hand.

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<sup>3</sup> **Exhibit G** (11/20/2018 ACC Transcript) pp. 25:12-28:9.

Mont. R. Civ. P. Rule 26(c) allows a party to move for a protective order forbidding discovery. A protective order protects a party from, *inter alia*, “undue burden or expense.” Mont. R. Civ. P. 26(c)(1). The court has “inherent discretionary power” in controlling the administration of pre-trial discovery. *Bartlett v. Allstate Ins. Co.* (1996), 280 Mont. 63, 72, 929 P.2d 227, 232. The purpose of this aspect of the court’s authority, “in controlling and regulating discovery” is to promote fairness, “neither according one party an unfair advantage nor placing the other at a disadvantage.” *Id.*

This *Motion* does not intend to prevent eventual discovery requests and responses, but rather protect the Plaintiffs from undue expense and burden until such time as the Asbestos Claims Court has determined that these or other cases should be moved into pre-trial discovery and litigation status. As such, Plaintiff respectfully requests the Court enter a protective order pursuant to Mont. R. Civ. P. Rule 26(c) to protect Plaintiff from answering the propounded discovery requests and depositions in violation of the Asbestos Claims Court’s orders.

### **CONCLUSION**

Based on the foregoing, MHSL Plaintiffs respectfully request the Asbestos Claims Court enter an order:

1. Finding BNSF is in contempt of court for disobeying the lawful orders of a judicial officer;
2. Setting a hearing to determine the appropriate sanctions for BNSF’s contempt and violations of the Asbestos Claims Court’s discovery prohibition;
3. Forbidding service of discovery or depositions on any non-lead MHSL Plaintiffs pending further order of the Asbestos Claims Court; and

4. Protecting Plaintiff, pursuant to Mont. R. Civ. P. Rule 26(c), from answering the propounded discovery requests and depositions in violation of the Asbestos Claims Court's orders.

Respectfully submitted this 6<sup>th</sup> day of August, 2020.

McGARVEY LAW

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

*Attorney for MHSL Plaintiffs*

## **CERTIFICATE OF SERVICE**

I, Jinnifer Jeresek Mariman, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 08-06-2020:

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

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

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

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)  
27 Shiloh Road, Ste 10  
Billings MT 59106  
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

James E. Roberts (Attorney)

283 West Front Street  
Suite 203  
Missoula MT 59802  
Representing: BNSF Railway Company  
Service Method: eService

William Adam Duerk (Attorney)  
283 West Front Street  
Suite 203  
Missoula MT 59802  
Representing: BNSF Railway Company  
Service Method: eService

Daniel W. Hileman (Attorney)  
22 Second Ave. W., Suite 4000  
Kalispell MT 59901  
Representing: Maryland Casualty Corporation  
Service Method: eService

Nathan Andrew Huey (Attorney)  
201 West Main Street  
Suite 101  
Missoula MT 59802  
Representing: Robinson Insulation Company  
Service Method: eService

Electronically Signed By: Jinnifer Jeresek Mariman  
Dated: 08-06-2020