THE HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELILE ADAMS Petitioner, v. ELFO, et. al., Respondent.	No. C19-1263 JCC-MLP SUPPLEMENTAL RESPONSE TO PETITIONER'S SECOND MOTION FOR RECONSIDERATION

I. Introduction.

Respondents Leathers, Francis, the Nooksack Tribal Court, and the Nooksack Indian Tribe submit the following Response to Petitioner's Second Motion for Reconsideration pursuant to the Court's Remand Order dated November 4, 2020 and Minute Order dated February 19, 2021. The Court's Remand limits the issue of how, if at all, the fact that the Nooksack Indian Tribe was federally recognized after the passage of P.L. 280[1] impacts Petitioner's claim that the Nooksack

[1] Pub. L. No. 83-280, 67 Stat. 588 (1953)(codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321 – 1325, and 28 U.S.C. § 1360).

NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY
P.O. BOX 63
DEMING, WA 98244
PH: (360) 592-4158, FAX: (360) 592-2227

Tribal Court lacked jurisdiction over off-reservation land. The Minute Order also requests the parties to address the issue of certification to the Washington Supreme Court.

II. Date of Federal Recognition is Irrelevant.

First, Respondents note that while the date of federal recognition is undoubtedly of paramount importance to later-recognized Washington tribes,[2] it is irrelevant to this case. The reason is simple – P.L. 280 was not intended to and did not divest tribal courts of criminal jurisdiction.[3] Therefore, whether a tribe was first federally recognized before or after the passage of P.L. 280 is irrelevant to the question of that tribe's jurisdiction. Tribal court jurisdiction existed before and remains intact after passage of P.L. 280, regardless of the date of federal recognition. This is true because tribes exercise inherent criminal jurisdiction over their members and over members of other federally recognized tribes.[4]

The overwhelming view among state courts, federal courts, tribal courts, the United States Department of the Interior and legal scholars is that P.L. 280 did not affect civil or criminal tribal court jurisdiction.[5] The plain language and clear legislative intent of P.L. 280 was to strengthen

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[2] Eight tribes in Washington were federally recognized after 1968, when Public Law 280 was amended to require tribal consent before the state could assume jurisdiction – Cowlitz Indian Tribe, Jamestown S'Klallam Indian Tribe, Nooksack Indian Tribe, Samish Nation, Sauk-Suiattle Indian Tribe, Snoqualmie Indian Tribe, Stillaguamish Indian Tribe, and Upper Skagit Indian Tribe. RCW 37.12.021 was amended in 1968 to allow 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 by Washington. *State v. Cooper,* 130 Wash. 2d 770, 775, 928 P.2d 406, 408 (Wash. 1996).

[3] See Respondent's Response to Petitioner's Objections to Magistrate Judge's Report, [Doc. 38] at pp. 2-4.

[4] *US v. Lara*, 541 U.S. 193, 210 (2004)(upholding Congressional restoration tribal criminal jurisdiction over non-member Indians); *US v. Wheeler*, 435 U.S. 313, 331-32 (1978)(recognizing tribes' inherent criminal jurisdiction over members); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979).

[5] *See, e.g., Native Village of Venetie v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991); *State v. Schmuck*, 121 Wash.2d 373, 850 P.2d (Wash. 1993); Op. Sol. Int., M – 6907 (11/14/78); Cohen, *Federal Indian* Law, § 6.04(3)(c) (2012 and Supp. 2019); and V. Jimenez and S. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627 (1998).

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OFFICE OF TRIBAL ATTORNEY
P.O. BOX 63
DEMING, WA 98244
PH: (360) 592-4158, FAX: (360) 592-2227

law enforcement in Indian country. The statute fails to address tribal court jurisdiction at all, clearly indicating the intent that it remain undisturbed.[6] It is therefore irrelevant whether a given tribe was federally recognized before or after P.L. 280's passage – P. L. 280 did not affect that tribe's tribal court jurisdiction in either event.

III. Certification to the Washington Supreme Court is Not Appropriate.

Washington's Federal Court Local Law Certificate Procedure Act[7] allows the Washington Supreme Court to accept certified questions from federal courts. The use of certified questions rests in the sound discretion of this Court.[8] However, certification is appropriate only when there is "no clear and controlling" Washington precedent on point and when the issue is dispositive.[9] Here, there is clear and controlling precedent from the Washington Supreme Court on the issue of concurrent jurisdiction. The Washington Supreme Court has implicitly or explicitly reached this conclusion on repeated occasions.

For example, in *State v. Schmuck*,[10] a non-tribal motorist was stopped by a tribal police officer while on the tribe's reservation. The tribal officer detained the driver until the Washington state police responded and took him into custody and charged him with DUI. The driver moved to dismiss, arguing that the tribal police officer had no authority to detain a non-tribal driver. The Washington Supreme Court noted three issues: (1) did the tribal officer have inherent authority to stop the driver? (2) did the tribal officer have the inherent authority to detain the driver until the

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[6] Cohen, *supra,* at § 6.04(c)(3).
[7] RCW 2.60.010-900
[8] *Queen Anne Park v. State Farm*, 763 F.3d 1232, 1235(9th Cir. 2014)(citing *Churchill v. F/V Fjord (In Re McLinn), 744 F.2d 677, 681 (9th Cir. 1984)).*
[9] *Queen Anne Park, supra, at 1235.*
[10] 121 Wash.2d 373, 850 P.2d 1332 (1993), *cert. den'd* 510 U.S. 931 (1993).

NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY
P.O. BOX 63
DEMING, WA 98244
PH: (360) 592-4158, FAX: (360) 592-2227

Washington state patrol arrived? and (3) did Washington's assumption of jurisdiction authorized under P.L. 280 divest the tribe of any inherent jurisdiction?

After deciding the first question in the affirmative, the Court turned the question whether the tribal officer could detain. It first concluded the tribe's inherent jurisdiction within its own territory remains intact unless federal law abrogates it.[11] Noting that the 1855 Treaty of Point Elliott[12] expressly reserved the tribe's right to detain offenders and surrender them to federal authorities, the Court turned to the final issue -- the effect of P.L. 280 on the tribe's jurisdiction.

The Court considered the claim that Washington's assumption of criminal jurisdiction under P.L. 280 divested the tribe of jurisdiction.[13] This is precisely Petitioner's argument here. The Court said:

> Schmuck contends that even if the Tribe did have inherent authority to stop and detain him, that authority was divested by the State's enactment of RCW 37.12.010. Schmuck argues that the statute gives the State *exclusive* jurisdiction …[14]

The Court unanimously rejected this argument, saying:

> The State does not have the authority to divest the Tribe of its sovereignty; tribal sovereignty can be divested only by affirmative action of Congress…. Both the United States Supreme Court and the Ninth Circuit have concluded that Public Law 280 is not a divestiture statute. … **Accordingly, we hold that RCW 37.12.010, enacted pursuant to Public Law 280, does not divest the Suquamish Indian Tribe of its inherent authority to stop and detain a non-Indian** …[15]

Schmuck therefore stands as a clear statement by the Washington Supreme Court that Washington's assumption of P.L. 280 does not operate to divest tribes of their inherent authority

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[11] The Court said: "…within their remaining territory, the Suquamish Indian Tribe's aboriginal powers are reserved unless limited by the United States' superior power," citing *U.S. v. Wheeler,* 435 U.S. 313, 323 (1978) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832).

[12] 12 Stat. 927 (Jan. 22, 1855). It should be noted that the Nooksack Indian Tribe is also a signatory to this Treaty, so the analysis of treaty rights over Nooksack tribal lands would be similar.

[13] 121 Wash.2d at 393, 850 P.2d at 1342.

[14] 121 Wash.2d at 393, 850 P.2d at 1342.

[15] 121 Wash.2d at 396, 850 P.2d at 1344 (emphasis added).

NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY
P.O. BOX 63
DEMING, WA 98244
PH: (360) 592-4158, FAX: (360) 592-2227

over their own territory. If P.L. 280 jurisdiction does not divest a tribe of its authority to detain non-Indians, then *a fortiori,* it does not divest the tribe of its authority over tribal members, ***and Petitioner here was a Nooksack tribal member at the time of her arrest.***

In *State v. Cooper*,[16] decided just three years after *Schmuck,* the Washington Supreme Court considered the case of a Nooksack tribal member who was charged with a sex offense in an off-reservation allotment. The Court concluded that the 1968 amendments to P.L. 280 did not vitiate pre-existing state jurisdiction over off-reservation tribal land and so upheld the conviction. Because the allotment where the offense occurred had been defined as "Indian country" at the time of Washington's assumption, and the 1968 amendments did not retroactively vitiate pre-existing state assumption, state jurisdiction remained. Important for the present case, nowhere in *Cooper* did the Court suggest that state jurisdiction was exclusive of tribal jurisdiction or question its holding in S*chmuck.* The Court did not attempt to limit tribal court jurisdiction; presumably, if it had intended to do so, it would have discussed *Schmuck.* It did not do so.[17]

Taken together, *Schmuck* and *Cooper* demonstrate that certification to the Washington Supreme Court is not appropriate here. The Washington Supreme Court has been clear and consistent in its approach to tribal and state jurisdiction – within its reservation, the tribe has exclusive jurisdiction unless it has consented to state involvement. Within off-reservation tribal lands, both the State ***and*** the tribe have jurisdiction unless state jurisdiction has been retroceded. Furthermore, the Court has suggested that tribes have criminal jurisdiction over tribal members

[16] 130 Wash.2d 770, 928 P.2d 406 (Wash. 1996).

[17] Indeed, *Schmuck* has been cited repeatedly with approval by the Washington Supreme Court since its publication. *See, e.g., State v. Moses*, 145 Wash.2d 370, 37 P.3d 1216 (Wash. 2002), in which the Court cited *Schmuck* for the proposition that tribes retain inherent authority to prosecute tribal members. In M*oses*, the offense took place in Cowlitz County on private land, far from the Tulalip Reservation, which is located in Snohomish County,145 Wash.2d at 372, 37 P.3d at 1217. This suggests that the Washington Supreme Court recognizes tribal authority over tribal members no matter where the offense is committed.

NOOKSACK INDIAN TRIBE
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DEMING, WA 98244
PH: (360) 592-4158, FAX: (360) 592-2227

even outside of Indian country. Accordingly, Respondents respectfully submit that certification is inappropriate here.

IV. Conclusion.

The issue raised in Petitioner's Second Motion for Reconsideration – that Washington State's assumption of P.L. 280 has acted to divest tribes of their inherent criminal jurisdiction over their off-reservation land – has been soundly rejected by almost every court, both state and federal, that has considered it. Accordingly, the date of federal recognition – whether before or after the assumption of P.L. 280 jurisdiction – is irrelevant, as the assumption did not affect tribal court jurisdiction.

Furthermore, the Washington Supreme Court has repeatedly and expressly noted that the State of Washington cannot divest tribes of jurisdiction and has upheld tribal jurisdiction over off-reservation lands and over tribal members outside the reservation. The consistent holdings by the Washington Supreme Court form a "clear and controlling precedent on point," thereby rendering certification inappropriate by this Court.

WHEREFORE, Respondents Leathers, Francis, the Nooksack Tribal Court, and the Nooksack Indian Tribe oppose Petitioner's Second Motion for Reconsideration.

NOOKSACK INDIAN TRIBE

Charles Hurt, WSBA #46217
Rickie W. Armstrong, WSBA #34099
Office of Tribal Attorney
5047 Mt. Baker Hwy
P.O. Box 63
Deming, WA 98244
Tel: (360) 592-4158 ext. 1009
churt@nooksack-nsn.gov

CERTIFICATE OF SERVICE

On March 5, 2021, I electronically filed the foregoing Response to Petitioner's Second Motion for Reconsideration with the Clerk of Court suing the CM/ECF System, which will sed electronic notification of such filing to t the following parties:

Rob Roy Smith
Rachel B. Saimons
KILPATRICK TOWNSEND & STOCKTON LLP
1420 Fifth Ave., Suite 3700
Seattle WA 98101
RRSmith@kilpatricktownsend.com
RSaimons@kilpatricktownsend.com
Attorneys for Respondents Dodge and Majumdar

And to,

Gabriel Galanda
Anthony Broadman
Ryan D. Dreveskracht
Galanda Broadman
PO Box 15146
8606 35th Ave NE, Suite L1
Seattle WA 98115
gabe@galandabroadman.com
anthony@galandabroadman.com
ryan@galandabroadman.com
Attorneys for Petitioner

And to,

George Roche
Civil Deputy Prosecuting Attorney
Whatcom County
311 Grand Ave
Bellingham WA 98225
groch@co.whatcom.wa.us
Attorney for Respondents
Elfo and Jones

Signed under penalties of perjury and the laws of the United States of America this 5th day of March, 2021.

Charles N. Hurt, Jr.