

THE HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELILE ADAMS

No. C19-1263 JCC-MLP

Petitioner,

v.

RESPONDENTS' RESPONSE TO
PETITIONER'S OBJECTIONS TO
MAGISTRATE JUDGE'S APRIL
13, 2021 REPORT AND
RECOMMENDATION

ELFO, et. al.,

Respondent.

I. Introduction.

Respondents Leathers, Francis, the Nooksack Tribal Court, and the Nooksack Indian Tribe submit the following Response to Petitioner's Objections to the Magistrate Judge's April 13, 2021 Report and Recommendation. Petitioner raises two arguments that have already been addressed in this action. First, she argues that the Magistrate Judge erred in not concluding that the State of Washington has exclusive jurisdiction over off-reservation trust land of the Nooksack Indian Tribe. Second, Petitioner argues that the Nooksack Tribal Court is not entitled to comity because it has denied her due process. These are refrains of earlier arguments, but Respondents will treat them briefly below.

RESPONSE TO PETITIONER'S OBJECTIONS TO
APRIL 13, 2021 REPORT AND
RECOMMENDATION
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2 II. Tribal Court has Concurrent Jurisdiction.

3 The overwhelming view among state courts, federal courts, tribal courts, the United States
4 Department of the Interior and legal scholars is that P.L. 280 was not intended to and in fact did
5 not affect civil or criminal tribal court jurisdiction.¹ The plain language and clear legislative intent
6 of P.L. 280 was to strengthen law enforcement in Indian country. The statute fails to address tribal
7 court jurisdiction at all, clearly indicating the intent that it remain undisturbed.²

8 Petitioner, however, argues that the State of Washington assumed exclusive criminal
9 jurisdiction under Public Law 280.³ However, this is not the position of the State of Washington.
10 The Supreme Court of Washington has repeatedly held that its criminal jurisdiction is *concurrent*
11 with tribes in off-reservation trust lands.⁴

12 As recently as 2015, the Washington Supreme Court confirmed as much. In *State v.*
13 *Shale*,⁵ a Yakama tribal member living on the Quinault Reservation was charged with failure to
14 register as a sex offender in state court. He argued that the State lacked criminal jurisdiction
15 because the offense occurred on the reservation. The Court closely examined Washington’s P.L.
16 280 assumption and noted:
17

18 _____
19 ¹ See, e.g., *Native Village of Venetie v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991); *State v. Schmuck*, 121 Wash.2d
20 373, 850 P.2d (Wash. 1993); Op. Sol. Int., M – 6907 (11/14/78); Cohen, *Federal Indian Law*, § 6.04(3)(c) (2012 and
21 Supp. 2019); and V. Jimenez and S. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am.
22 U. L. Rev. 1627 (1998).

23 ² Cohen, *supra*, at § 6.04(c)(3). Petitioner has addressed this argument at length in previous filings and does not
24 intend to address it here.

25 ³ Petitioner cites 18 U.S.C. § 1162(c) for the proposition that Washington state criminal jurisdiction is exclusive.
That section, however, does not apply to the State of Washington. It reads: “[t]he provisions of sections 1152 and
1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section
as areas over which the several States have exclusive jurisdiction.” Subsection (a) lists only the so-called
“mandatory” P.L. 280 states: Alaska, California, Minnesota, Oregon, Nebraska, and Wisconsin.

⁴ The scope of a state’s assumption under P.L. 280 is a question of state law.

⁵ 182 Wash. 2d 882, 345 P.3d 776 (2015).

1 ... we find Shale’s argument that State courts only have concurrent jurisdiction
2 with tribal courts when such jurisdiction has been explicitly granted by statute
3 unavailing. *Public Law 280 and RCW 37.12.010 together do grant such*
4 *jurisdiction.*⁶

5 *Shale* thus expressly states the Washington Supreme Court’s view that its jurisdiction is
6 *concurrent* with tribal courts. *Shale* also cited with approval *State v. Moses*,⁷ previously discussed
7 by Respondents, for the proposition that tribes and the State can have overlapping criminal
8 jurisdiction.⁸

9 In *Moses*, the Washington Supreme Court concluded its criminal jurisdiction is *concurrent*
10 with tribal courts in off-reservation trust lands. Discussing the differences between Washington
11 and Colorado state court jurisdiction, the Court noted:

12 Colorado and Washington have not taken similar approaches to concurrent
13 state and tribal jurisdiction. Once Congress made it possible to do so,
14 Washington assumed partial, nonconsensual, *concurrent* jurisdiction over tribal
15 reservations in 1963.⁹

16 Accordingly, the Washington Supreme Court has repeatedly reaffirmed that its criminal
17 jurisdiction under P.L. 280 assumption is concurrent with tribes. Both *Shale* and *Moses* cited *State*
18 *v. Schmuck*,¹⁰ previously discussed by Respondents. In that case, the Washington Supreme Court
19 expressly stated the issue as whether Washington’s assumption of jurisdiction under P.L. 280
20 divested the tribe of any inherent jurisdiction. That is precisely Petitioner’s argument here. The
21 Court unanimously rejected this argument, saying:

22 ⁶ 182 Wash.2d at 895, 345 P.3d at 782, fn. 11 (citations omitted). As noted above, the Washington Supreme
23 Court’s interpretation of Washington’s P.L. 280 assumption in RCW Chapter 37 is binding.

⁷ 145 Wash.2d 370, 37 P.3d 1216 (2002).

⁸ 182 Wash.2d at 890 (citing *State v. Moses*, 145 Wash.2d at 374).

⁹ 145 Wash, 2d at 378, 37 P.3d at 1219 (citing Pub.L.280, 67 Stat. 588)(emphasis added).

¹⁰ 121 Wash.2d 373, 850 P.2d 1332 (1993), *cert. den’d* 510 U.S. 931 (1993).

1 The State does not have the authority to divest the Tribe of its sovereignty; tribal
 2 sovereignty can be divested only by affirmative action of Congress.... Both the
 3 United States Supreme Court and the Ninth Circuit have concluded that Public
 4 Law 280 is not a divestiture statute. ... *Accordingly, we hold that RCW*
 5 *37.12.010, enacted pursuant to Public Law 280, does not divest the Suquamish*
 6 *Indian Tribe of its inherent authority to stop and detain a non-Indian...*¹¹

7 *Schmuck*, like *Moses* and *Shale* after it, therefore presents a clear statement by the
 8 Washington Supreme Court that Washington’s P.L. 280 assumption does divest tribes of their
 9 inherent authority over their own territory, including off-reservation trust lands, and that state
 10 criminal jurisdiction is *concurrent* with tribal authority.¹² As they are bound to do, lower
 11 Washington courts agree. For example, in *State v. Depoe*,¹³ construing *Shale*, the appellate court
 12 described P.L. 280 this way: “Congress authorized certain states to impose *concurrent* state court
 13 jurisdiction in Indian country without tribal consent.”¹⁴ Washington courts are unanimous that
 14 state criminal jurisdiction is concurrent with tribes on off-reservation trust land.

15 III. Petitioner has Been Afforded Due Process.

16 Petitioner’s second argument, like the first, is a rehash of previous arguments. She claims
 17 the Nooksack Tribal Court is not entitled to comity as it has denied her due process, as her criminal
 18 case in tribal court has not been acted on. However, Petitioner has consented to repeated
 19 continuances.¹⁵ The record reflects that not only did Respondent consent to the continuance of
 20 her criminal case but did so expressly for the purpose of allowing *this litigation* to go forward. She

21 ¹¹ 121 Wash.2d at 396, 850 P.2d at 1344 (emphasis added).

22 ¹² Petitioner also cites an old attorney general opinion for the conclusion that state criminal jurisdiction is exclusive
 23 under P.L. 280, AGO 63-64, No. 68 (11/8/63). Despite repeatedly opportunities, not only has the Washington
 24 Supreme Court not relied on that opinion, it has never even mentioned it. Nor has any lower court reported decision.
 25 The implication is clear.

¹³ 188 Wash. App. 1012 (Wash. App. 2015).

¹⁴ 188 Wash. App. at 1013 (emphasis added).

¹⁵ See attached Declaration of D. Francis and exhibit.

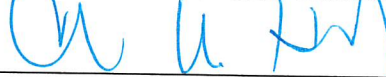
1 therefore cannot be heard to complain of denial of due process when she has consented to a delay
2 for tactical purposes. To argue otherwise here is the height of hypocrisy.

3 IV. Conclusion.

4 Petitioner again argues that the State of Washington has exclusive criminal jurisdiction
5 over off-reservation tribal lands. This is contrary to the overwhelming weight of authority and to
6 the Washington Supreme Court's interpretation of its own statute. Petitioner also argues that she
7 should be excused from exhausting tribal court remedies because her tribal court criminal case has
8 been delayed. However, she has repeatedly consented to continuances in the case. One wonders
9 if she is agreeing to continuances simply to be able to argue denial to due process to this Court.
10 This arguments smacks of bad faith and should be rejected.

11 WHEREFORE, Respondents Leathers, Francis, the Nooksack Tribal Court, and the
12 Nooksack Indian Tribe oppose Petitioner's Objections to the Judge Magistrate's April 13, 2021
13 Report and Recommendation.
14

15 NOOKSACK INDIAN TRIBE

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25 **CERTIFICATE OF SERVICE**

On May 7, 2021, I electronically filed the foregoing Response to Petitioner's Objections to the Report and Recommendation dated April 13, 2012 with the Clerk of Court using the CM/ECF System, which will send electronic notification of such filing to the following parties:

RESPONSE TO PETITIONER'S OBJECTIONS TO APRIL 13, 2021 REPORT AND RECOMMENDATION PAGE 5 OF 6	NOOKSACK INDIAN TRIBE OFFICE OF TRIBAL ATTORNEY P.O. BOX 63 DEMING, WA 98244 PH: (360) 592-4158, FAX: (360) 592-2227
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18 Signed under penalties of perjury and the laws of the United States of America this 7th day of May,
19 2021.

19 
20 _____
21 Charles N. Hurt, Jr.