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.

Tribal Court Has Criminal Jurisdiction.

First, Petitioner argues that the State of Washington exercises ***exclusive*** criminal jurisdiction over the allotment where Petitioner resides. This argument is based on the state statute, RCW 37.12.010, that accepted the federal grant of jurisdiction under Public Law 280.[1] Petitioner cites a Washington Supreme Court case, *State v. Cooper*,[2] in support of this argument. Petitioner, however, misreads both the statute and case law and by omitting controlling precedent, shows a shocking lack of candor to this Court.

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

> The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians … in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established 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]

The statute is silent as to tribal court jurisdiction, as is PL 280. In other words, both the statute in which the State agreed to assume jurisdiction and the federal statute authorizing such assumption do not even mention tribal courts, much less purport to divest tribal courts 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).

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

[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.

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

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

The Ninth Circuit considered this very issue in *Native Village of Venetie IRA Council v. Alaska*,[5] in which Alaska native villages sued to compel the State of Alaska to recognize tribal court adoption orders. Like Petitioner here, Alaska argued that PL 280 gave the State ***exclusive*** jurisdiction and thereby divested the tribal courts of jurisdiction.[6] The Court went through a lengthy analysis of the legislative history and case law construing PL 280 and concluded that "… Public Law 280 was designed not to supplant tribal institutions, but to supplement them."[7]

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[4] *See* Cohen, *Federal Indian Law*, § 6.04(3)(c)(2012 & Supp. 2019) and authorities compiled there.
[5] 944 F.2d 548 (9th Cir. 1992).
[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.

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

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

Petitioner has Failed to Exhaust.

Petitioner's second argument is that she should be excused from the exhaustion requirement because it is futile. She continues to claim that she has been denied legal counsel, even though she had legal counsel in both the custody action and in the pending criminal case, and ***even though by her own admission her criminal defense counsel was present in tribal court when the arrest warrant was issued.*** She has submitted a declaration by her counsel in the present action that he attempted to file a *habeas* petition in the Nooksack Tribal Court and then a mandamus petition in the Nooksack Court of Appeals and both were rejected. Dkt. 36 at 4. She concludes from this that she has no meaningful remedy in tribal court and therefore should be excused from failing to exhaust tribal court remedies.

[8] 898 F.2d 672 (8th Cir. 1990).
[9] 898 F.2d at 675.

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

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

Conclusion.

The Nooksack Tribal Court had and continues to have criminal jurisdiction over Petitioner, who is a member of a federally recognized tribe, whose minor child is also a tribal member, and both of whom reside on land held in trust for the Nooksack Indian Tribe. The Nooksack Tribal Court issued an arrest warrant only after repeated failures to appear by Petitioner, who was and is represented by counsel, and only after she had personal notice and an opportunity to be heard. The case in which the warrant was issued is still pending, and Petitioner has ample tribal court procedures, some of which she has pursued, to resolve the detention. In short, there is simply no reason for this Court to entertain her Petition.

WHEREFORE, Respondents move this Court to adopt the Magistrate Judge's Report and Recommendation and dismiss the present action and for such other relief as the Court deems just.

Dated this 20th day of March, 2020.

s/ Charles N. Hurt, Jr.
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CERTIFICATE OF SERVICE

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

Attorney Gabriel Galanda gabe@galandabroadman.com

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

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

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