Appeal No. 21-35490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELILE ADAMS

Petitioner-Appellant,

v.

RAYMOND G. DODGE, JR., Nooksack Tribal Court Chief Judge; RAJEEV MAJUMDAR, Nooksack Tribal Court Judge Pro Tem; BETTY LEATHERS, Nooksack Tribal Court Clerk; DEANNA FRANCIS, Nooksack Tribal Court Clerk; NOOKSACK TRIBAL COURT, instrumentality of the Nooksack Indian Tribe; NOOKSACK INDIAN TRIBE, a federally recognized Indian tribal government,

Respondents-Appellees.

United States District Court, Western District of Washington, Seattle Division
Honorable John C. Coughenour
Case No. 2:19-cv-01263-JCC

APPELLEE NOOKSACK INDIAN TRIBE, ET. AL ANSWERING BRIEF

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INTRODUCTION

This case involves Appellant's attempt to avoid a tribal court criminal prosecution for custodial interference following a lengthy custody dispute spanning several courts, attempts to forum shop, and Appellant's repeated refusal to comply with child custody orders and criminal summonses.

Appropriately, the District Court dismissed Appellant's latest attempt to avoid prosecution because of her failure to exhaust tribal court remedies. The decision below should be affirmed.

JURISDICTIONAL STATEMENT

This is an appeal from the Dismissal of Appellants' Petition for Habeas Corpus for failure to exhaust tribal court remedies by the U.S. District Court for the Western District of Washington (Coughenour, J.), dated June 3, 2021, which disposed of all claims in the proceeding below. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

This appeal presents the following issue for review -- whether Appellant's conclusory and unsupported allegations override the well-established rule that a petitioner must first exhaust her tribal court remedies prior to seeking federal habeas relief. The answer is no.

STATEMENT OF THE CASE

On August 9, 2019, Appellant filed a Petition for Writ of Habeas Corpus against various Whatcom County, Washington officials following her arrest for a tribal offense and booking into the Whatcom County jail. Following the dismissal of the county officials, Adams amended her petition to name the Nooksack Indian Tribe, the Nooksack Tribal Court, Tribal Court Chief Judge Dodge and Pro Tem Judge Majumdar, and Tribal Court Clerks Leathers and Francis. Appellees then moved for dismissal on various grounds, including failure to exhaust tribal court remedies and sovereign immunity.

On March 3, 2020, the District Court Magistrate Judge issued her initial Report and Recommendation (First R&R), recommending that Appellee Tribe's motion be granted and the petition dismissed. Appellant objected to the First R&R, claiming that exhaustion was excused because of alleged bad faith by Respondents and that the Nooksack Tribal Court plainly lacked jurisdiction.

On April 21, 2020, the District Court adopted the First R&R with regards to Petitioner's failure to exhaust tribal court remedies, overruling her claims of bad faith. The Court remanded the claim that the Tribal Court plainly lacked jurisdiction back to the Magistrate Judge. On July 13, 2020, following Appellant's additional complaints of bad faith, the Magistrate Judge issued another Report and Recommendation ("Second R&R). The Magistrate Judge

again recommended dismissal for Appellant's failure to exhaust tribal court remedies, finding the Nooksack Tribal Court did not plainly lack jurisdiction.

On September 23, 2020, following Appellant's objections to the Second R&R, the Court issued its order adopting the Second R&R and dismissing Adams' amended petition. The Court then granted Adams' motion for reconsideration and again referred the matter to the Magistrate Judge for consideration of a single issue -- whether the fact that PL 280 predated the Nooksack Tribe's recognition impacts the conclusion that the Tribal Court did not plainly lack jurisdiction.

On April 13, 2021, the Magistrate Judge issued yet another Report and Recommendation ("Third R&R"), again recommending dismissal and again finding that the Tribal Court did not plainly lack jurisdiction over the trust land in question. Finally, on June 3, 2021, the Court overruled Appellant's objections and dismissed the habeas petition.

STATEMENT OF FACTS

A. The Nooksack Indian Tribe and its Tribal Court.

The Nooksack Indian Tribe is a federally recognized Indian Tribe, vested with all the powers of a Tribal government.[1] Pursuant to its Tribal Constitution, the Tribal Council adopted Title 10 of the Nooksack Tribal Code (Tribal Court System and Court Rules), formed a Tribal Court and appointed a Chief Judge, other judges, and appellate judges.[2] Raymond G. Dodge, Jr. is the current Chief Judge of the Nooksack Tribal Court.[3] At no time since 2019 has the Bureau of Indian Affairs invalidated a Nooksack Tribal Court order, nor indeed does it have authority to take such action.[4]

Pursuant to Nooksack Tribal law the Tribal Court judges, including Judge Dodge, preside over a wide array of cases, including criminal and domestic relations cases.[5] The Tribal Code is available to the public and is posted online.[6] A list of all currently admitted Tribal attorneys (or other advocates) is available to anyone who requests, and is also posted in the courthouse.[7] For those persons charged with a criminal law violation, attorneys are appointed at no cost to the

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[1] SER 60, 193-194.
[2] SER 82, 195, 199, 201.
[3] SER 6, 82.
[4] SER 193-194.
[5] SER 199.
[6] SER 82. *See also* https://nooksacktribe.org/departments/nooksack-tribal-court/laws-ordinances/laws-ordinances/.
[7] SER 44.

accused.[8] Should the accused identify independent counsel, a clear and simple process for those persons seeking admissions to the Tribal bar is found within the publicly-available Title 10.[9]

For the accused who are dissatisfied with the presiding judge, routine motions are available to seek recusal.[10] Other times, judges have recused themselves on their own motion.[11] And, for those accused unsatisfied with the legal processes provided, a clear and simple process for obtaining a writ of habeas corpus is identified in Title 10.[12] In the event that a filing fee is required, the Court posts a publicly available notice entitled "Nooksack Tribal Court Filing Instructions and Fees", which includes the Standing Administrative Order of the Court RE: Filing Fees (May 21, 2019).[13] Lastly, in the event that the accused is dissatisfied with all of the processes outlined herein (or otherwise aggrieved), the Tribe's Appellate Court Code is also publicly available.[14]

B. Adams' Custody Dispute, Forum Shopping, and Custodial Interference.

Adams, a one-time Nooksack Tribal Member, was at all times relevant, a

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[8] SER 1-2, 92-93, 97-101, 126-127, 196.
[9] SER 196. *See also* https://nooksacktribe.org/wp-content/uploads/2021/08/Petition-for-Admission-to-Tribal-Court-Bar..pdf.
[10] SER 97-101, 197, 201, 220.
[11] SER 95-99.
[12] SER 92-96.
[13] SER 38-42, 45-46.
[14] SER 195-198. *See also* https://nooksacktribe.org/departments/nooksack-tribal-court/laws-ordinances/laws-ordinances/.

tenant in Nooksack Tribal housing located on off-reservation trust land.[15] In 2015, the State of Washington established parentage of her daughter.[16] In the parentage action, the state superior court clearly found in § 2.6 that "[n]o party requested a parenting plan" and the state superior therefore has not issued one.[17] In the absence of a parenting plan by the superior court, Adams later sought and obtained a parenting plan from the Nooksack Tribal Court.[18] In October 2019, only after Adams' dissatisfaction with the Tribal Court parenting plan, the pending tribal prosecution, and her recent arrest, did she seek an ex parte order granting declaratory relief from the state superior court in the parentage action.[19]

C. Adams' Prosecution and Adams' Efforts to Avoid Prosecution

In 2019, the Nooksack Tribal Police were tasked with investigating possible custodial interference stemming from Adams' noncompliance with the parenting plan issued by the Tribal Court.[20] Nooksack Tribal officers attempted to observe the custodial exchange between Adams and the father of her child.[21] During the month-long review, officers identified ten separate occasions when Adams failed

[15] SER 71, 135.
[16] SER 79-81.
[17] SER 80.
[18] SER 71-78.
[19] ER 57-59.
[20] SER 133-140.
[21] SER 135-136.

to appear as required by the Tribal Court parenting plant.[22] During the month-long review, officers spoke with Adams as well as family members about the obligations of the parenting plan, apparently with little effect.[23]

Nooksack Tribal Police concluded the investigation by serving Adams with a criminal citation in Tribal Court with a court date for March 14, 2019.[24] The arraignment was continued to April 11, 2019, at which time Appellant failed to appear.[25] The Tribal Court re-issued summons for May 20, 2019 at which time Adams was arraigned and appointed defense counsel.[26] Adams executed a promise to appear for her pretrial conference in June 2019.[27] In June 2019, the parties agreed to a month continuance; Adams again executed a promise to appear for July 11, 2019.[28] Adams then failed to attend her criminal pre-trial hearing on July 11, 2019.[29] The Tribal Court subsequently issued a warrant.[30] In the following weeks, Adams took no action to quash or otherwise dispose of her warrant and failed to re-appear in the Tribal Court.[31] Tribal officers ultimately executed the warrant for Adams' arrest on July 30, 2019.[32]

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[22] *Id.*
[23] SER 137-138.
[24] SER 144.
[25] SER 88.
[26] SER 88, 126-127, 124.
[27] SER 126.
[28] SER 124.
[29] SER 88, 123.
[30] SER 90, 122
[31] SER 90.
[32] SER 109-122.

In the months that followed, Adams filed the underlying action for habeas corpus.[33] Adams also filed a similar application in the Tribal Court.[34] Adams also filed tort claims in state superior court against the local jail where she was booked, the local county sheriff, the Tribal Court Judge and several Tribal police officers.[35] As reflected in the District Court's docket provided herein, Adams objected to each of the three Reports and Recommendation issued by the Magistrate Judge and the District Court's order of dismissal. During this time, Adams unsuccessfully moved for dismissal of the Tribal Court prosecution, and received approximately two years of continuances and stays at her request.[36]

SUMMARY OF ARGUMENT

As the District Court aptly put it, Adams' action

> asks the federal court to insert itself into the Nooksack Tribal Court's criminal system, find it plainly lacks jurisdiction over Petitioner, and grant her relief from the tribal warrant before Petitioner has even raised this issue with the Nooksack Tribal Court.[37]

"Here, [Adams] has tribal court remedies available to her to raise her jurisdictional argument and she should be required to exhaust those remedies

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[33] SER 6.
[34] SER 38-42.
[35] *Adams v. Dodge*, No. 19-2-01552-37 (Whatcom Cty. (Wa) Superior Ct. 2019).
[36] SER 1-4, 43.
[37] ER 214.

before seeking federal habeas relief."[38] Adams' argument "that [State] jurisdiction is exclusive of the Nooksack Tribal Court's is not supported by the legislative history of Public Law 280 or judicial interpretations of the statute."[39]

STANDARD OF REVIEW

This Court review questions of tribal court jurisdiction and exhaustion of tribal court remedies de novo; but factual findings are reviewed for clear error.[40]

ARGUMENT

A. The District Court Properly Dismissed Adams' Petition as a Result of her Refusal to Exhaust Tribal Court Remedies

In the Indian Civil Rights Act, Congress both adopted a statutorily-created limited bill of rights in 25 USC § 1302 and allowed for a writ of habeas corpus to be brought under 25 U.S.C. § 1303 as the exclusive means to challenge tribal detention in federal court.[41] Despite the clear jurisdictional authority, a federal court may intervene only after tribal remedies have been exhausted and the tribal court has ruled on the jurisdictional issue.[42] The exhaustion requirement is a

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[38] Id.
[39] ER 2.
[40] *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc*, 715 F.3d 1196 (9th Cir. 2013) (*quoting Smith v. Salish Kootenai College,* 434 F.3d 1127, 1130 (9th Cir. 2006); *Philip Morris USA, Inc. v. King Mountain Tobacco Co.,* 569 F.3d 932, 938 n. 1 (9th Cir. 2009).
[41] *See generally Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-72 (1978); *Means v. Navajo Nation*, 432 F.3d 924, 930, 932 - 35 (9th Cir. 2005); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (regarding terminology).
[42] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 (1987).

prerequisite to a federal court's exercise of jurisdiction.[43]

The Supreme Court has held that there are strict exceptions to the tribal remedy exhaustion requirement: (1) when the tribal court action is motivated by a desire to harass or is conducted in bad faith; (2) when it patently violates express jurisdictional prohibitions; or (3) when there is a lack of adequate opportunity to challenge the tribal court jurisdiction.[44]

Nevertheless, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors."[45] Exhaustion of tribal remedies requires that tribal appellate courts be given the opportunity to review determinations of lower tribal courts before federal court considers issue of the tribal court's subject matter jurisdiction.[46]

Here, the District Court found that Adams' complaints that the Nooksack Tribal Court acted in bad faith and that it plainly lacked jurisdiction over her criminal prosecution are without merit and dismissed her petition. Adams' repeated attempts to coax federal courts into halting her tribal prosecution must fail. Her speculation and clear disdain for the Nooksack Tribe and the Tribal Court are insufficient to defeat the tribal exhaustion requirement.

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[43] *Grand Canyon Skywalk*, 715 F.3d at 1200.
[44] *Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *see also Grand Canyon Skywalk,* 715 F.3d at 1200.
[45] *Iowa Mut. Ins. Co.*, 480 U.S. at 16 (*quoting Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)).
[46] *Iowa Mut. Ins. Co.*, 480 U.S. 9.

1. The District Court Repeatedly Rejected Adams' Claims of Bad Faith.

The Supreme Court has suggested that exhaustion of tribal remedies is not required if "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith."[47] This Court has explained that when "a tribal court has asserted jurisdiction and is entertaining a suit, the tribal court must have acted in bad faith for exhaustion to be excused."[48] The Court also noted that the district court should look to the "[tribal court] *proceeding* and the court overseeing that proceeding."[49]

There are only a limited number of cases addressing the bad faith exception.[50] Of the courts reviewing the bad faith exception, none have delineated clearly what would constitute bad faith.[51] Unfortunately for Adams, this Court must affirm the District Court's dismissal, as Adams' claims of bad faith are nothing more than a formulaic recitation of the elements of the claim.[52]

Counting the present attempt, this is the fourth time Adams complains to

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[47] *Nat'l Farmers,* 471 U.S. at 856 n. 21 (internal citation omitted).
[48] *Natl. Farmers,* 471 U.S. at 856.
[49] *Grand Canyon Skywalk,* 715 F.3d at 1202 (emphasis in original).
[50] *See generally Acres v. Blue Lake Rancheria*, 2017 WL 733114 (N.D. Cal) (2017), *aff'd Acres v. Blue Lake Rancheria*, 692 Fed.Appx. 894 (9th Cir.).
[51] "Construction and Application of Federal Tribal Exhaustion Doctrine," 186 A.L.R. Fed. 71 § 2[a] n. 10 (2003).
[52] While the Court accepts the facts alleged in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662 at 667 (2009), "***bare assertions***...amount[ing] to nothing more than a formulaic recitation of the elements of a...claim...***are not entitled to an assumption of truth***." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 681) (brackets in original) (internal quotation marks omitted) (emphasis added). The court discounts these allegations because "they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation." *Id.* (citing *Iqbal*, 556 U.S. at 681)

the federal courts about bad faith. The District Court rejected each of Adams' prior complaints, ultimately requiring Adams to exhaust tribal court remedies. Adams' current recitation of bad faith offers nothing new. As the District Court did time and time again, this Court should do now: require Appellant to exhaust her tribal remedies.

Adams' attempts to concoct the minimal threshold requirements for federal court jurisdiction are without merit. The District Court quickly dispatched of Adams' bad faith complaints because the record established that [Adams' excuses] do not establish that the tribal court has unjustifiably precluded [her] from pursuing her tribal court remedies and do not otherwise rise to the level of bad faith or harassment such that [she] is excused from exhausting those tribal court remedies."[53]

Here, the Tribal Court did not commence a child custody proceeding *sua sponte*; rather, Adams commenced a tribal court action during her forum shopping expedition. In the tribal court case, Adams was represented by counsel of her choosing, the Nooksack Tribal Court retained a guardian *ad litem* to represent the child and hired a forensic child psychologist to evaluate Adams' unsupported claims of abuse by the father of her child. When those claims were debunked, the Court issued a visitation

[53] ER 23.

order, which Adams ignored.

Next, after ignoring the tribal court's visitation order ten times in one month,[54] Adams faced a tribal court prosecution;[55] she was appointed defense counsel at no expense;[56] the court issued orders to appear (and opportunities to cure when she did not appear), then a warrant[57] for her arrest after she repeatedly mocked the tribal court's attempt to obtain her personal attendance.[58] Adams' dissatisfaction with the orders of the tribal court in response then led her to utilize a newly obtained state court custody order to claim the tribal court lacked jurisdiction in her tribal court custody case.[59]

To add to Adams' manufactured bases for a federal habeas petition, her present counsel attempted to file a tribal habeas petition contrary to Tribal law knowing he is neither licensed, nor permitted to practice law, in the Nooksack Tribal Court. Adams' tribal habeas pleadings were then rejected, due to counsel's failure to comply with Tribal pleading and filing

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[54] SER 133-140.
[55] SER 141-144.
[56] SER 126.
[57] SER 122.
[58] Many of Appellant's complaints are squarely aimed at Judge Dodge as opposed to the Tribal Court Clerks or the Tribe. As to those complaints, this Court should also affirm the District Court. Following initiation of this action, Judge Dodge recused himself from both the tribal criminal and custody case. Judge Dodge is certainly in no position to exercise "bad faith" if he has recused himself. *See Acres v. Blue Lake Rancheria*, 2016 WL 4208328 at 3 (N.D. Cal. 1/11/17), *aff'd* 692 Fed. Appx. 894 (9th Cir. 2017)(mem.).

requirements.[60]

Now, in Adams' latest baseless complaint, she claims the Tribal Court is acting in bad faith for its failure to give her the relief she wants. A review of the record indicates that the Tribal Court gave Adams every possible courtesy and benefit of the doubt, to which she responded with willful contempt and repeated non-compliance with straightforward requirements. There is no evidence of bad faith or harassment, and Adams' argument to the contrary is simply an attempt to excuse her failure to exhaust tribal court remedies.

2. The District Court Rejected Adams' Claims that the Tribal Court Plainly Lacked Jurisdiction

The Nooksack Tribal Court has jurisdiction over the child custody matter and the criminal prosecution. Indian tribes possess inherent and exclusive power over matters of internal tribal governance.[61] Tribes have the power to both make their own substantive law in internal matters and to enforce that law in their own forums.[62] Internal matters include the tribal membership determinations,

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[60] *See Lundy v. Balaam*, No. 21-267, 2021 WL 2904917, at 9 (D. Nev.7/9/21) ("treating Petitioner's habeas proceeding in tribal court as a civil proceeding and applying civil procedure rules … was neither novel nor indicative of bad faith.")

[61] See, e.g., *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171, 1185 (E.D. Cal. 2009).

[62] *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55–56.

domestic relations among members, rules of inheritance for members, and the power to punish tribal offenders.[63]

Adams at all relevant times was a tribal member (either Nooksack or Lummi), residing on Nooksack Tribal lands in Nooksack Tribal housing (owned and operated by the Tribe). The Tribe's *inherent* authority over its own members has been clear under federal law for almost 200 years. Pursuant to the so-called "Duro fix,"[64] the Tribe also has jurisdiction over non-member Indians for offenses on Nooksack Tribal lands.

To the extent that Adams' argument is that the Nooksack Tribal Court lacked subject matter jurisdiction over the original custody action, that argument fails for at least two reasons. First, the Tribal Court clearly had jurisdiction over the child custody action. Both Adams and her child were enrolled Nooksack Tribal members living on Nooksack Tribal Trust lands within Nooksack Tribal housing at the time that she invoked the Court's jurisdiction. It is well established that Indian tribes have civil jurisdiction over tribal members living on the tribes' land generally, and over domestic cases in particular. Once Adams was unable to obtain her preferred remedy in

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[63] *Id.* at 56; *Montana v. U. S.*, 450 U.S. 544, 564 (1981).

[64] The so-called "Duro Fix" appears at 25 U.S.C. §1301 Definitions For the purposes of this subchapter, the term – … (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to ***exercise criminal jurisdiction over all Indians.***

Tribal Court, she relinquished enrollment, but that relinquishment did not divest the Nooksack Tribal Court of its continuing jurisdiction over the case and over her personally. Further, her contempt had already occurred and the tribal prosecution for her contemptuous behavior and custodial interference was already underway. Appellant's Nooksack membership status was no longer necessary for *Montana* purposes, the Tribal Court was vested with subject matter jurisdiction in the *criminal* case.

Public Law 280 does not alter this conclusion. The overwhelming view among state courts, federal courts, tribal courts, the United States Department of the Interior and legal scholars is that Public Law 280 was not intended to, and in fact, did not affect civil or criminal tribal court jurisdiction.[65] The plain language and clear legislative intent of Public Law 280 was to strengthen law enforcement in Indian country. Moreover, the statute fails to address tribal court jurisdiction at all, clearly indicating the Congressional intent that it remain undisturbed.[66]

Adams, however, argues that the State of Washington assumed exclusive criminal jurisdiction under Public Law 280, citing to antiquated and/or irrelevant court and attorney general opinions.[67] The Supreme Court of Washington has

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[65] *See, e.g., Native Village of Venetie v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991); State *v. Schmuck*, 121 Wash.2d 373 (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).

[66] Cohen, *supra,* at § 6.04(c)(3).

[67] 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

repeatedly held that its criminal jurisdiction is *concurrent* with tribes concerning offenses occurring on off-reservation trust lands.[68] As recently as 2015, the Washington Supreme Court confirmed as much.

In *State v. Shale,*[69] a Yakama tribal member living on the Quinault Reservation was charged with failure to register as a sex offender in state court. He argued that the State lacked criminal jurisdiction because the offense occurred on the reservation. The Court closely examined Washington's Public Law 280 assumption and noted:

> … we find Shale's argument that State courts only have concurrent jurisdiction with tribal courts when such jurisdiction has been explicitly granted by statute unavailing. ***Public Law 280 and RCW 37.12.010 together do grant such jurisdiction.***[70]

Shale expressly states the Washington Supreme Court's view that its jurisdiction is *concurrent* with tribal courts. *Shale* also cited with approval *State v. Moses,*[71] previously discussed by Appellees, for the proposition that tribes and the State have overlapping criminal jurisdiction.[72]

In *Moses,* the Washington Supreme Court stated its criminal jurisdiction is

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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" Public Law 280 states: Alaska, California, Minnesota, Oregon, Nebraska, and Wisconsin.

[68] The scope of ***a state's voluntary assumption*** under Public Law 280, as opposed to the grant of jurisdiction to mandatory PL 280 states, is a question of state law.

[69] 182 Wash. 2d 882 (2015).

[70] 182 Wash.2d at 895 fn. 11 (citations omitted). As noted above, the Washington Supreme Court's interpretation of Washington's Public Law 280 assumption in RCW Chapter 37 is controlling.

[71] 145 Wash.2d 370, 37 P.3d 1216 (2002).

[72] 182 Wash.2d at 890 (*citing State v. Moses,* 145 Wash.2d at 374*).*

concurrent with tribal courts in off-reservation trust lands. Discussing the differences between Washington and Colorado state court jurisdiction, the Court noted:

> Colorado and Washington have not taken similar approaches to concurrent state and tribal jurisdiction. Once Congress made it possible to do so, Washington assumed partial, nonconsensual, ***concurrent*** jurisdiction over tribal reservations in 1963.[73]

Accordingly, the Washington Supreme Court has repeatedly reaffirmed that its criminal jurisdiction under Public Law 280 assumption is ***concurrent*** with tribes. Both *Shale* and *Moses* cite *State v. Schmuck*,[74] previously discussed by Appellees. In that case, the Washington Supreme Court expressly stated the issue as whether Washington's assumption of jurisdiction under Public Law 280 divested the tribe of any inherent jurisdiction, precisely Appellant's argument here. 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 … Tribe of its inherent authority to stop and detain a non-Indian***…[75]

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[73] 145 Wash, 2d at 378 (citing Pub.L.280, 67 Stat. 588) (emphasis added).
[74] 121 Wash.2d 373 (1993), *cert. den'd* 510 U.S. 931 (1993).
[75] 121 Wash.2d at 396 (emphasis added).

Schmuck, like *Moses* and *Shale* after it, therefore presents a clear statement by the Washington Supreme Court that Washington's assumption of Public Law 280 jurisdiction does not operate to divest tribes of their inherent authority over their own territory and that Washington state criminal jurisdiction is ***concurrent*** with tribal authority in off-reservation trust lands.[76] As they are bound to do, lower Washington courts agree. For example, in *State v. Depoe,*[77] construing *Shale* opined: "Congress authorized certain states to impose *concurrent* state court jurisdiction in Indian country without tribal consent."[78] Washington courts are unanimous that state criminal jurisdiction is concurrent with tribes on off-reservation trust land.

As the Magistrate Judge below found: [t]hat this jurisdictional issue is still before the Court after several motions for reconsideration and supplemental briefing ***supports the finding that tribal jurisdiction was not plainly lacking.***[79] Appellant's continued complaints to the contrary are simply evidence of her disdain for the Tribe, not meritorious arguments demonstrating the federal government divested the Nooksack Indian Tribe of its inherent jurisdiction.

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[76] Petitioner also cites an old Washington State Attorney General opinion for the conclusion that state criminal jurisdiction is exclusive under Public Law 280, AGO 63-64, No. 68 (11/8/63). Despite repeated opportunities, the Washington Supreme Court has not only never relied on that opinion, it has not even cited it, nor has any lower state court that Appellees have found. The implication is clear.
[77] 188 Wash. App. 1012 (Wash. App. 2015).
[78] 188 Wash. App. at 1013 (emphasis added).
[79] ER 246 (emphasis added).

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

DATED: September 23, 2021

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellee knows of no cases pending in this Court that would be deemed related under Circuit Rule 28-2.6.

DATED: September 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,417 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

DATED: September 23, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Charles Hurt
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