

WC-0001-C-2021

July 3, 2024

Rick Schoening
41694 Stasso Road
Polson, MT 59860

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES -
MONTANA - UNITED STATES COMPACT

WC-0001-C-2021

Objection to Denial of a Jury Trial – Motion/Brief

The right to trial by jury is “of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right” has always been and “should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

Recently in *SEC vs Jarkesy*, 603 U.S. 2024, decided on June 27, 2024, the Supreme Court stated the SEC was in violation of the Seventh Amendment. The SEC is an administrative agency of the executive branch. In *Jarkesy*, he asked for a jury trial before the SEC which was denied. While not totally similar to this proceeding, it is interesting that *Jarkesy* dealt with fraud. This Water Court case deals with fraud. We have a denial of a jury in *Jarkesy*, we have a denial of a jury in Water Court Proceedings. *Jarkesy* dealt with private rights not public. Here we have a mixture of the private rights of objectors and the public rights of the tribe and the citizens at large.

Here, we have one of the incredible denials of due process in Water Court Adjudication Rule 20 which denies the right to a Jury Trial in these proceedings. It is difficult to ascertain the origin of this rule. Perhaps it dates to the late 1980’s under the Water Right Claim Examination Rules. However, when you look at the Supreme Court amending the W.R.C.E.R. on December 6th, 2006, you do not find a denial of a jury right in those rules. It was inserted in the W.C.Adj.R. sometime either in 2006 or 2008. There is no legislative history to indicate the Legislature

adopted this rule either by bill or by resolution. No explanation is given in Rule 20 as to its origin or why a jury trial is denied.

It is baffling how a denial can be authorized since Water Court Compact proceedings are civil in nature and do deal with findings of fact. Furthermore, this denial is totally in opposition to the Montana Constitution. We read in Article II, Section 26 the following:

The right of trial by jury is secured to all and shall remain inviolate. . . In all civil actions, two-thirds of the jury may render a verdict and a verdict so rendered shall have the same force and effect as if all had concurred therein.


The Legislature has also authorized the right to a jury. In Title 25 we have the Rules of Civil Procedure under Rule 20. In VI, Rule 38, the right of trial by jury is “preserved to the parties inviolate.” The right of an advisory jury is even given in Rule 39 where a party may motion for an advisory jury in an action that is “**not triable of right of jury.**” Why some of these rules were even necessary is perplexing due to the explicit language of the Montana Constitution. While the Water Court may explain away the fact that all previous objectors to Water Compacts have not prevailed, it does suggest an inference that the Water Court, due to precedent, has much ammunition to throw at objectors and therefore make their burden very heavy. The statement by the Water Court in its October 10th zoom meeting that “the facts are already known” concerning this Compact is very troubling. Can a judge be totally neutral when so many Water Compacts have been approved and objectors’ objections denied? The Compacting Parties will argue that sufficient due process has been shown in these proceedings and a jury is not need to satisfy due process. However, one of the best ways to insulate against a bias tribunal, whether he knows it or not, is to have a jury decide the issues of fraud, overreaching, collusion and material injuries to objectors.

There will be a temptation to give a terse reply that the Supreme Court has denied the right of a jury trial in Water Court proceedings. That is not sufficient. There must be an explanation how a ruling like that does not violate the right to a jury trial according to Article II, Section 16 of the Montana Constitution. This is both a procedural and fundamental right. The right is not conferred by legislative grace nor denied by judicial fiat. It is a constitutional right that must be jealously guarded and protected.

Conclusion

There will be a hearing on these matters scheduled for January 6, 2025. It should be a trial with a jury to determine the factual matters of fraud, collusion, overreaching and material (which includes economic) injuries to the rights of objectors. At the very least, if a jury is again denied, an advisory jury must be appointed.

Dated this 3 day of July, 2024

DocuSigned by:
RICK SCHOENING
OC003B3087C743F
Objector


Rick Schoening

Certificate of Service by Email {X} or regular mail { }

Montana Water Court
PO Box 1389
Bozeman MT 59771
watercourt@mt.gov

Todd Kim, Assistant Attorney General

Daniel J. Decker

David W. Harder, Senior Attorney for Legal Issues
Bradley S. Bridgewater, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Div.
999 18th St., South Terrace, Suite 370
Denver, Colorado 80202
david.harder@usdoj.gov
bradley.s.bridgewater@usdoj.gov
efile_denver.enrd@usdoj.gov

Yosef Negose, Trial Attorney
United States Department of Justice
Indian Resources Section
Environment and Natural Resources Div.
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20004
yosef.negose@usdoj.gov

Rebecca M. Ross, Senior Attorney
James Cooney, Trial Attorney
United States Department of Justice
Indian Resources Section
rebecca.ross@usdoj.gov
james.cooney@usdoj.gov

Dated this 3 day of July, 2024

Melissa Schlichting
Christina M. Courville
Zach Zipfel
CSKT
P0 Box 278
Pablo, MT 59855
Melissa.Schlichting@cskt.org
Christina.Courville@cskt.org
Daniel.Decker@cskt.org
zachary.zipfel@cskt.org

Molly M. Kelly
Montana DNRC
1539 Eleventh Avenue
P0 Box 201601
Helena, MT 59601
Molly.kelly2@mt.gov
Jean.saye@mt.gov

DocuSigned by:
RICK SCHAEMING
92D0303207C743F



