

The Honorable John C. Coughenour

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELILE ADAMS,)	Case No.: 2:19-cv-01263-JCC
)	
Petitioner,)	RESPONDENTS' RETURN TO PETITION
)	FOR WRIT OF <i>HABEAS CORPUS</i> AND
vs.)	MOTIONS FOR DISMISSAL UNDER FRCP
)	12(b)(6) AND 12(b)(7)
)	
BILL <i>ELFO</i> , Whatcom County Sheriff, and)	NOTED FOR HEARING ON FRIDAY,
WENDY JONES, Whatcom County Chief of)	OCTOBER 25, 2019
Corrections,)	<i>WITHOUT ORAL ARGUMENT</i>
)	
Respondents.)	

COME NOW, Bill Elfo and Wendy Jones, Respondents herein, by and through their counsel of record, Civil Deputy Prosecutor George Roche, and hereby move this Court to dismiss the petition for writ pursuant to Federal Rule of Civil Procedure (F.R.C.P.) 19(1)(A), F.R.C.P. 12(b)(6), and F.R.C.P. 12(b)(7). Petitioner has failed to join Nooksack Tribal Judge Raymond Dodge, the only party responsible for the detention at issue in this petition; Petitioner has also failed to state a claim against Whatcom County for which this Honorable Court could grant habeas relief.

RESPONDENTS' RETURN TO PETITION
FOR WRIT OF *HABEAS CORPUS* AND
MOTIONS FOR DISMISSAL UNDER
FRCP 12(b)(6) AND 12(b)(7) - 1
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1 In the alternative, Respondents argue in return that there is no cause to grant the
2 Petitioner's request for habeas relief and it is plain that an evidentiary hearing is unnecessary.
3 Further, Respondents argue in return that Petitioner has failed to exhaust her available tribal
4 court remedies and therefore the Petition should be denied.

5 JURISDICTION AND VENUE

6 The Respondents agree with the Petitioner that venue is appropriate, and the Court has
7 jurisdiction to hear the Petition under 25 U.S.C. § 1303. See also *Sweet v. Hinzman*, 634 F.
8 Supp. 2d 1196, 1199 (W.D. Wash. 2008).

9
10 However, the Respondents argue that the statutory grant of jurisdiction under 25 U.S.C.
11 § 1303 is the sole basis of the Court's jurisdiction in this case. A petition for writ of habeas
12 corpus under 25 U.S.C. § 1303 is the exclusive mechanism for federal courts to review a
13 detention that occurs pursuant to a tribal court order. See *Santa Clara Pueblo v. Martinez*, 436
14 U.S. 49, 67, 98 S. Ct. 1670, 1681, 56 L. Ed. 2d 106 (1978). See also *Tavares v. Whitehouse*,
15 851 F.3d 863, 866 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1323, 200 L. Ed. 2d 512 (2018),
16 quoting *Santa Clara Pueblo*, 436 U.S. at 65, 67.

17 Here, as outlined by the Petition, the Petitioner is detained exclusively by the order of
18 Nooksack Tribal Judge Raymond Dodge. See *Dkt. 6* pgs. 7-13. Whatcom County and the State
19 of Washington have not issued any orders relevant to this Petition, and Whatcom County and
20 the State of Washington do not currently detain the Petitioner in any capacity. The Nooksack
21 Tribal Court Order is the only order at issue in this Petition, therefore, the Court's jurisdiction is
22 exclusively found within 25 U.S.C. § 1303, and the Court does not have subject matter
23 jurisdiction pursuant to 28 U.S.C. § 2241.

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ISSUES

- 1
- 2 1. Is it clear from the face of the Complaint that the Nooksack Tribal Judge is
- 3 both necessary and indispensable to the resolution of the issues presented
- 4 in this Petition for habeas relief?

5 Answer: Yes, the Petition shows that the Nooksack Tribal Judge issued

6 the arrest warrant that produced the Petitioner’s detention and the

7 Nooksack Tribal Court is currently the sole custodian of the Petitioner.

8 Therefore, the Nooksack Tribal Judge is both a necessary and

9 indispensable party.

- 10 2. Do the Plaintiffs state a claim against Whatcom County for which habeas
- 11 relief could be granted?

12 Answer: No, the Petitioner is not detained by Whatcom County, and the

13 proper statute for relief in this case is 25 U.S.C. § 1303. If the Court were

14 to issue a writ based on the Petition, that writ should be directed to the

15 Nooksack Tribal Judge as he alone has the power to give the Petitioner her

16 unconditional freedom.

- 17 3. In the alternative, is there cause to grant the Petition, and is an evidentiary
- 18 hearing on the merits of this Petition necessary?

19 Answer: An evidentiary hearing is not necessary because it is plain that

20 there is no cause to grant this Petition. The Petitioner has not exhausted

21 her available tribal remedies; and further it is plain that her detention by

22 the Nooksack tribe did not violate due process, and it is plain that the

23 Nooksack Tribal Court had subject matter jurisdiction to issue the order.

FACTS

24 On July 19, 2019, the Nooksack Tribal Judge Raymond Dodge issued an arrest warrant

25 for the Petitioner. See *Declaration of Wendy Jones in support of Respondents’ Return to*

Petition for writ of habeas corpus and motions for dismissal under FRCP 12(b)(6) and 12(b)(7)

(hereinafter, *Jones Dec.*) pg. 2. See also *Dkt. 6* pg. 7. On July 30, 2019 the Nooksack Tribal

Police Department served the arrest warrant on the Petitioner, and delivered her into the

custody of the Whatcom County Jail. See *Jones Dec.* pg. 2. See also *Dkt. 6* pgs. 8-13. On the

1 same day, the Petitioner posted bail and was released from the custody of Whatcom County
2 Jail. See *Jones Dec.* pg. 2. See also *Dkt. 6* pg. 13. On August 1, 2019, Whatcom County Jail
3 wire transferred the bail that was posted to secure the Petitioner's release to the Nooksack
4 Tribe. See *Jones Dec.* pg. 2. Currently Whatcom County has no role in the Petitioner's
5 bailor/bailee relationship. See *Jones Dec.* pg. 2. To date the Petitioner has not returned to the
6 custody of the Whatcom County jail. See *Jones Dec.* pg. 3.

7 In an effort to understand the facts relevant to this Petition, I communicated with the
8 Nooksack Tribal Attorney and requested that they offer documents they felt were relevant to
9 the Petition. See *Roche Dec.* In response, the Nooksack Tribal Attorney's Office faxed forty-
10 one pages of relevant documentation. See Exhibit 1 to *Declaration of George Roche in support*
11 *of Respondents' Return to Petition for writ of habeas corpus and motions for dismissal under*
12 *FRCP 12(b)(6) and 12(b)(7)* (hereinafter, *Roche Dec.*). I also communicated with the
13 Department of the Interior's Bureau of Indian Affairs (BIA) asking for facts relevant to this
14 Petition. See Exhibit 2 to *Roche Dec.* The Northwest Regional Director of the BIA responded
15 to my letter with information relevant to this Petition. See Exhibit 3 to *Roche Dec.*

17 The Nooksack Tribal Court affords persons detained with a right to petition of writs of
18 habeas corpus. See Exhibit 4 to *Roche Dec.* The Superior Courts of the State of Washington
19 will decline to enforce tribal court orders that lack subject matter jurisdiction, offend the
20 notions of due process, or fail to provide reciprocity for the orders of Washington's superior
21 courts. See *Washington State Superior Court Civil Rule* (Washington CR) 82.5.

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ARGUMENT

1. Nooksack Tribal Judge Raymond Dodge is the Petitioner’s custodian and he is a necessary party to resolution of this Petition’s merits. Absent the joinder of Raymond Dodge, the Court should dismiss the Petition with leave to amend pursuant to F.R.C.P. 12(b)(7).

The respondent in any habeas corpus action must be the individual custodian of the prisoner. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978). “The writ, or order to show cause shall be directed to the person having custody of the person detained.” 28 U.S.C.A. § 2243. The proper respondent in a petition for habeas relief is not always the petitioner’s literal custodian, but instead the proper respondent is the agency or person “who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit—namely, his unconditional freedom.” *Reimnitz v. State's Attorney of Cook Cty.*, 761 F.2d 405, 409 (7th Cir. 1985). The rationale of *Reimnitz* is consistent with F.R.C.P. 19(1)(a), which requires joinder of a party if that party’s absence would deprive the court from providing complete relief. Where a tribal court’s order results in the unlawful detention of a petitioner, the tribal court judge is the appropriate respondent. See *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 898-900 (2d Cir. 1996). See also *Moore v. Nelson*, 270 F.3d 789, 792 (9th Cir. 2001). Joinder of a necessary party may be raised sua sponte, and at any time in the proceedings. *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994). When it becomes clear that a joined party is necessary, the court should next determine if joinder is feasible. *Id.* If an indispensable party cannot be joined then dismissal is an appropriate remedy. *Id.* See also

1 *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir.
2 1991), citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990).

3
4 This Petition arises from the detention of the Petitioner pursuant to an arrest warrant
5 issued by Nooksack Tribal Court Judge Raymond Dodge. See *Jones Dec.* pg. 2. See also *Dkt. 6*
6 pgs. 7. The Petitioner remains in the custody of Nooksack Tribal Court Judge Raymond Dodge
7 in the form of bail, which currently makes her freedom conditional. See *Jones Dec.* pg. 2. See
8 also *Dkt. 6* pgs. 13. The Nooksack Tribal Court orders are the sole basis for the detention at
9 issue in this petition. If the Court chooses to grant habeas relief to the Petitioner the Court's
10 writ must be directed to the Nooksack Tribal Judge Raymond Dodge in order to ensure the
11 Petitioner's unconditional freedom. Nooksack Tribal Judge Raymond Dodge is both necessary
12 to the just adjudication of this Petition, and is an indispensable party under F.R.C.P. 19(1)(a).
13 Joinder of Nooksack Tribal Court Judge Raymond Dodge is feasible because venue is
14 appropriate and he is subject to this Court's jurisdiction under 25 U.S.C. § 1303. Unlike *Pit*
15 *River Home* and *Confederated Tribes of Chehalis Indian Reservation* joinder is feasible
16 because sovereign immunity does not prevent the joinder of a tribal judge in a federal habeas
17 action brought pursuant to 25 U.S.C. § 1303. See *Poodry*, 85 F.3d at 899. Absent joinder of
18 Nooksack Tribal Court Judge Raymond Dodge, dismissal with leave to amend the pleading is
19 appropriate under F.R.C.P. 12(b)(7).

20 Therefore, the Court should mandate joinder of the necessary and indispensable party:
21 Nooksack Tribal Court Judge Raymond Dodge.

22 **2. The Petitioner has failed to state a claim against Whatcom County for**
23 **which this Court could grant relief.**

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1 When considering a respondent's motion to dismiss a federal habeas petition from
2 a tribal court order, brought pursuant to F.R.C.P. 12(b)(6), the court will construe the
3 complaint in the light most favorable to the petitioner. See *Sweet*, 634 F. Supp. 2d at
4 1200. All well plead facts will be taken as true and all reasonable inferences shall be in
5 favor of the petitioner. *Id.* The court can grant an F.R.C.P. 12(b)(6) motion to dismiss
6 based on a lack of cognizable legal theory or the absence of sufficient facts. *Id.* However,
7 the court should allow leave to amend the petition, unless amendment would prove futile.
8 *Id.*

9 Here, the Petitioner is seeking a writ of habeas corpus directed to Whatcom
10 County via the Whatcom County officials that manage the Whatcom County Jail, Sheriff
11 Bill Elfo and Chief Corrections Deputy Wendy Jones. However, taking the facts outlined
12 in the Petition, in the light most favorable to the Petitioner, and with all inferences taken
13 in the Petitioner's favor, it becomes clear that the Petitioner is in the sole custody of the
14 Nooksack Tribal Court. See *Dkt. 6* pg. 13-14. The Petition expressly acknowledged that
15 the detention is based solely upon the tribal court warrant. *Id.* at pg. 14. Further, it is clear
16 that the Petitioner does not have a current custodial relationship with Whatcom County,
17 due to her release on bail. *Id.* at pgs. 13-14. As arguer in greater detail above, the proper
18 Respondent under the factual narrative presented in the Petition would be Nooksack
19 Tribal Court Judge Raymond Dodge. He alone is in the position to either contest the
20 merit of this Petition, or to effect the relief requested if the Petition were to be granted.
21 Inclusion of Bill Elfo and Wendy Jones as Respondents is unnecessary because they have
22 no custodial relationship with the Petitioner. Petitioner should be granted leave to amend,
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1 but that amendment should replace the current Respondents with the person currently in
2 custody of the Petitioner, Nooksack Tribal Court Judge Raymond Dodge.

3 For these reasons, the Petitioner has failed to state a claim for which this
4 Honorable Court could direct effective habeas relief, and the Court should dismiss the
5 Petition with leave to amend.

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7 **3. In the alternative, Respondents return by arguing that an evidentiary**
8 **hearing is not required because it is plain that the Petition should be**
9 **denied.**

- 10 a. Nooksack Tribal Court had subject matter jurisdiction when
11 issuing the Petitioner's arrest warrant and the Nooksack Tribal
12 Court did not violate due process when issuing the Petitioner's
13 arrest warrant.

14
15 The United States, and smaller state and municipal governments, must respect tribal
16 systems of self-governance in the spirit of comity between nations. See *Bird v. Glacier Elec.*
17 *Coop., Inc.*, 255 F.3d 1136, 1140 (9th Cir. 2001). Federal courts will not grant a tribal court
18 order comity if the tribal court lacked subject matter jurisdiction to issue the order in question,
19 or if the tribal court denied the petitioner due process. *MacArthur v. San Juan Cty.*, 497 F.3d
20 1057, 1067 (10th Cir. 2007). The principles of tribal comity are rooted in the desire to avoid
21 interference with tribal courts and the tribe's system of self-governance. *Schauer v. Burleigh*
22 *Cty.*, 626 F. Supp. 61, 63 (D.N.D. 1985), citing *Preiser v. Rodriguez*, 411 U.S. 475, 490, 93 S.
23 Ct. 1827, 1836–37, 36 L. Ed. 2d 439 (1973). Tribal courts have authority to prosecute non-

1 member Indians within their jurisdictions. See *United States v. Lara*, 541 U.S. 193, 210, 124 S.
2 Ct. 1628, 1639, 158 L. Ed. 2d 420 (2004).

3 Here, it is plain that Petitioner was detained pursuant to a tribal criminal prosecution.
4 *Dkt. 6* pgs. 6-8. It is equally plain that the Petitioner is a non-member Indian residing on trust
5 land within the bounds of Nooksack Tribal Court's jurisdiction. See *Dkt. 6* pg. 1. The
6 Nooksack Tribal Court plainly had subject matter jurisdiction at the time the arrest warrant in
7 question was issued. The Petition's true focus relates to tribal self-governance issues that
8 occurred in the year 2016, and ultimately resulted in letters from the BIA chastising the
9 Nooksack Tribe for not holding a constitutionally mandated elect in 2016. See *Dkt. 6* pgs. 2-4.
10 However, the Petition's narrative seems woefully incomplete. The Nooksack Tribe has offered a
11 wealth of factual information that calls this narrative into question; including: the order of this
12 Court in 2:18-cv-00859-TSZ, the order of this Court in 2:17-cv-00088-JCC, a memorandum of
13 understanding between the Nooksack Tribe and BIA from the 25th of August 2017, and letters
14 from the BIA to the Chairman of the Nooksack Tribal Council dated the 9th of March of 2018
15 and the 11th of June 2018. See *Roche Dec* Exhibit 1. Additionally, the BIA offered a wealth of
16 factual information relevant to this Petition. See *Roche Dec* Exhibits 2 and 3. It is plain that the
17 Nooksack Tribe is a federally-recognized domestic sovereign with jurisdictional authority to
18 issue valid arrest warrants for non-member Indians within their jurisdiction. Additionally, there
19 is no information that suggests that the Petitioner was denied due process in this case.
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21 Therefore, an evidentiary hearing is not necessary and the Petition should be denied on
22 the merits.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2019, I caused to be delivered, via the CM/ECF system, a copy of the foregoing document to the Plaintiffs' counsel at the following address(es):

Gabe Galanda
gabe@galandabroadman.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is a true and correct statement.

Signed at Bellingham, WA.

TARA D. ADRIAN-STAVIK

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