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 APRIL 13, 2021, REPORT AND RECOMMENDATION

Petitioner Elile Adams objects to the Magistrate's April 13, 2021, Report and Recommendation ("R&R"), based on clear error.

The Magistrate overlooked Petitioner's citation to 18 U.S.C. § 1162(c), which affirms Washington State's "exclusive jurisdiction" over the Suchanon Allotment also as a matter of federal law. *Compare* Dkt. # 67 at 2, with Dkt. # 69. That federal statute, coupled with RCW § 37.12.010 and AGO 63-64 No. 68 (Nov. 8, 1963), makes plain that the state's criminal jurisdiction over that off-reservation allotment is **exclusive**. Nooksack criminal jurisdiction over that land *is* plainly lacking. The Magistrate erred in concluding "the Nooksack Indian Tribe did not plainly lack jurisdiction over the allotted lands." Dkt. # 69 at 10.

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The Magistrate misapplied the federal comity doctrine as well. Dkt. # 69 at 11. A tribal court that (1) deprives Petitioner, a criminal arrestee, with private counsel of her choosing, (2) elicits *ex parte* advice from Respondents' defense counsel of record about how to stymy Petitioner's tribal *habeas corpus* application, and (3) takes no action on that application for nearly a year, is not a court entitled to federal comity. Dkt. # 37-6; Dkt. # 49-1; Dkt. # 68 at 2; *see Bird v. Glacier Elec. Coop., Inc*., 255 F.3d 1136, 1140 (9th Cir. 2001) (quoting *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997). ("Comity is precluded [when] 'the defendant was not afforded due process of law.'").

The Magistrate also once again misapprehended judicial immunity as applied to Respondent Majumdar, who is sued in his official—not personal—capacity. Dkt. # 69 at 3 n.1; *Kentucky v. Graham*, 473 U.S. 159, 166-167 (1985); *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011). Without any citation to law, the Magistrate mistakenly concluded Respondent Majumdar should "be dismissed due to judicial immunity." *Id.*

A. State Criminal Jurisdiction is Exclusive; Tribal Jurisdiction is Plainly Lacking.

This case is *sui generis*.

By 1931, it appears the land parcel in Whatcom County known today as the Suchanon Allotment was "alienated" to the United States in trust for John Suchanon as a public domain allotment. 25 U.S.C. § 336; *see* Dkt. # 37-3 at 1 (Tract name: "John Suchanon"); Dkt. # 37-3 at 2 ("Alienated 1931"). According to U.S. Department of the Interior land records, the parcel was later inherited in "trust status" by "Canadian citizen" Irene Miller Silver and in turn "U.S. citizen Indian" Mary Kelly and finally Nooksack Indian George Swanaset. Dkt. ## 37-4, 37-5.[1]

In 1953, Congress passed Public Law 83-280 ("P.L. 280"), granting "several States *full* civil and criminal jurisdiction over Indian reservations." *Organized Vill. of Kake v. Egan*, 369

[1] Although the 1855 Point Elliott Treaty bears a Nooksack signature, Nooksack Indians were considered Canadian Indians by courts in the United State until 1973. *See e.g. In re Junious M.*, 193 Cal. Rptr. 40, 43 (Cal. App. 1983).

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U.S. 60, 74 (1962) (emphasis added). According to the U.S. Supreme Court: "The primary concern of Congress in enacting Pub. L. 280 . . . was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 379 (1976). P.L. 280 "was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 490 (1979).

In 1963, Washington State—an "optional" state—passed its P.L. 280 law and thereby "assumed *full* nonconsensual civil and criminal jurisdiction over all Indian country outside established Indian reservations." *State v. Cooper*, 928 P.2d 406, 408 (Wash. 1996) (citing RCW § 37.12.010) (emphasis added); *id.* ("Allotted or trust lands are not excluded from *full* nonconsensual state jurisdiction unless they are 'within an established Indian reservation.'") (emphasis added); *see also generally Yakima Indian Nation*, 439 U.S. at 498 ("State jurisdiction is *complete*" when delegated to P.L. 280 states) (emphasis added). Pivotally, when Washington assumed jurisdiction over Indians on off-reservation allotments, the Nooksack Tribe did not exist. *See Cooper*, 928 P.2d at 408. Concurrent state-tribal criminal jurisdiction over the Suchanon Allotment was therefore impossible; there was no Nooksack sovereignty to affirm or divest; there could only have been state jurisdiction as per RCW § 37.12.010. *See id.* ("Because the Nooksack reservation did not exist in 1963, the State's assumption of jurisdiction pursuant to RCW 37.12.010 necessarily included the [off-reservation allotment] property . . .").[2]

That same year, the Washington State Attorney General issued AGO 63-64 No. 68, titled "Indians—State Jurisdiction—Exclusive Rather than Concurrent," which provides:

> [T]o the extent that the state of Washington has assumed criminal and civil jurisdiction pursuant to § 1, chapter 36, Laws of 1963, that jurisdiction is **exclusive**. Thus, the state has **exclusive** criminal and civil jurisdiction over (1) all

[2] To the extent Respondents maintain that RCW § 37.12.160 "'must be liberally construed in favor of the tribe, and all ambiguities are to be resolved in its favor," that contention is misplaced. Dkt. # 66 at 5 (quoting *State v. Jim*, 156 Wn. App. 39, 41, 230 P.3d 1080, 1082 (2010)). When both parties are Indian, as here, that canon of construction "has no application." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

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> Indians and Indian territory, except Indians on their tribal lands or allotted lands within the reservation and held in trust by the United States . . .

AGO 63-64 No. 68 at 15 (emphasis added). In other words, Washington State assumed exclusive criminal jurisdiction over Indians on allotted lands *beyond* the reservation. *Id.* That includes, for example, the Suchanon Allotment. *See Cooper*, 928 P.2d at 408. The Attorney General did, as the Magistrate observes, also seek "authoritative" guidance on the question from the Federal Government. AGO 63-64 No. 68 at 15; Dkt. # 45 at 10. Congress obliged seven years later.

In 1970, Congress amended P.L. 280 to confirm that states assumed "**exclusive jurisdiction**" over Indian crimes on enumerated Indian lands pursuant to P.L. 280. Pub. L. No. 91-523, 84 Stat. 1358 (1970), *codified at* 18 U.S.C. § 1162(c) (emphasis added). This Court has applied 18 U.S.C. § 1162(c) to hold that Washington state assumed exclusive criminal jurisdiction under RCW § 37.12.010. *U.S. v. Johnson*, CR80-57MV, Order On Defendant's Motion To Dismiss (W.D. Wash. May 13, 1980) at 2 ("The Court can find nothing which would indicate that the abdication of jurisdiction effected by 2(c) of P.L. 280 was not intended to apply to those [optional] states which subsequently chose to accept jurisdiction . . .").[3]

With the passage of P.L. 91-523, Congress also excepted the Metlakatla Indian Community from the exclusive criminal jurisdiction of Alaska. 18 U.S.C. § 1162(a). The purpose of that amendment was to "add[] language permitting the Metlakatla Indian community on the Annette Islands in Alaska to exercise jurisdiction over minor offenses concurrent with the State of Alaska." H.R.Rep. No. 91–1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4783. As noted by the Alaska Supreme Court: "This amendment is important because it recognizes that

[3] While *U.S. v. Johnson* correctly applied Section 1162(c)'s exclusive state criminal jurisdiction provision to RCW § 37.12.010 given Washington's "optional" P.L. 280 status, one scholar calls the decision "incorrect" as to federal criminal jurisdiction under 18 U.S.C. §§ 1152-1153. M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, GONZAGA LAW REVIEW, Vol. 47:3 664, 690; *but see* U.S. House Committee on Interior and Insular Affairs, 83rd Cong., Need for Revision of the Public Land Laws (Comm. Print 1963) ("This legislation [H.R. 1063] (passed as P.L. 280), has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such."). Petitioner does not contend she is free of federal jurisdiction.

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the Metlakatla community lacked concurrent jurisdiction prior to the amendment. This, in turn, represents a recognition of pre-amendment **exclusive jurisdiction** in the state." *John v. Baker*, 982 P.2d 738, 810 (Alaska 1999) (emphasis added).

In 1973, the Federal Government recognized the Nooksack Tribe and formed the Nooksack Reservation in Deming, Washington. *Cooper*, 928 P.2d at 408. By then, Washington State had assumed exclusive criminal jurisdiction over the Suchanon Allotment for a decade. *Cf. id*. From 1972 to present, there has not been a single indication from Congress that Nooksack, like Metlakatla, is permitted to exercise concurrent criminal jurisdiction. *Cf. id*.; 18 U.S.C. § 1162(d)(2). Nor has Washington State been asked or caused to retrocede its exclusive criminal jurisdiction over Indians on off-reservation allotments to Nooksack, as allowed by existing state law. RCW § 37.12.100 ("the state may retrocede . . . all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe . . ."); RCW § 37.12.160(9)(d)(iii) ("'Indian country' means . . . [a]ll Indian allotments . . .").[4] State criminal jurisdiction over Indians on the Suchanon Allotment was exclusive in 1963, and in 1973, and has been ever since.

In the face of state and federal law establishing Washington State's exclusive jurisdiction over the Suchanon Allotment—specifically RCW § 37.12.010, AGO 63-64 No. 68, and 18 U.S.C. § 1162(c)—Respondents do not and cannot cite any controlling black letter law establishing that Nooksack enjoys concurrent criminal jurisdiction there. They cite *State v. Schmuck*, 850 P.2d 1332 (Wash.1993), but that decision does not recognize concurrent state-

[4] The more immediate solution to Nooksack's jurisdictional dilemma would be to enter into a cross-deputization agreement with Whatcom County. *See State v. Eriksen*, 25 P.3d 1079, 1083 (Wash. 2011) (encouraging state-tribal "use of political and legislative tools" to address policy concerns created by "the territorial limits on [tribal] sovereignty," including cross-deputization or mutual aid pacts in Whatcom County). However, due to the very same dynamics at Nooksack today that P.L. 280 was intended to remedy in 1953—"lawlessness . . . and the absence of adequate tribal institutions for law enforcement," *Bryan*, 426 U.S. at 379—Whatcom County is "not interested in deputizing their officers as deputies or accepting deputization" for County officers at this time. Declaration of Gabriel S. Galanda ("Galanda Decl."), Ex. A; *id.,* Ex. B ("After speaking with Sheriff [Bill] Elfo, it is clear that he does not wish to cross-depute Nooksack Tribal Police officers."). Nooksack can overcome the state's exclusive criminal jurisdiction over the Suchanon Allotment as soon as it re-establishes its inter-governmental legitimacy.

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tribal criminal jurisdiction. Instead *Schmuck* recognizes "a limited tribal power 'to stop and detain alleged offenders" on reservation roads. *U.S. v. Cooley*, 947 F.3d. 1215, 128 (9th Cir. 2020). *Schmuck* does not speak to off-reservation tribal criminal *arrest* power. *Cf. Eriksen*, 25 P.3d at 1082 (Wash. 2011) ("The inherent sovereign power identified in *Schmuck* does not logically extend beyond reservation boundaries."); *id.* at 1081 ("'[A] valid arrest may not be made outside the territorial jurisdiction of the arresting authority.'") (quotation omitted).[5]

When "it is plain that no federal grant provides for tribal governance of nonmembers' conduct[6] on land . . . [a]s in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes." *Strate v. A-1 Contractors*, 520 U.S. 438, 470 (1997) (citing *National Farmers*, 471 U.S. at 854, 856 n.21). Thus "when tribal-court jurisdiction over an action . . . is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay." *Id.* Now, nearly two years after her false arrest, Petitioner's unconditional freedom from Nooksack should be delayed no further. It is what Congress intended. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67 (1978) ("Congress apparently decided that review by way of *habeas corpus* would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.").

B. The Nooksack Court is Not Entitled to Comity.

The Magistrate concluded that "in the interest of comity, this matter should be dismissed." Dkt. # 69 at 11. The federal comity doctrine is inapplicable, however, when a litigant is not afforded due process of law. *Bird*, 255 F.3d at 1140 (quoting *Wilson*, 127 F.3d at 810); *see also National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 n.

[5] Nor does *Native Alaska Village of Venetie I.R.A. v. Alaska* help Respondents. 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). The Ninth Circuit Court of Appeals' finding of concurrent civil jurisdiction in Indian child custody proceedings is specific to the Indian Child Welfare Act, where Congress did contemplate concurrent state-tribal authority. *Id.* at 561 (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).

[6] Petitioner is a nonmember Lummi Indian, having taken the extraordinary step of "seeking asylum in the Lummi Nation." Dkt. # 21 at 7. Were it not for RCW § 37.12.010, AGO 63-64 No. 68, and 18 U.S.C. § 1162(c), she would remain subject to Nooksack criminal jurisdiction at Suchanon. *See U.S. v. Lara*, 541 U.S. 193 (2004).

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21 (1985) (exhaustion not "required when an assertion of tribal jurisdiction is . . . conducted in bad faith . . . or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.").

Petitioner has been deprived of counsel of her choosing. Dkt. # 37-6; *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) ("[T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."). Respondent Francis has sought *ex parte* advice from Respondents' defense counsel of record, Charles Hurt, about how to stymy Petitioner's tribal *habeas corpus* application. Dkt. # 49-1. And as a result of both procedural due process violations, Respondents have not taken any action on Petitioner's tribal application for nearly a year.[7] Dkt. # 68 at 2. None of these judicial civil rights violations would occur elsewhere. The Nooksack "judiciary" is not deserving of comity.[8]

C. Respondent Majumdar, Sued in His Official Capacity, Does Not Enjoy Immunity.

Respondent Majumdar has not been sued in his personal capacity. Dkt. # 21 at 1-2. The Magistrate is thus mistaken that he is entitled to judicial immunity. Dkt. # 69 at 3 n.1. *Graham*, 473 U.S. at 166-167 ("[A]n official in a personal-capacity action may . . . be able to assert personal immunity defenses," but "in an official-capacity action, these defenses are unavailable."); *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."); *Crowe & Dunleavy*, 640 F.3d at 1156 ("[W]e may dispense quickly with [Tribal Court] Judge Stidham's contention that he is entitled to judicial immunity.").

[7] The fact that Respondents continue to summon Petitioner to Tribal Court in the related matter shows that they have simply chosen to sit on her *habeas corpus* application indefinitely. Galanda Decl., Ex. C.

[8] Petitioner maintains that exhaustion is not required because the assertion of Nooksack criminal jurisdiction over her has been conducted in bad faith since July 30, 2019 and there is no opportunity whatsoever to challenge tribal jurisdiction. *National Farmers Union*, 471 U.S. at 857 n.21. There has never been clearer case for these exceptions.

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DATED this 30th day of April 2021.

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s/ Gabriel S. Galanda

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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 30th day of April 2021.

s/Wendy Foster
Wendy Foster

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