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

Respondents BETTY LEATHERS, DEANNA FRANCIS, the NOOKSACK  
TRIBAL COURT, and the NOOKSACK INDIAN TRIBE submit the following  
Memorandum in reply to Petitioner's Objections to the Magistrate's July 13, 2020 Report  
and Recommendation<sup>1</sup>.

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<sup>1</sup> Respondent Tribe notes that the Order of April 21, 2020 was remanded to Judge Peterson *only* "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." See Docket #43 at 5.

1                   WASHINGTON AND FEDERAL LAW ARE CLEAR – NOOKSACK HAS  
2                   JURISDICTION OVER OFF-RESERVATION TRUST LANDS.  
3

4                   Petitioner’s claim that the exhaustion doctrine does not apply because the Nooksack  
5 Tribal Court lacked criminal jurisdiction over off-reservation trust land is unsupported by  
6 law. Petitioner’s claimed support, *Anderson v. Gladden*,<sup>2</sup> for the proposition that state law  
7 governs and state jurisdiction is exclusive misrepresents the applicable law. Washington  
8 state and federal courts agree that tribal court jurisdiction extends to lands held in trust for  
9 the tribe or for individual tribal members outside the reservation.<sup>3</sup>  
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11                   *Anderson* was a habeas action by a Klamath tribal member who was convicted in  
12 state court of murder on the Klamath Reservation. He argued that Oregon, a mandatory  
13 Public Law 280 state, lacked criminal jurisdiction over him for the crime because the treaty  
14 with Klamath guaranteed *exclusive* criminal jurisdiction to the federal government, which  
15 right had not been extinguished by Public Law 280. The Ninth Circuit disagreed, holding  
16 that Public Law 280 “unambiguously” withdrew federal jurisdiction.<sup>4</sup>  
17

18                   The Court also rejected the next argument -- that Oregon needed to accept criminal  
19 jurisdiction by some affirmative act, had failed to do so, and therefore lacked jurisdiction  
20 over the defendant. The Court noted that the Oregon Supreme Court had already determined  
21 that such affirmative legislation was not necessary. It was this conclusion that the Court said  
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26 <sup>2</sup> 293 F.2d 463 (9<sup>th</sup> Cir. 1961) *cert den’d* 368 U.S. 949 (1961).

<sup>3</sup> 18 U.S.C. § 1151(c) defines “Indian country” to include all allotments outside the boundaries of the reservation.

<sup>4</sup> 293 F.2d at 466.

1 was binding on it.<sup>5</sup> Petitioner mischaracterizes this conclusion as conferring exclusive state  
2 jurisdiction over off-reservation tribal lands.

3  
4 It is clear from this summary that *Anderson* is not even remotely apposite in this case.  
5 The case involved a crime under the Major Crimes Act<sup>6</sup> on a reservation, and more  
6 important, did not raise questions of tribal court jurisdiction. In fact, far from concluding  
7 that Public Law 280 divested the Klamath tribal court of jurisdiction, ***the decision does not***  
8 ***mention tribal court jurisdiction at all.*** It therefore has no bearing on the issues before this  
9 Court.  
10

11 Petitioner also cites to *Tyndall v. Gunter*<sup>7</sup> in support of the argument that state, not  
12 federal, law determines the scope of state criminal jurisdiction over off-reservation trust land  
13 in Public Law 280 states. Like *Anderson*, *Tyndall* is inapposite on the facts. *Tyndall* was a  
14 habeas corpus action by an Omaha tribal member who was convicted of rape on the Omaha  
15 reservation. He argued that Nebraska lacked criminal jurisdiction because it had retroceded  
16 jurisdiction after he was convicted but one day before he was sentenced. The Eighth Circuit  
17 disagreed and noted that Nebraska had determined that a savings clause applied to pending  
18 cases. It went on to discuss which law applied:  
19  
20

21 The validity of retrocession is a question of *federal law* and has already been  
22 confirmed by federal courts. However, the substance of what Nebraska  
23 retroceded, or more specifically, what Nebraska did with the criminal cases  
24 pending in its courts, is a question of state law.<sup>8</sup>

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25 <sup>5</sup> 293 F.2d at 467-8.

26 <sup>6</sup> 18 U.S.C. § 1153.

<sup>7</sup> 840 F.2d 617 (8<sup>th</sup> Cir. 1988).

<sup>8</sup> 840 F.2d at 618 (citations omitted)(emphasis added).

1 While *Tyndall* is distinguishable from the present case on its facts, it therefore stands  
2 for the proposition that the *state* law determines retrocession but *federal* law determines the  
3 grant of jurisdiction to the state in the first place.  
4

5 The Ninth Circuit has been clear that Washington state's assumption of Public Law  
6 280 jurisdiction did not divest tribal courts of criminal jurisdiction on off-reservation trust  
7 land. In *Yakima Indian Nation v. State of Washington*,<sup>9</sup> the tribe brought a suit for  
8 declaratory judgment that Washington's assumption of *partial civil as well as criminal*  
9 jurisdiction was unconstitutional. In rejecting this argument, however, the court also  
10 dispensed with the same argument Petitioner makes here. It noted:  
11

12 The district court held that '(t)he jurisdiction exercised by the State of  
13 Washington over plaintiff tribe and its members by enactment of RCW  
14 37.12.010 is exclusive of that of either the federal government or the plaintiff  
15 tribe.' *As Washington recognizes, the district court's holding on this point*  
16 *cannot survive the Supreme Court's decision.* That portion of the district  
17 court's judgment is reversed.<sup>10</sup>

18 Therefore, at least since *Washington v Yakima*<sup>11</sup> was decided, it is clear that Washington's  
19 criminal jurisdiction over off-reservation tribal land is not exclusive but is at best concurrent  
20 with that of the tribe.  
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25 <sup>9</sup> 608 F.2d 750 (9<sup>th</sup> Cir. 1979)(per curiam) (*on remand from Washington v Yakima*, 439 U.S. 463 (1979)).

26 <sup>10</sup> 608 F.2d at 752 (emphasis added). It is notable that in *Yakima*, the State of Washington admitted that its jurisdiction was concurrent with that of the tribe.

<sup>11</sup> 439 U.S. 463 (1979).

1 The Washington Supreme Court also agrees that the State’s off-reservation  
2 jurisdiction is not exclusive. In *State v. Schmuck*,<sup>12</sup> a unanimous Washington Supreme Court  
3 noted:  
4

5 Both the United States Supreme Court and the Ninth Circuit have concluded  
6 that Public Law 280 is not a divestiture statute. ... *Likewise, nothing in the*  
7 *language of RCW 37.12.010 affirmatively grants exclusive jurisdiction to the*  
8 *State. In any event, because RCW 37.12.010 was enacted pursuant to Public*  
9 *Law 280, its scope cannot exceed that authorized by Public Law 280.*<sup>13</sup>

10 This conclusion by the *Schmuck* court that tribes have concurrent criminal  
11 jurisdiction with the State of Washington has been reaffirmed as recently as 2013.<sup>14</sup> So,  
12 even if Petitioner were correct, which she is not, that state law governs the extent of state  
13 criminal jurisdiction over off-reservation tribal land, the Washington Supreme Court has  
14 determined that the tribe has concurrent jurisdiction in such cases.

15 Petitioner’s Exhaustion and Bad Faith Arguments have been addressed.<sup>15</sup>

16 Finally, Petitioner’s baseless claims of excuse from the exhaustion requirement and  
17 bad faith must be disregarded, as the Court previously noted. In this Court’s prior Order, it  
18 found “Petitioner [did] not demonstrate that she has actually exhausted her tribal court  
19 remedies such that she may now seek federal habeas relief.” Docket #43 at 3.

20 Now, Petitioner claims that she should be excused from exhausting tribal court  
21 remedies because she has filed a petition for habeas corpus in the Nooksack Tribal Court, but  
22 took no further action required under Tribal law to obtain relief. Petitioner conveniently  
23

24  
25 <sup>12</sup> 121 Wash.2d 373 (1993).

<sup>13</sup> 121 Wash. 2d at 395-6 (citations omitted)(emphasis added).

<sup>14</sup> Cited with approval in *State v. Clark*, 178 Wash.2d 19, 30 (2013).

<sup>15</sup> Again, the Court previously overruled Petitioner’s objections on this ground. See Docket #43 at 3, 5

1 neglects to inform this Court that she has not served the petition, has not provided a working  
2 copy to the judge nor noted the petition for hearing, even though these steps are clearly  
3 required by the tribal court's rules before the petition can be heard. *See* Second Decl. of D.  
4 Francis. The tribal court petition was clearly designed for effect in this Court and not to seek  
5 relief in the tribal court.  
6

7 Conclusion.

8 The Nooksack Tribal Court had and continues to have jurisdiction over Petitioner, who is a  
9 member of a federally recognized tribe, whose minor child is also a tribal member, and both  
10 of whom reside on land held in trust for the Nooksack Indian Tribe. The Nooksack Tribal  
11 Court issued an arrest warrant only after Petitioner's repeated failures to appear for  
12 mandatory hearings following her lengthy refusal to comply with the court's orders, all the  
13 while having licensed legal counsel in both the underlying civil and criminal proceedings,  
14 and after her personal receipt of notices to appear and an opportunities to be heard. The case  
15 in which the warrant was issued is still pending, and Petitioner has had ample tribal court  
16 procedures for relief that she has failed to pursue, or which were unsuccessful. In short, this  
17 Court should no longer entertain this Petition.  
18

19 WHEREFORE, Respondents move pursuant to FRCP 12(b)(1) and 12(b)(6) to  
20 dismiss the present action and for such other relief as the Court deems just.  
21

22 Dated this 14<sup>th</sup> day of August, 2020.

23 s/ Charles N. Hurt, Jr.

24 \_\_\_\_\_  
Charles N. Hurt, Jr., WSBA #46217

25 Senior Tribal Attorney

Nooksack Indian Tribe

26 Attorney for Respondents

[churt@nooksack-nsn.gov](mailto:churt@nooksack-nsn.gov)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT ON THIS \_\_\_\_ DAY OF AUGUST, 2020, I CAUSED TO BE SERVED VIA THE CM/ECF SYSTEM, A COPY OF THE FOREGOING RESPONDENTS' REPLY TO PETITIONER'S OBJECTIONS TO MAGISTRATE'S SECOND REPORT AND RECOMMENDATION TO ALL COUNSEL OF RECORD AT THE FOLLOWING ADDRESSES:

Attorney Gabriel Galanda [gabe@galandabroadman.com](mailto:gabe@galandabroadman.com)

Attorney Ryan David Dreveskracht [ryan@galandabroadman.com](mailto:ryan@galandabroadman.com)

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Attorney Rachel Saimons [rsaimons@kilpatricktownsend.com](mailto:rsaimons@kilpatricktownsend.com)

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 4<sup>th</sup> day of August, 2020, at Deming, Washington.

s/Charles N. Hurt, Jr. \_\_\_\_\_  
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