UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELILE ADAMS,

Petitioner,

v.

RAYMOND DODGE, et al.,

Respondents.

NO. 2:19-cv-1263 JCC

PETITIONER'S OBJECTIONS TO MAGISTRATE'S SECOND REPORT AND RECOMMENDATION

Petitioner Elile Adams objects to the Magistrate's July 13, 2020, Report and Recommendation ("R&R"), based on clear error.

The Magistrate misapprehended the law that controls the question of criminal jurisdiction over an allotment outside the Nooksack Reservation, specifically the Suchanon Allotment. Dkt. # 45 at 9-11. Washington State law, not federal law, controls that question, *Anderson v. Gladden*, 293 F.2d 463, 467-68 (9th Cir. 1961), *cert. denied*, 368 U.S. 949 (1961), and clearly establishes that state criminal jurisdiction over that land is exclusive. RCW 37.12.010; *State v. Cooper*, 130 Wn.2d at 770, 775-76 (1996); AGO 63-64 No. 68. The Magistrate erred in finding "the plainly lacking jurisdiction exception to exhaustion does not apply." Dkt. # 45 at 11.

GALANDA BROADMAN, PLLC
Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509

The Magistrate also misapprehended the judicial immunity doctrine as applied to Respondent Judges, who have each been sued in their official—not personal—capacities. *Id*. at 16-17; Dkt. #21 at 1-2. Although "an official in a personal-capacity action may . . . be able to assert personal immunity defenses . . . [i]n an official-capacity action, these defenses are unavailable." *Kentucky v. Graham*, 473 U.S. 159, 166-167 (1985). Judicial immunity is not a defense available to Respondent Judges because they are not sued here in their individual capacities. *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011).

I. FACTS

The relevant facts and evidence have been relayed to the Court in Dkt. ## 29-32 and 36-42, and are incorporated herein by reference.

On April 21, 2020, the Court overruled the Magistrate and remanded this matter "for consideration of whether Petitioner has raised a *plausible* claim that the Nooksack Tribal Court lacked jurisdiction over Petitioner at the time of her arrest and of Respondents' alternative grounds for dismissal of Petitioner's petition for writ of habeas corpus." Dkt. # 43 at 5 (citing Fed. R. Civ. P. 72(b) (emphasis added).

On July 13, 2020, the Magistrate subverted the Court's instruction by ruling that "Petitioner has not cited any case *definitively* determining that concurrent Nooksack Indian Tribe jurisdiction is lacking over these lands." Dkt. # 45 at 11. Petitioner raised not only a plausible claim that the Tribal Court lacks criminal jurisdiction, she raised the only claim supported by applicable law. RCW 37.12.010; *Cooper*, 130 Wn.2d at 775-76; AGO 63-64 No. 68.

On July 16, 2020, Petitioner filed a *Pro Se* Application for Writ of *Habeas Corpus* ("Application") with the Tribal Court pursuant to Nooksack Tribal Code ("NTC") § 10.08. Fourth Declaration of Elile Adams ("Adams Decl."), Ex. A. As with Petitioner's prior attempt at filing suit for tribal *habeas* relief, she took the Application and cash for the filing fee to the Tribal Courthouse. Adams Decl., ¶2; *id*., Ex. A. This time, Petitioner's Application was not

GALANDA BROADMAN, PLLC
Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509

"REJECTED." *Id*. But Respondent Deanna Francis refused to tell her anything about the status of her application and has since refused to answer her repeated requests as to whether any writ will be "issued without a delay" as required by NTC § 10.08.030(a). *Id.,* ¶4; Ex. B ("It has been nearly two weeks since I filed my Writ of Habeas Corpus application. I have not yet heard anything . . . The code says the tribal court must issue a writ 'without a delay.'"); id. ("I again write to ask about the status of my application for writ of habeas corpus. It's now August and I filed or tried to file my application several weeks ago. . . I am only inquiring about the status of my application."); Dkt. # 13 at 91.

Now over one year after her false arrest and imprisonment, Petitioner still has yet to receive any Summons to appear for the alleged July 19, 2019, FTA violation. Adams Decl., Ex. A at 19.

II. LAW AND ARGUMENT

A. STATE JURISDICTION OVER THE OFF-RESERVATION SUCHANON ALLOTMENT IS EXCLUSIVE; TRIBAL JURISDICTION IS PLAINLY LACKING.

Whether state criminal jurisdiction over an off-reservation Nooksack allotment is exclusive "is a state question," according to the Ninth Circuit Court of Appeals. *Anderson*, 293 F.2d at 467-68; *see also Tyndall v. Gunter*, 840 F.2d 617, 618 (8th Cir. 1988) (the scope of Public Law 280 jurisdiction retained is a question of state law). It is not a federal question. *Id*. The Magistrate erred by considering federal law—*Native Alaska Village of Venetie I.R.A. v. Alaska*, 944 F.2d 548 (9th Cir. 1992), *rev'd on other grounds*, *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)—and thus shirking "highly persuasive" state law—AGO 63-64 No. 68—in answer to the jurisdictional question at hand. Dkt. # 45 at 9-11; *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 87 n.10 (1975).

The Magistrate relied upon *Venetie*—an inapposite Ninth Circuit case involving Alaska state-tribal civil child custody jurisdiction under the federal Indian Child Welfare Act

GALANDA BROADMAN, PLLC
Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509

("ICWA")—to conclude that it "cannot be said that concurrent tribal jurisdiction is lacking." 944 F.2d at 562; Dkt. # 45 at 11. The Magistrate correctly observed that in 1953, Congress enacted Public Law 280 to allow states to assume jurisdiction over Indian country. Dkt. # 45 at 6; Pub.L. No. 280, 67 Stat. 588 (1953) (citations omitted). Although the Magistrate also correctly observed that the *federal* P.L. 280 statute automatically allowed "mandatory" states like Alaska to assume jurisdiction, the Magistrate failed to appreciate that it was *state* P.L. 280 statutes that caused "optional" states like Washington to assume jurisdiction. *See id*. As the U.S. Supreme Court explained in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, Washington State was given permission to amend its "existing statutes" in order to assume jurisdiction, which it did in material part in 1963. 439 U.S. 463, 471-74 (1979). It, therefore, follows that state law should govern the question of whether Washington's optional assumption of criminal jurisdiction over an off-reservation allotment renders it exclusive.[1]

Under RCW 37.12.010, "Washington assumed full nonconsensual civil and criminal jurisdiction over all Indian country outside established Indian reservations. Allotted or trust lands are **not** excluded from full nonconsensual state jurisdiction unless they are 'within an established Indian reservation.'" *Cooper*, 130 Wn.2d at 770 (quoting RCW 37.12.010) (emphasis added). In the same year when the Washington State legislature passed RCW 37.12.010, the Washington State Attorney General issued AGO 63-64 No. 68. As the Magistrate correctly observed:

> In 1963, the Attorney General's Office issued an opinion, AGO 63-64 No. 68, addressing the question of whether the jurisdiction assumed by the state pursuant to RCW 37.12 is exclusive or concurrent with tribal jurisdiction. The Attorney General's Office opined:
>
> > . . . the state has **exclusive** criminal and civil jurisdiction over (1) all Indians and Indian territory, except Indians on their tribal lands or allotted lands within the reservation and held in trust by the United States; (2) the

[1] State law has been held to govern the scope of even mandatory states' assumed criminal jurisdiction under P.L. 280. *Anderson*, 293 F.2d at 467-68 (Oregon); *Tyndall*, 840 F.2d at 618 (Nebraska).

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Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509

> eight areas specified in the 1963 law, regardless of the ownership of any land involved; and (3) the nine tribes and reservations already under state jurisdiction by virtue of a governor's proclamation under the provisions of chapter 37.12 RCW.

Dkt. # 45 at 8 (quoting AGO 63-64 No. 68 at 15) (emphasis added). RCW 37.12.010, *State v. Cooper,* and AGO 63-64 No. 68 confirm exclusive state criminal jurisdiction at Suchanon.

However, the Magistrate erred when looking to *Venetie* instead—to federal law instead of state law—in considering whether the state's jurisdiction at Suchanon is exclusive.[2] Dkt. # 45 at 9-11. Reasoning that that this Court is not bound by AGO 63-64 No. 68, the Magistrate ignored the U.S. Supreme Court's direction that such an Attorney General opinion should be considered as "highly persuasive" state law. *Id.* at 10-11; *Harris County*, 420 U.S. at 87 n.10. There is simply no Washington State law that makes "room for argument that there is concurrent tribal jurisdiction" here. Dkt. # 45 at 11; *see* RCW 37.12.010; *Cooper*, 130 Wn.2d at 775-76; AGO 63-64 No. 68. Nooksack criminal jurisdiction over the Suchanon Allotment is plainly lacking and the Magistrate erred in finding otherwise. Dkt. # 45 at 11.

More generally, the Magistrate seemingly failed to appreciate the primary purpose of the federal Indian Civil Rights Act ("ICRA"), as declared by the U.S. Supreme Court:

> [A] central purpose of the ICRA . . . was to secure for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments . . . After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of *habeas corpus* would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal

[2] Even the Ninth Circuit in *Venetie* looked to state Attorney General opinions while considering whether "'[f]or nonregulatory proceedings, such as voluntary termination of parental rights, the tribal courts, and state courts pursuant to Pub.L. 280, have concurrent jurisdiction.'" 944 F.2d at 561 (quoting 70 Op. Att'y Gen. Wisc. 237, 243 (1981)). Critically, *Venetie* did not concern criminal jurisdiction, and the Ninth Circuit's finding of concurrent *civil* jurisdiction in *Indian child custody proceedings* was bolstered by the fact that Congress—which passed ICWA two decades after P.L. 280—contemplated concurrent state-tribal jurisdiction in that narrow context. *Id.* (quoting Letter from Assistant Attorney General Patricia M. Wald to Hon. Morris K. Udall (Feb. 8, 1978), included in H.R.Rep. No. 1386, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530, 7558). Further, given the U.S. Supreme Court's holding that the lands at issue in *Venetie* are not Indian country, the Ninth Circuit's civil jurisdictional ruling is dubious. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. at 523; *see* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 476-477 (6th ed. 2015) ("As a consequence of the *Venetie* decision, Alaska Native villages are left without any jurisdiction based on territorial power, and the State of Alaska is left with adjudicatory, regulatory, and legislative jurisdiction over [Alaska Native]-held lands.").

GALANDA BROADMAN, PLLC
Mailing: P.O. Box 15146
Seattle, Washington 98115
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governments.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978). ICRA was intended to secure constitutional protection for individuals like Petitioner, in arbitrary and unjust tribal circumstances such as these.[3] The Court should again overrule the Magistrate.

B. JUDICIAL IMMUNITY IS UNAVAILABLE TO RESPONDENT JUDGES.

The Magistrate erred in ruling that "Respondent Dodge and Pro Tem Judge Majumdar are . . . entitled to judicial immunity and should therefore be dismissed from this action." Dkt. # 45 at 15-16. Petitioner has not named Respondent Judges in their individual capacities. Dkt. #21 at 1-2. The personal immunity defense of judicial immunity if therefore unavailable to Respondent Judges. *Graham*, 473 U.S. at 166-167; *Crowe & Dunleavy*, 640 F.3d at 1156; *see also Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Berch*, 973 F. Supp. 2d 1082, 1097 (D. Ariz. 2013), *aff'd,* 773 F.3d 1037 (9th Cir. 2014) ("Plaintiffs are suing the Defendants in their official capacities, thus a judicial immunity defense is unavailable."); *Holland v. Andrews*, No. 11-1733, 2011 WL 6838642, at *5 (C.D. Cal. Sept. 7, 2011) ("Because defendants have not been sued in their personal capacity, their personal, judicial immunity defense is not available."). They should not be dismissed from this action.

C. ALTERNATIVELY, THE COURT SHOULD STAY ITS HAND.

The Tribal Court has shown Petitioner no sign that it will consider her *Pro Se* Application for Writ of *Habeas Corpus* or issue any writ without delay as it "must" under Nooksack law. Adams Decl., ¶4; Ex. B; Dkt. # 13 at 91. If the Court accepts the Magistrate's recommendation to dismiss Petitioner's *habeas* petition without prejudice, the Court can be guaranteed that Respondents will continue to deny Petitioner any access to justice. Dkt. # 45 at 18; *see* Adams Decl., Ex. A at 19. That has been the pattern and practice at the Tribal Court since February 24, 2016. *C u f. Rabang v. Kelly*, No. 17-0088 (W.D. Wash.), Dkt. # 166 at 8 (commenting that the "well documented" allegations regarding the Tribal Court "are highly concerning"). Nor should

[3] As reflected by this record—now including Petitioner's accompanying Fourth Declaration—nothing at Nooksack has changed since legitimate governmental entities criticized the Tribal Court as lacking "compliance with the federal ICRA or fundamental tenets of due process at law"; as unworthy of the moniker "justice system'"; and having rendered "the rule of law is dead" at Nooksack. Dkt. ## 30-13, 30-14, and 30-15 at 2.

GALANDA BROADMAN, PLLC
Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509

Petitioner, an indigent Lummi woman, be expected to incur the time and expense of starting this federal *habeas corpus* action all over again after some period of time during which Respondents *will* have failed to act. If this Court is not inclined to further overrule the Magistrate and grant Petitioner her unconditional freedom given RCW 37.12.010, *State v. Cooper*, and AGO 63-64 No. 68, it should stay this proceeding and order the parties to file a status report in ninety days.

DATED this 3rd day of August 2020.

GALANDA BROADMAN, PLLC

s/Ryan D. Dreveskracht

Gabriel S. Galanda, WSBA #30331
Ryan D. Dreveskracht, WSBA #42593
Attorneys for Petitioner
8606 35th Avenue NE, Suite L1
P.O. Box 15146, Seattle, WA 98115
(206) 557-7509 Fax: (206) 299-7690
Email: gabe@galandabroadman.com
Email: ryan@galandabroadman.com

CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I electronically filed the foregoing with the clerk of the Court using the CM/ECF system which will send notification of such filing to the parties registered in the Court's CM/ECF system.

Signed at Seattle, Washington, this 3rd day of August 2020.

s/Wendy Foster
Wendy Foster

GALANDA BROADMAN, PLLC
Mailing: P.O. Box 15146
Seattle, Washington 98115
(206) 557-7509