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 FEBRUARY 19, 2021 MINUTE ORDER

NOTED: MARCH 8, 2021

Respondents Nooksack Tribal Court Chief Judge Raymond G. Dodge, Jr., and Pro Tem Judge Rajeev Majumdar ("Respondent Judges") submit this brief pursuant to the Magistrate Judge's February 19, 2021 Minute Order (Dkt. 64).

That Public Law 280 ("P.L. 280") predates federal recognition of the Nooksack Tribe ("Tribe") has no impact on the determination that the Nooksack Tribal Court did not plainly lack jurisdiction over the off-reservation allotted lands where Petitioner was arrested. The Court sought briefing on this issue in response to Petitioner's claims that the Court "misapprehended" that the Tribe's jurisdictional rights over the Suchanon Allotment survived P.L. 280. Dkt. 56 at 1. However, the Court made no such error. The statutory language and case law make clear that there was no intention by Congress or the State to exclude tribes from concurrently exercising criminal jurisdiction over their off-reservation tribal lands, whether the tribes were recognized at the time P.L. 280 was passed or after. Indeed, several courts have outright rejected the notion that tribes were stripped of such authority. Finally, Petitioner has failed to provide any

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

controlling authority to establish that the Court would be entitled to exclusive criminal jurisdiction over the Suchanon Allotment. As a result, regardless of when it became federally recognized, the Nooksack Tribal Court did not "plainly lack" jurisdiction over the Suchanon Allotment at the time of Ms. Adams' arrest. As local law provides sufficient guidance and authority on this issue, certification of this issue to the State Supreme Court is not warranted.

STANDARD OF REVIEW

Under Washington's Federal Court Local Law Certificate Procedure Act, federal courts "may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto." RCW 2.60.020. The decision to certify a question to a state supreme court rests in the "sound discretion" of the district court. *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003). Certification is appropriate where there is no clear and controlling Washington State precedent on point. *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 763 F.3d 1232, 1235 (9th Cir. 2014). However, even where state law is unclear, federal courts are not obligated to resort to the certification process. *Massachusetts Bay Ins. Co. v. Walflor Indus., Inc.*, 383 F. Supp. 3d 1148, 1167 (W.D. Wash. 2019). Further, "mere difficulty in ascertaining local law" does not necessitate "remitting the parties to a state tribunal for the start of another lawsuit." *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974)). Thus, where a federal court can find sufficient guidance in prior decisions of the Washington Supreme Court to resolve an issue, certification may be avoided. *Massachusetts Bay Ins. Co.*, 383 F. Supp. 3d at 1167.

ARGUMENT

A. Certification to the Supreme Court is Not Necessary, as Local Law is Clear That the Passage and Amendment of P.L. 280 Before Recognition of the Tribe Does Not Preclude the Tribe from Exercising Concurrent Criminal Jurisdiction

1. The Language and History of P.L. 280 Make No Reference to Exclusive State Jurisdiction or the Exclusion of Concurrent Tribal Jurisdiction

A review of the P.L. 280 statutory language illustrates the absence of any intent to exclude tribes from exercising jurisdiction over off-reservation tribal lands. When Congress

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

passed P.L. 280 in 1953, it mandated state criminal jurisdiction over Indian country[1] in certain states and made it optional for others to choose to assert jurisdiction. That statute read:

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provision of this Act.

Arquette v. Schneckloth, 56 Wn.2d 178, 183, 351 P.2d 921, 924 (1960). Importantly, that statute simply sought to "remove any legal impediment" to states assuming jurisdiction, but makes no mention of any impact to tribal jurisdiction, whether existing at that time or prospectively.

Then, in 1957, the state of Washington chose to enact legislation asserting state jurisdiction over Indian Country within its boundaries. RCW 37.12. Under the 1957 law, the State could not assume jurisdiction unless and until a tribe expressly authorized an extension of the State's jurisdiction over its lands. *Arquette*, 56 Wn.2d at 183 (explaining that the state statute "[did] not vest state courts with civil and criminal jurisdiction over Indians on Indian reservations; it only gives the tribal council, or other governing body, the right to petition the governor for the issuance of a proclamation placing the people and lands of the tribe under civil and criminal jurisdiction of the state."). It is evident from the language in that provision that the legislature intended for tribes to retain their authority to exercise jurisdiction over Indian Country, unless they desired to relinquish it.

In 1963, Washington amended its statute to assert limited jurisdiction over all of Indian Country outside a tribe's reservation. Now codified as RCW 37.12.010, that law provides that the state is obligated and bound to "assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent

[1] Pursuant to federal law, "Indian Country" is defined to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government … (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. Although RCW 37.12 does not use the term "Indian Country," Washington Courts have looked to this definition when interpreting RCW 37.12.010. *See State v. Jim*, 173 Wn.2d 672, 679, 273 P.3d 434, 437 (2012).

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

of the United States given by the act of August 15, 1953 (P.L. 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 . . .” Once again, despite ample opportunity to do so, the statute makes no reference to state jurisdiction being exclusive or to any exclusion of tribes from concurrently exercising jurisdiction.

In 1968, the Indian Civil Rights Act (“ICRA”) was passed, and amended P.L. 280 to prospectively require optional states, including Washington, to obtain tribal consent for future assertions of state authority in Indian Country, as well as to provide a means for state retrocession of jurisdiction. 25 U.S.C. § 1326. That statute provided that “State jurisdiction . . . with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.” *Id.* Again, not only did the amendment omit any reference to exclusive state jurisdiction, but it conditioned the exercise of state jurisdiction on approval from tribes. Thus, as amended in 1968, P.L. 280 permitted states to assert jurisdiction in Indian Country only where tribes have expressly consented thereto. Because this limitation was not retroactive, where states had already assumed jurisdiction over tribal lands prior to the passage of the amendment, that jurisdiction remained intact. 25 U.S.C. § 1323(b); *State v. Hoffman*, 116 Wn. 2d 51, 68-69, 804 P.2d 577 (1991).

The absence of any language which would support exclusive state jurisdiction or revoke tribal jurisdiction is telling, as it is presumed that “the purpose and meaning of the legislature are correctly and definitely expressed by the language employed in the [law].” *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 507, 104 P.2d 478, 482 (1940). If either Congress or the state legislature had intended for later-recognized tribes to lose their right to exercise criminal jurisdiction in Indian Country through the passage of P.L. 280, they certainly could have included such a provision within any of the statutes passed. *See Bryan v. Itasca Cty., Minnesota*,

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

426 U.S. 373, 389 (1976) (noting that "the same Congress that enacted Pub.L. 280 also enacted several termination Acts legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation."). Finally, it is well-established that Treaties, agreements, and statutes "must be liberally construed in favor of the tribe, and all ambiguities are to be resolved in its favor." *State v. Jim*, 156 Wn. App. 39, 41, 230 P.3d 1080, 1082 (2010). As neither Congress nor the State elected to include a provision excluding tribes from concurrent jurisdiction, it is safe to presume that there was no intent to do so, and that tribes have retained their authority to exercise concurrent jurisdiction over off-reservation tribal lands.

2. Courts Have Repeatedly Held That Tribes Did Not Lose Jurisdiction Through the Passage of P.L. 280

Petitioner argues that because the Tribe was not yet recognized at the time the State assumed jurisdiction over the Suchanon Allotment, the Tribe is consequently precluded from exercising concurrent criminal jurisdiction after recognition because "there was no Nooksack criminal jurisdiction to divest in 1963." Dkt. #56 at 2. Petitioner's attempt to extract such a narrow meaning from the word "divest" by interpreting it to strictly require pre-existing tribal jurisdiction does not square with courts' repeated pronouncements that P.L. 280 was not intended to remove, transfer, or limit tribal jurisdiction. Contrary to Petitioner's assertion, courts have repeatedly found that P.L. 280 did not strip tribes of their jurisdiction over Indian Country, and that such authority actually runs concurrent with state jurisdiction.

While both state and federal courts have indeed referred to P.L. 280 as being "not a divestiture statute," they have also used broader language to make clear that its passage did not eliminate or preclude tribal jurisdiction. For example, in *State v. Schmuck*, 121 Wn.2d 373, 394–95, 850 P.2d 1332, 1343 (1993), the Washington State Supreme Court summarized some of these findings, explaining:

> Both the United States Supreme Court and the Ninth Circuit have concluded that Public Law 280 is not a divestiture statute. In the area of criminal jurisdiction, the Eighth Circuit concluded that Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their members for violations of tribal law:

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

> 'Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority.' In the area of civil regulatory authority, the United States Supreme Court observed that nothing in the text of Public Law 280 addresses the removal of tribal authority, as would be expected if Congress intended such a "sweeping change in the status of tribal government." The Ninth Circuit has also concluded that Public Law 280 was designed to supplement tribal institutions, not supplant them. Thus, the court held that no provision in either a federal child welfare statute or Public Law 280 prevented concurrent state and tribal jurisdiction. The so-called mandatory Public Law 280 states that have addressed the issue consider state and tribal jurisdiction to be concurrent under Public Law 280.

Schmuck, 121 Wn.2d at 394–95 (internal citations omitted).

Thus, while Petitioner attempts to construe courts' pronouncements that P.L. 280 does not "divest" tribes of jurisdiction to mean that any tribe not recognized as of 1963 would be forced to relinquish jurisdiction over off-reservation Indian Country lands, the adherence to such a strict interpretation is unsupported by the law. P.L. 280 does not divest concurrent jurisdiction from tribes, and it does not preclude them from exercising it upon recognition.

3. Petitioner Cannot Establish That the Tribe's Prospective Right to Exercise Jurisdiction Was Terminated by P.L. 280

Petitioner cites two sources in support of her claim that the Tribe cannot exercise concurrent jurisdiction: *State v. Cooper*, 130 Wn.2d 770, 780, 928 P.2d 406, 410 (1996) and AGO 63-64 No. 68. Dkt. # 56 at 2. For the reasons previously articulated by this Court, neither source is compelling to show exclusive state jurisdiction over the Suchanon allotment. With respect to the Attorney General Opinion, although such opinions may offer guidance to courts, they are not controlling authority, contrary to Petitioner's claims. Dkt. #54 at 3; *See Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No.1*, 305 P.3d 1079, 1082 (Wash. 2013); *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993). Additionally, the AGO was written before P.L. 280 was amended in 1968, a relevant fact for purposes of a jurisdictional analysis and one considered by the Court in *Cooper*. 130 Wn.2d at 776.

Further, as also noted by the Court, *Cooper* is not dispositive as to the issue of jurisdiction for two reasons: first, because the issue before the Court in that case was whether the

KILPATRICK, TOWNSEND & STOCKTON LLP
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101
(206) 467-9600

State had jurisdiction over off-reservation trust lands, and not whether the Tribe did; and second, because although the Court found that the State did indeed have jurisdiction, it made no finding that such jurisdiction was exclusive. *See* 928 P.2d at 408. If, as Petitioner argues, the State's exclusive jurisdiction is "quite clear," she should be able to cite to more than just one 58-year old Attorney General Opinion to establish the State's alleged exclusive jurisdiction. She has not, and cannot, because that authority does not exist. Rather, the authority illustrates just the opposite.

CONCLUSION

Petitioners' efforts to undermine tribal jurisdiction fail. For the foregoing reasons, local law is clear that the Nooksack Tribe was not divested of concurrent criminal jurisdiction by the passage of P.L. 280, and that the Tribal Court consequently did not "plainly lack" jurisdiction over the Suchanon Allotment at the time of Ms. Adams' arrest. The Court need not certify this issue to the Washington State Supreme Court.

DATED this 8th day of March, 2021.

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

Attorneys for Raymond Dodge and Rajeev Majumdar