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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ELILE ADAMS,

Petitioner,

v.

RAYMOND DODGE, RAJEEV
MAJUMDAR, BETTY LEATHERS,
DEANNA FRANCIS, NOOKSACK TRIBAL
COURT, and NOOKSACK INDIAN TRIBE,

Respondents.

Case No. 2:19-cv-01263 JCC

**RESPONDENTS' RESPONSE TO
PETITIONER'S OBJECTIONS TO
MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION**

Respondents submit this Response to Petitioner's Objections, dated March 12, 2020, to the Magistrate Judge's Report and Recommendation in this action. Under MJR 3(b), objections to a magistrate judge's non-dispositive pre-trial ruling in a civil case are governed by FRCP 72(a). Under that rule, the court may modify or set aside any part of the order that "clearly erroneous or is contrary to law." Petitioner raises essentially two objections to the Report and Recommendation, neither of which rises to the level of clear error.

1 Tribal Court Has Criminal Jurisdiction.

2
3 First, Petitioner argues that the State of Washington exercises *exclusive* criminal
4 jurisdiction over the allotment where Petitioner resides. This argument is based on the state
5 statute, RCW 37.12.010, that accepted the federal grant of jurisdiction under Public Law
6 280.¹ Petitioner cites a Washington Supreme Court case, *State v. Cooper*,² in support of this
7 argument. Petitioner, however, misreads both the statute and case law and by omitting
8 controlling precedent, shows a shocking lack of candor to this Court.
9

10 The state statute, RCW 37.12.010, reads in pertinent part:

11 The state of Washington hereby obligates and binds itself to assume criminal
12 and civil jurisdiction over Indians ... in accordance with the consent of the
13 United States given by the act of August 15, 1953 (Public Law 280, 83rd
14 Congress, 1st Session), but such assumption of jurisdiction shall not apply to
15 Indians when on their tribal lands or allotted lands within an established
16 Indian reservation and held in trust by the United States or subject to a
restriction against alienation imposed by the United States, unless the
provisions of RCW 37.12.021 have been invoked ...³

17 The statute is silent as to tribal court jurisdiction, as is PL 280. In other words, both the
18 statute in which the State agreed to assume jurisdiction and the federal statute authorizing
19 such assumption do not even mention tribal courts, much less purport to divest tribal courts
20 of jurisdiction.
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¹ Public Law 280 (Pub.L. 83-280, 8/15/53, *codified as* 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326).

25 ² 130 Wash.2d 770, 928 P.2d 406 (1996).

26 ³ RCW 37.12.021 allows the State of Washington to assume civil and criminal jurisdiction over an Indian tribe's reservation ***if requested by the tribe***. It is undisputed that the Nooksack Indian Tribe has never requested such an assumption of jurisdiction.

1 Likewise, *Cooper* does not deal with tribal court jurisdiction. That case involved a
2 Nooksack tribal member who was criminally prosecuted in state court for conduct in an off-
3 reservation allotment. The appellate court dismissed the conviction, and the
4 Washington Supreme Court reversed, holding that by virtue of RCW 37.12.021 the State has
5 criminal jurisdiction in Indian country outside the Nooksack Reservation. Nowhere in the
6 decision does the Court claim that such state jurisdiction is *exclusive* and does not even
7 discuss tribal court jurisdiction.
8

9
10 Both the federal statute and the state statute and *Cooper* are silent on tribal court
11 jurisdiction for good reason. Most authorities agree, and it is controlling precedent in this
12 circuit, that PL 280 does not divest tribal courts of jurisdiction.⁴

13
14 The Ninth Circuit considered this very issue in *Native Village of Venetie IRA*
15 *Council v. Alaska*,⁵ in which Alaska native villages sued to compel the State of Alaska to
16 recognize tribal court adoption orders. Like Petitioner here, Alaska argued that PL 280 gave
17 the State *exclusive* jurisdiction and thereby divested the tribal courts of jurisdiction.⁶ The
18 Court went through a lengthy analysis of the legislative history and case law construing PL
19 280 and concluded that "... Public Law 280 was designed not to supplant tribal institutions,
20 but to supplement them."⁷
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24 ⁴ See Cohen, *Federal Indian Law*, § 6.04(3)(c)(2012 & Supp. 2019) and authorities compiled there.

25 ⁵ 944 F.2d 548 (9th Cir. 1992).

26 ⁶ 944 F.2d at 559. The US Supreme Court considered a similar argument concerning the regulation of gaming in *California v. Cabazon Band of Mission Indians*, in which it held that any "infringement" on tribal government is not within the jurisdictional grant of PL 280, 480 U.S. 202, 220 (1987).

⁷ 944 F.2d at 560.

1 Other courts agree. The Eighth Circuit stated it even more forcefully in *Walker v*
2 *Rushing*,⁸ when it said: “[n]othing in the wording of Public Law 280 or its legislative history
3 precludes concurrent tribal authority.”⁹ Indeed, Respondents have found no federal court of
4 appeal decision holding otherwise.
5

6 Accordingly, here, the Nooksack Tribal Court had criminal jurisdiction over
7 Petitioner because at the time of the conduct she was a Nooksack tribal member residing on
8 an allotment held in trust by the federal government and therefore within “Indian Country” as
9 defined by federal law. Any assumption of jurisdiction by the State of Washington did not
10 and indeed ***could not*** divest the Nooksack Tribal Court of jurisdiction.
11

12 Petitioner has Failed to Exhaust.

13
14 Petitioner’s second argument is that she should be excused from the exhaustion
15 requirement because it is futile. She continues to claim that she has been denied legal
16 counsel, even though she had legal counsel in both the custody action and in the pending
17 criminal case, and ***even though by her own admission her criminal defense counsel was***
18 ***present in tribal court when the arrest warrant was issued.*** She has submitted a declaration
19 by her counsel in the present action that he attempted to file a *habeas* petition in the
20 Nooksack Tribal Court and then a mandamus petition in the Nooksack Court of Appeals and
21 both were rejected. Dkt. 36 at 4. She concludes from this that she has no meaningful remedy
22 in tribal court and therefore should be excused from failing to exhaust tribal court remedies.
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26 ⁸ 898 F.2d 672 (8th Cir. 1990).

⁹ 898 F.2d at 675.

1 Petitioner fails to disclose that her legal counsel was not admitted to the Nooksack
2 Tribal Court, had not purchased a business license to practice there, and had not tendered the
3 filing fee for either attempted filing. D. Francis Decl., ¶¶ 8 – 20.
4

5 Perhaps even more to the point, Petitioner *has* availed herself of tribal court remedies.
6 In the underlying criminal case, her court-appointed attorney has filed a motion to dismiss
7 the case, relying on many of the same arguments Petitioner raises here, D. Francis Decl., ¶ 5,
8 Exh. A. Her public defender has not, however, moved to strike the arrest warrant or to
9 exonerate the bail or modify the release conditions, D. Francis Decl., ¶ 21. In other words,
10 her legal counsel has made reasonable tactical decisions in conducting the defense. It is
11 unavailing for Petitioner to argue that she lacks tribal court remedies when she has in fact
12 chosen to pursue some, simply not all, of the remedies available to her.
13

14 Conclusion.

15 The Nooksack Tribal Court had and continues to have criminal jurisdiction over
16 Petitioner, who is a member of a federally recognized tribe, whose minor child is also a tribal
17 member, and both of whom reside on land held in trust for the Nooksack Indian Tribe. The
18 Nooksack Tribal Court issued an arrest warrant only after repeated failures to appear by
19 Petitioner, who was and is represented by counsel, and only after she had personal notice and
20 an opportunity to be heard. The case in which the warrant was issued is still pending, and
21 Petitioner has ample tribal court procedures, some of which she has pursued, to resolve the
22 detention. In short, there is simply no reason for this Court to entertain her Petition.
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1 WHEREFORE, Respondents move this Court to adopt the Magistrate Judge's Report
2 and Recommendation and dismiss the present action and for such other relief as the Court
3 deems just.
4

5 Dated this 20th day of March, 2020.

6 s/ Charles N. Hurt, Jr. _____

7 Charles N. Hurt, Jr., WSBA #46217

8 Senior Tribal Attorney

9 Nooksack Indian Tribe

10 Attorney for Respondents

11 churt@nooksack-nsn.gov

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on this 20th day of March, 2020, I caused to be served via the CM/ECF
14 System, a copy of Respondents' Response to Petitioner's Objections to Magistrate Judge's
15 Report and Recommendation to all counsel of record at the following addresses:

16 Attorney Gabriel Galanda gabe@galandabroadman.com

17 Attorney Ryan David Dreveskracht ryan@galandabroadman.com

18 Attorney George Roche groche@co.whatcom.wa.us

19 Attorney Rob Roy Smith rrsmith@kilpatricktownsend.com

20 Attorney Rachel Saimons rsaimons@kilpatricktownsend.com

21 I certify under penalty of perjury under the laws of the State of Washington that the
22 foregoing is a true and accurate statement.

23 Dated this 20th day of March, 2020, at Deming, Washington.

24 s/Charles N. Hurt, Jr. _____

25 Charles N. Hurt, Jr.

26 Senior Tribal Attorney

Nooksack Indian Tribe

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