

The Honorable John C. Coughenour
The Honorable Michelle L. Peterson

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

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

**RESPONDENT JUDGES DODGE AND
MAJUMDAR’S RESPONSE TO
PETITIONER’S OBJECTIONS TO
MAGISTRATE’S SECOND REPORT
AND RECOMMENDATION**

NOTED: AUGUST 21, 2020

INTRODUCTION

Respondents Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr., and Pro Tem Judge Rajeev Majumdar (“Respondent Judges”), pursuant to the Magistrate’s July 13, 2020 Report and Recommendation (Dkt. 45), hereby respond to Petitioner Elile Adams’ Objections to Magistrate’s Second Report and Recommendation. (Dkt. 46).¹ This Court should adopt the Report and Recommendation of the Magistrate in its entirety and deny Petitioner’s Objections and request for a writ of habeas corpus.

STANDARD OF REVIEW

A. Objections to Magistrate’s Report

Pursuant to MJR 4(c), “[a]fter the magistrate judge’s proposed findings, recommendations or report have been filed, further proceedings before the district judge shall be

¹ On August 11, 2020, Petitioner filed a supplemental document and declarations. Dkt. Nos. 48-50. The allegations therein do not relate to Respondent Judges and, therefore, are not addressed.

1 governed by Fed.R.Civ.P. 72(b) in a civil case.” Under Fed. R. Civ. P. 72(b)(2), within 14 days
2 after being served with a copy of the recommended disposition, “a party may serve and file
3 specific written objections to the proposed findings and recommendations.” A party may then
4 respond to another party’s objections within 14 days after being served with a copy. *Id.* The
5 district judge must then “determine de novo any part of the magistrate judge’s disposition that
6 has been properly objected to. The district judge may accept, reject, or modify the recommended
7 disposition; receive further evidence; or return the matter to the magistrate judge with
8 instructions.” FRCP 72(b)(3).

9 ARGUMENT

10 **A. The Respondent Judges Are Not Appropriately Subject to This Suit**

11 As to Respondent Judges, Petitioner provides nine lines of argument focused on judicial
12 immunity. Dkt. No. 46 at 6. This is eight lines more than were offered previously. On the
13 merits, previously, Petitioner offered a one-sentence retort to the Respondent Judges’ arguments,
14 to wit: “Respondents Dodge and Mujumdar, on the other hand, disagree and urge that either the
15 Tribal Court itself or the Clerks are proper Respondents.” Dkt. No. 29 at 12, ln. 18-19.

16 Having failed to offer any legal argument before, now Petitioner conveniently ignores the
17 fact that Judge Dodge has recused himself (rendering him not a proper respondent). Dkt. No. 46
18 at 6. Instead, Petitioner tries a new tack, arguing for the first time that both Respondent Judges
19 are not entitled to judicial immunity because they were sued in their official capacities. *Id.* This
20 is a distinction without difference, as the doctrine of judicial immunity focuses on a different
21 question, namely: whether the actions complained of were taken in a judicial capacity. *See*
22 *Jenkins v. Kerry*, 928 F.Supp.2d 122, 134 (D.D.C. 2013) (“[A] judge acting in his or her judicial
23 capacity— i.e., performing a function normally performed by a judge—is immune from suit on
24 all judicial acts.”). There is no dispute that the conduct of the Respondent Judges complained of
25 here was judicial and, therefore, immunity applies. *See* Dkt. No. 45 at 16-17.

26 Even if Petitioner was correct that judicial immunity could be conveniently avoided by
27 artful pleading naming a judge in his or her official capacity, the official capacity nature of the

1 suit would instead trigger the Nooksack Indian Tribe’s sovereign immunity. This immunity
2 would shield the Respondent Judges from suit in their official capacity. The Ninth Circuit has
3 repeatedly recognized that “when tribal officials act in their official capacity and within the
4 scope of their authority, they are immune” from suit as well. *Imperial Granite Co. v. Pala Band*
5 *of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *United States v. Oregon*, 657 F.2d
6 1009, 1012 n.8 (9th Cir. 1981); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir.
7 1983), *cert. denied*, 467 U.S. 1214 (1984).

8 In addition, this new argument should not be heard. The Ninth Circuit has made clear
9 that a new argument should not be considered by the District Court Judge after referral to a
10 Magistrate because to do so would negate efficiencies gained through the Magistrates Act and
11 would permit litigants to change tactics after the issuance of an Report and Recommendations.
12 *See, e.g., Greenhow v. Sec’y of Health & Human Servs.*, 863 F.2d 633, 638 (9th Cir. 1988)
13 (holding that “allowing parties to litigate fully their case before the magistrate and, if
14 unsuccessful, to change their strategy and present a different theory to the district court would
15 frustrate the purpose of the Magistrates Act”), *overruled on other grounds by United States v.*
16 *Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*). Petitioner’s new argument should be
17 deemed waived and not considered.

18 The Court should reject Petitioner’s continued effort to make the Respondent Judges
19 parties to this case. The Magistrate’s Report and Recommendation is entirely correct.

20 **B. Petitioner’s Ask to Stay Is Inappropriate and Premature**

21 Petitioner asks the Court “to stay its hand” until the Tribal Court can take action on
22 Petitioner’s habeas corpus petition filed therein, which acknowledged the Magistrate’s correct
23 decision as to tribal exhaustion. Dkt. No. 46 at 6-7. But, Petitioner should not be allowed to
24 keep this case pending through conjecture and speculation about how the Tribal Court may
25 handle the recently filed Tribal Court habeas petition. One year ago, this Court in *Doucette et al.*
26 *v. Bernhardt et al. (Zinke)*, Case No. C18-0859-TSZ (W.D. Wash.) (Zilly, J.) (appeal pending),
27 affirmed the proper functioning of the Tribal government as recognized by the United States.

1 There is no reason for this Court to pre-judge the Tribal Court process, which is ultimately
2 irrelevant to whether the Respondent Judges can be sued, based on unsupported claims of
3 entirely speculative future bias.

4 **CONCLUSION**

5 For the foregoing reasons, Respondent Judges respectfully request that the Court adopt
6 the Magistrate’s Report and Recommendation, grant their Return and dismiss Petitioner’s habeas
7 petition.

8 DATED this 17th day of August, 2020.

9 By: /s/ Rob Roy Smith
10 Rob Roy Smith, WSBA #33798
11 Email: rrsmith@kilpatricktownsend.com
12 Rachel B. Saimons, WSBA #46553
13 Email: RSaimons@kilpatricktownsend.com
14 Kilpatrick Townsend & Stockton, LLP
15 1420 Fifth Avenue, Suite 3700
16 Seattle, Washington 98101
17 Tel: (206) 467-9600
18 Fax: (206) 623-6793

19 *Attorneys for Raymond Dodge and Rajeev*
20 *Majumdar*