No. 21-

IN THE

Supreme Court of the United States

ELILE ADAMS,

Petitioner,

v.

RAYMOND G. DODGE, JR., RAJEEV MAJUMDAR, BETTY LEATHERS, DEANNA FRANCIS, THE NOOKSACK TRIBAL COURT AND THE NOOKSACK INDIAN TRIBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GABRIEL S. GALANDA
Counsel of Record
ANTHONY S. BROADMAN
RYAN D. DREVESKRACHT
MATTHEW J. SLOVIN
GALANDA BROADMAN, PLLC
PO Box 15146
Seattle, WA 98115
(206) 557-7509
gabe@galandabroadman.com

Counsel for Petitioner

313091

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether federal plaintiffs seeking to challenge their non-federal prosecution on the basis of bad faith face a heightened pleading standard.

2. Whether actions taken by the clerk of a non-federal court to impede review of a *habeas* petition obviate the petitioner's need to further exhaust remedies in that court.

PARTIES TO THE PROCEEDING AND CERTIFICATE OF RELATED CASES

Petitioner Elile Adams was the petitioner-appellant before the United States Court of Appeals for the Ninth Circuit. Raymond G. Dodge, Jr., Rajeev Majumdar, Betty Leathers, Deanna Francis, the Nooksack Tribal Court, and the Nooksack Indian Tribe were the respondent-appellees in the Ninth Circuit. Bill Elfo and Wendy Jones were respondents in the underlying trial court proceedings but were not parties to the Ninth Circuit proceedings.

The related cases are:

- *Adams v. Dodge et al.*, No. 21-35490, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 15, 2022.

- *Adams v. Elfo et al.*, No. 2:19-cv-01263-JCC, U.S. District Court for the Western District of Washington. Judgment entered September 23, 2020.

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PETITION FOR WRIT OF CERTIORARI

Elile Adams respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents two circuit splits, both between the Second and Tenth Circuits on one hand and the Ninth Circuit on the other. Each split relates to the general requirement that, before federal courts infringe upon a non-federal proceedings, federal plaintiffs must exhaust their remedies before non-federal forums.

The first split involves what a federal plaintiff must do to invoke the exception to the exhaustion requirement applicable where the non-federal proceeding is being conducted in bad faith. Consistent with this Court's focus in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), on the allegations of the complaint, the Second and Tenth Circuits do not subject federal plaintiffs invoking bad faith to dismissal at the pleading stage because of a failure to adequately invoke the exception. *See Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003); *Phelps v. Hamilton*, 122 F.3d 885, 890 n.4 (10th Cir. 1997). However, in the decision below, the Ninth Circuit held that, at the motion-to-dismiss stage, a federal plaintiff has a "burden of demonstrating that due to bad faith she need not exhaust[.]" Pet. App. 3a.

The second split involves whether the exhaustion requirement evaporates when the clerk of the non-federal court acts to prevent adjudication before that forum. The Second Circuit has explicitly held that it does. *See Finetti v. Harris*, 609 F.2d 594, 599 (2d Cir. 1979). The Tenth

Circuit recently indicated it would reach the same result if confronted with such an "allegation." *Chegup v. Ute Indian Tribe of Uintah and Ouray Reservation*, 28 F.4th 1051, 1069 n.16 (10th Cir. 2022). But the Ninth Circuit faced allegations and proof of clerk interference in this case and nevertheless required exhaustion. *See* Pet. App. 1a-6a.

The Court should grant the petition to resolve these splits of authority, as well as important questions of tribal authority over non-members.

OPINIONS BELOW

The Ninth Circuit's decision has not yet been published in the Federal Register but is reported at 2022 WL 458394 and reprinted in the Appendix ("Pet. App.") at 1a-6a. The district court's dismissal of Adams' *habeas* petition (30a-35a) and denial of reconsideration (7a-11a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Elile Adams is a non-member in the custody of the Nooksack Indian Tribe who sought domestic violence protection from the Tribe's court. *See* Ninth Circuit Excerpts of Record ("E.R.") at 21. After Judge Raymond Dodge of the Nooksack Tribal Court initiated a *sua sponte* parenting action involving Adams' child and then personally directed the Nooksack Tribal Police Chief to investigate Adams for alleged custodial interference, Adams sought federal *habeas* relief. *See id.* at 57; *see also* Pet. App. at 2a-3a.

On March 17, 2017, Adams sought a domestic violence protection order in Nooksack Tribal Court. E.R. at 61. At that time Adams and her child lived on Nooksack lands. *See* E.R. at 25. On March 30, 2017, Dodge *sua sponte* converted that case into a parenting action over Adams' child, even though a Washington State court had already asserted its "exclusive jurisdiction" over the child and awarded Adams full custody. E.R. at 44–47, 61–62. Through that parenting action, the child's father was granted visitation with—but not custody of—the child. *Id.* at 47.

In February 2019, even though the *sua sponte* parenting action dealt only with visitation, not custody, Dodge reached out to Nooksack Tribal Police Chief Mike Ashby and asked him to investigate Adams for custodial interference. *Id.* at 57. As a result, Adams was criminally charged on February 20, 2019 with custodial interference. *Id.* at 58.

Between 2017 and 2019, Dodge required Adams to appear before him at least 21 times in the *sua sponte* parenting and custodial interference actions. *Id.* at 34. Adams' child's father last sought visitation in February 2019, since which time he has neither asserted any custody rights nor pressed the custodial interference charges Dodge prompted. *Id.* at 35. Notwithstanding, Dodge continued to serially hail Adams to court in both proceedings.[1] *Id.* at 14, 34–35. When she was unable to personally appear before Dodge at a single hearing on July 11, 2019, and even though her attorney appeared in person that day on her behalf, Dodge issued a warrant for Adams' arrest for failure to appear. *Id.* at 56.

On July 30, 2019, Adams was arrested and imprisoned, each for the first time in her life. *Id.* at 39, 56. She was handcuffed and transported to a county jail, where she was booked, fingerprinted, subjected to mug shots, and held all day. *Id.* at 39–42. After she was bailed out, her bail money was transferred to the Nooksack Tribal Court, where she has now been hailed to court by Dodge and Respondent Pro Tem Judge Rajeev Majumdar nearly 50 times in the last five years. *Id.* at 14, 34–35. Respondents have refused to release Adams from the Tribal Court's custody.

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1. Adams is a non-member Indian; she belongs to the Lummi Nation. *See* E.R. at 13. She does not hereby contest the Nooksack Tribal Court's criminal or civil jurisdiction over her. *See United States v. Lara*, 541 U.S. 193, 200 (2004); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1141 (9th Cir. 2006). She maintains, however, that Dodge and Respondents' manifest bad faith excuses her from exhausting the only federal, quasi-constitutional remedy Congress has afforded her: *habeas corpus*. *See* 25 U.S.C. § 1303.

On March 5, 2020, Adams, through counsel, filed an application for writ of *habeas corpus* in Nooksack Tribal Court. *Id.* at 32. Nooksack Tribal Court Clerk Deanna Francis "REJECTED" the application. *Id.* Adams has since attempted to exhaust her tribal court remedies *pro se*. She returned to the Nooksack Tribal Court to file a *pro se habeas* application on July 16, 2020. *Id.* at 19, 21.

On August 10, 2020, Francis inadvertently sent Adams an email intended for Charles Hurt, counsel of record for Respondents in Adams' federal *habeas* action. *Id.* at 16. In the email, Francis sought Hurt's *ex parte* advice on how to avoid acting on Adams' *pro se* application. *Id.* Francis asked Hurt if she "can let her flat out know she has not followed through with the code," even though she had adhered to applicable *habeas* statute. *Id.* Neither Francis nor any other Respondent has since allowed any action on Adams' *pro se habeas* application. *Id.* at 14.

B. Proceedings Below

On October 18, 2019, Adams filed a federal court petition for a writ of *habeas corpus*. *Id.* at 59–62. Respondents successfully moved to dismiss the petition, arguing Adams failed to exhaust her tribal court remedies. *See* Pet. App. at 13a. The Ninth Circuit affirmed the district court's dismissal of Adams' *habeas* petition on February 15, 2022. *Id.* at 1a-6a. The Ninth Circuit noted the Nooksack Tribal Court's refusal "to consider [Adams'] pro se habeas corpus petition upon the ex parte advice of one of Respondents' counsel" but nevertheless held that Adams "has not met her burden of demonstrating that due to bad faith she need not exhaust tribal remedies." *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Review to Clarify the Pleading Standard for Federal Challenges to Non-Federal Prosecutions.

There is now an unsettled question of the appropriate burden at the pleading stage on those seeking to challenge non-federal prosecutions in federal court.

1. Generally, federal courts do not interfere with pending proceedings in state or tribal forums. *See Younger v. Harris*, 401 U.S. 37, 41 (1971); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 15–16 (1987). This principle is known as abstention in the federal-state context and as the tribal court exhaustion rule in the federal-tribal context. *See Iowa Mutual*, 480 U.S. at 16 n.8 (analogizing between tribal court exhaustion and abstention); *see also* Kirsten Matoy Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 Mich. L. Rev. 569, 575 n.44 (2002) ("The tribal exhaustion doctrine functions like a state abstention doctrine because it stays the federal court's jurisdiction until after the tribal court has heard and decided the merits of the case."). As this Court has recognized, these rules of deference to non-federal forums are necessitated by comity, as well as Congress' wish that those forums operate without federal interference. *Compare Younger*, 401 U.S. at 43 ("Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal

courts.") *with National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

2. But deference to non-federal tribunals is not always appropriate. Under an exception to the requirements of abstention and exhaustion, federal courts may intervene if the state or tribal proceedings are brought "in bad faith or are motivated by a desire to harass." *Juidice v. Vail*, 430 U.S. 327, 338 (1977) (state court proceedings); *National Farmers Union*, 471 U.S. at 856 n.21 (quoting *Juidice*, 430 U.S. at 338) (tribal court proceedings). In determining whether bad faith exists, the focus is on the manner in which the tribal court proceedings have been conducted. *See Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1201 (9th Cir. 2013).

3. In order to survive a motion to dismiss, a plaintiff "must plead facts sufficient to show that her claim has substantive plausibility." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (citing *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Still, federal courts are divided on how much scrutiny to give a complaint's bad faith allegations upon a motion to dismiss. This Court suggested in the pre-*Younger* case of *Dombrowski v. Pfister* that the proper inquiry is whether a plaintiff's allegations, taken as true, justify intervention in the non-federal litigation. 380 U.S. 479, 492 (1965) ("We conclude that on the allegations of the complaint, if true, abstention . . . cannot be justified."); *see also*

Younger, 401 U.S. at 56 (Brennan, J. concurring) (noting the appellee "has not alleged that the prosecution was brought in bad faith to harass him"); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975) (noting that the federal incursion on state proceedings in *Dombrowski* was proper because "the arrests and threatened prosecutions . . . were alleged to have been in bad faith and employed as a means of harassing the federal-court plaintiffs").

4. Consistent with that guidance from this Court regarding the sufficiency of allegations of bad faith, the Second and Tenth Circuits have recognized that it is premature to deny application of the exception and dismiss at the pleading stage on the grounds that bad faith has not been shown. The Tenth Circuit requires a federal plaintiff invoking the exception to "come forth with additional, supplemental evidence regarding defendant's alleged bad faith" only at summary judgment. *Phelps v. Hamilton*, 122 F.3d 885, 890 n.4 (10th Cir. 1997). Numerous federal courts follow that approach. *See, e.g.*, *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 898 F. Supp. 1549, 1562 (S.D. Fla. 1994) (denying motion to dismiss for failure to exhaust tribal court remedies because bad faith had been alleged); *Gubitosi v. Kapica*, 895 F. Supp. 58, 62 (S.D.N.Y. 1995) (holding plaintiff's bad faith "allegations are sufficient to survive a Fed. R. Civ. P. 12(b)(6) motion"); *Chiropractic Alliance of New Jersey v. Parisi*, 854 F. Supp. 299, 307 (D.N.J. 1994) (noting bad faith "is alleged throughout Plaintiff's complaint and, in the context of the instant motion to dismiss, is properly presumed by the Court to be true"); *Masterpiece Cakeshop Inc. v. Elenis*, 445 F.

Supp. 3d 1226, 1241 n.4 (D. Colo. 2019) (denying motion to dismiss because complaint contained "well-pleaded" allegations of bad faith). Also in the Tenth Circuit, before a motion to dismiss may be converted into one for summary judgment—at which time dismissal for failure to properly invoke the bad faith exception is available—a court must hold an evidentiary hearing, giving the plaintiff an opportunity to put on evidence of bad faith. *See Phelps*, 122 F.3d at 890 n.4. The Second Circuit likewise requires an evidentiary hearing before dismissal of a case in which the bad faith exception has been pled. *See Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003); *see also Sica v. Connecticut*, 331 F. Supp. 2d 82, 87 (D. Conn. 2004). And, in the false arrest context, the Fifth Circuit has held that "mere allegations" that a proceeding was tainted are sufficient to survive a motion to dismiss. *See McLin v. Ard*, 866 F.3d 682, 690 (5th Cir. 2017).

5. The Ninth Circuit has diverged from those courts holding allegations of bad faith are sufficient to overcome a motion to dismiss. Adams' federal *habeas* petition contains detailed allegations that Dodge initiated, and Respondents conducted, tribal court proceedings in bad faith. *See* E.R. at 59–62. Nevertheless, the Ninth Circuit concluded that Adams "has not met her burden of demonstrating" that the bad faith exception applies. Pet. App. at 3a. The Court should clarify how high of a hurdle plaintiffs must clear in the early stages of litigation challenging non-federal prosecutions in federal court.

B. The Court Should Grant Review to Resolve a Split Over Whether the Exhaustion Requirement Persists When a Clerk Acts to Prevent Adjudication.

Through its opinion here, the Ninth Circuit has split from the Second and Tenth Circuits on another issue as well: whether the exhaustion requirement persists when the clerk of a non-federal tribunal prevents review of a *habeas* petition. The Court should grant review to resolve that issue too.

1. In *Finetti v. Harris*, the Second Circuit held that "where action by a court clerk prevented state court review . . . the exhaustion requirement has been satisfied." 609 F.2d 594, 599 (2d Cir. 1979). The *Finetti* petitioner attempted to file a state *habeas* petition but was informed via letter from the court clerk that his petition "may not be entertained because there is no basis for a finding of illegal detention." *Id.* at 596. The Second Circuit concluded that the clerk letter eliminated any further exhaustion requirement because *habeas* petitioners should not have to undertake "extraordinary efforts in an attempt to obtain state court review." *Id.* at 598. In other words, the "clerk's action . . . rendered inadequate any available state court remedies." *Id.* Requiring a petitioner "to convince the clerk to accept his petition . . . not only would result in considerable delay; it might not produce any benefits 'in terms of federal-state comity or the efficient administration of justice.'" *Id.* (quoting *Emmett v. Ricketts*, 397 F. Supp. 1025, 1047 (N.D. Ga. 1975)).

2. The Tenth Circuit has recently suggested that—like their state court counterparts—tribal court *habeas* petitioners need not further exhaust where a clerk prevents their case from being heard. In *Chegup v. Ute Indian Tribe of Uintah and Ouray Reservation*, four tribal members sought federal *habeas* relief after they were temporarily banished by the tribe. 28 F.4th 1051, 1053–54 (10th Cir. 2022). The "banished members were told by a tribal court clerk that their banishment was final and not appealable in tribal court." *Id.* at 1069 n.16. The Tenth Circuit found that the tribal court clerk's comment was insufficient to excuse exhaustion but noted that "it would be another matter if a tribal court clerk refused to allow a party to file paperwork to initiate a case." *Id.* (citing *Finetti*, 609 F.2d at 598). The banished members had made no "allegation" that the tribal court clerk had refused to allow them to initiate their case. *Id.*

3. Here though, the Ninth Circuit did not address Adams' contention that actions by the tribal court clerk in response to her *pro se habeas* application freed her of the need to exhaust. *See* Pet. App. 1a-6a. The Ninth Circuit effectively held that Adams must exhaust even though action by a court clerk has prevented tribal court review of her *habeas* application. *See id.* Federal *habeas* Respondents have not acted on Adams' tribal *habeas* application, and the Tribal Court Clerk has prevented review of the application in coordination with Respondents' counsel. *See* E.R. at 14, 16. In the Second Circuit, the clerk's actions would excuse Adams from exhausting her remedies before the non-federal forum. *See Finetti*, 609 F.2d at 599. The Tenth Circuit would apparently

reach the same result. *See Chegup*, 28 F.4th at 1069 n.16. But the Ninth Circuit nevertheless required exhaustion. *See* Pet. App. at 1a-6a. This Court should resolve the deepening divide over the impact of clerk action on the exhaustion requirement.

C. The Court Should Grant Review to Hear Vital Issues of Tribal Power Over Non-Members.

The Ninth Circuit's decision severely restricts non-members' ability to challenge tribal courts' assertion of jurisdiction over them.

1. As this Court has long recognized, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). ICRA, which "represents an exercise of that authority," has the federal writ of *habeas corpus* as its "only remedial provision expressly supplied by Congress." *Id.* at 57–58 (citing 25 U.S.C. § 1303). Recognizing that no government is immune from overreach, Congress struck a balance in 25 U.S.C. § 1303 between limiting federal incursions on tribal governments and avoiding injustices by tribal governments. *See id.* at 66–67.

2. The sole remedy created by Congress for those subject to tribal jurisdiction has proven ineffective here. The Ninth Circuit's decision requires Adams to exhaust her tribal court remedies, but the Nooksack Tribal Court sought her adversary's advice on how to prevent her from doing just that. The decision below denies Adams a federal forum, thwarting Congress' clear

command that *habeas* relief "shall be available" to those in the custody of an Indian tribe.

3. In recent years, Congress has restored tribal criminal jurisdiction over non-members who commit violence against women in Indian country. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 (codified at 18 U.S.C. § 113); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 840. Under this Court's precedent, it is well established that tribal courts also enjoy civil jurisdiction over non-members who consent to tribal authority. *See Montana v. United States*, 450 U.S. 544, 565 (1981); *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545, 546 (2016) (per curiam). But where a tribal court wields its jurisdiction over a non-member in bad faith, "fundamental fairness" requires the non-member be allowed the right to challenge tribal authority. *United States v. Bryant*, 579 U.S. 140, 157 (2016); *see also National Farmers Union*, 471 U.S. at 856 n.21. For nearly five years, Adams has been denied that right and any remedy whatsoever. This Court should stem the domestic human rights abuse and effectuate the ICRA *habeas* remedy Congress afforded Adams.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

Gabriel S. Galanda
Counsel of Record
Anthony S. Broadman
Ryan D. Dreveskracht
Matthew J. Slovin
Galanda Broadman, PLLC
PO Box 15146
Seattle, WA 98115
(206) 557-7509
gabe@galandabroadman.com

Counsel for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-35490

D.C. No. 2:19-cv-01263-JCC

ELILE ADAMS,

Petitioner-Appellant,

v.

RAYMOND G DODGE, JR., NOOKSACK TRIBAL COURT CHIEF JUDGE; *ET AL.*,

Respondents-Appellees,

and

BILL ELFO, WHATCOM COUNTY SHERIFF; WENDY JONES, WHATCOM COUNTY CHIEF OF CORRECTIONS,

Respondents.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Before: BYBEE, BEA, and CHRISTEN, Circuit Judges.

Appendix A

MEMORANDUM[*]

Submitted February 10, 2022[**]
Seattle, Washington

Petitioner Elile Adams appeals the district court's order dismissing, for failure to exhaust tribal remedies, her 25 U.S.C. § 1303 habeas petition seeking relief from a Nooksack Tribal Court warrant. Reviewing "questions of tribal court jurisdiction and exhaustion of tribal court remedies de novo and factual findings for clear error," *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013), we affirm. Because the parties are familiar with the facts, we recite only those necessary to decide the appeal.

Prior to turning to federal court, habeas petitioners must exhaust the remedies available to them in tribal court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). However, exhaustion of tribal remedies is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or 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." *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (alteration in original) (quoting *Nat'l Farmers Union*, 471 U.S. at 856 n.21). Exhaustion is also "not required where the action is patently violative of express

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdictional prohibitions, or it is otherwise plain that the tribal court lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no purpose other than delay." *Id.* (internal quotation marks and citation omitted).

Adams first argues that she was not required to exhaust her tribal court remedies because Nooksack Tribal Court Chief Judge Dodge and the Nooksack Tribal Court acted in bad faith by: (1) *sua sponte* initiating a parenting action against her; (2) ignoring a 2015 state court parenting order and its jurisdictional impact; (3) harassing her by requiring her to appear before Dodge at least twenty times in two years; (4) issuing a warrant for her arrest and causing her to be imprisoned because of her failure to appear at a July 11, 2019 hearing despite her public defender's appearance on her behalf; (5) rejecting her habeas corpus counsel's appearance before the Tribal Court; and (6) refusing to consider her pro se habeas corpus petition upon the ex parte advice of one of Respondents' counsel.

Adams has not met her burden of demonstrating that due to bad faith she need not exhaust tribal remedies. Although Judge Dodge did not recuse himself from Adams's ongoing criminal matter until after Adams filed a motion for his disqualification, the fact remains that Judge Dodge appointed Pro Tem Judge Majumdar to preside over her criminal proceedings and Adams has not explained why she cannot receive a fair hearing from Judge Majumdar. Moreover, the criminal charges Adams faces were brought with an objectively reasonable expectation of obtaining a conviction following a police investigation. Petitioner also argues that the tribal court

wrongly refused to consider her tribal habeas petition, but the tribal court rejected that filing because her attorney was not licensed to practice before the tribal court and failed to pay the proper filing fee.

Adams next argues that she was not required to exhaust her tribal court remedies because she was arrested on off-reservation allotted land, and the Nooksack Tribal Court lacked criminal jurisdiction to arrest her. Specifically, she asserts the Nooksack Tribal Court plainly lacks criminal jurisdiction because, consistent with Congress's passage of Public Law 280 in 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 25 U.S.C. § 1321), Washington state assumed exclusive criminal jurisdiction over tribal lands by passing Revised Code of Washington (RCW) section 37.12.010.

We disagree. As an initial matter, it is well established that, although "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," Indian tribes "have power to make their own substantive law in internal matters and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (citation omitted).

Here, Adams fails to show that Washington state's jurisdiction is exclusive. Public Law 280 and RCW section 37.12.010 establish only that Washington state has jurisdiction; there is no language in either Public Law 280 or RCW section 37.12.010 that divests the Nooksack Tribal Court of jurisdiction. The decisions that Adams cites likewise establish only that Washington state has jurisdiction over off-reservation allotted lands; they do not address whether Washington state has exclusive

jurisdiction or whether tribes have concurrent jurisdiction over such lands. *See, e.g.*, *State v. Cooper*, 130 Wn. 2d 770, 928 P.2d 406, 410-11 (Wash. 1996); *State v. Clark*, 178 Wn. 2d 19, 308 P.3d 590, 593-95 (Wash. 2013).

Indeed, the Washington Supreme Court has stated in dicta that tribal and state courts generally have concurrent jurisdiction over criminal cases: "Both the state and a tribe may have jurisdiction in any given criminal case, and prosecution by one does not bar the other from also charging an offender with a crime arising out of the same conduct." *State v. Shale*, 182 Wn. 2d 882, 345 P.3d 776, 779 (Wash. 2015) (citing *State v. Moses*, 145 Wn. 2d 370, 37 P.3d 1216 (Wash. 2002)); *see Moses*, 37 P.3d at 1218. *But see Clark*, 308 P.3d at 596.

In addition, "Public Law 280 is not a divestiture statute." *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991) (reviewing legislative history of Public Law 280 and noting that "Congress's primary motivation in enacting the legislation seems to have been a desire to remedy the lack of adequate criminal-law enforcement on some reservations. . . . In short, Public Law 280 was designed not to supplant tribal institutions, but to supplement them.").

Adams counters that a Washington State Office of the Attorney General opinion is dispositive of the jurisdiction issue. In a 1963 opinion and response to a local prosecuting attorney's question regarding the exclusivity of state jurisdiction, then-Attorney General John O'Connell opined that, "to the extent that the state of Washington has assumed criminal and civil jurisdiction pursuant to § 1, chapter 36, Laws of 1963, [which amended RCW section 37.12.010,] that jurisdiction is exclusive." 1963 Wash.

Att'y Gen. Op. No. 68 (Nov. 8, 1963) (the "1963 Attorney General's Opinion").

But the 1963 Attorney General's Opinion is not controlling authority. *See Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993) ("Although [o]pinions of the [state] Attorney General are . . . generally regarded as highly persuasive, we are not bound by them." (alterations in original) (internal quotation marks and citation omitted)); *Skagit Cnty. Pub. Hosp. Dist. No. 304 v. Skagit Cnty. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 305 P.3d 1079, 1082 (Wash. 2013). As the 1963 Attorney General's Opinion itself acknowledged, "a legal determination of the exact nature and extent of [jurisdiction] presently possessed by an Indian tribe within the state of Washington in view of the 1963 legislation for purposes of internal self-government is a federal question which cannot be resolved by the attorney general of the state of Washington." Op. No. 68. Adams cites no authority—let alone persuasive or controlling authority—adopting the 1963 Attorney General's Opinion in the nearly 60 years since it was issued.

Thus, Adams cannot show that the Nooksack Tribal Court "plainly" lacks jurisdiction. *See Boozer*, 381 F.3d at 935.[1]

AFFIRMED.[2]

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1. Because Adams is not excused from exhausting her tribal court remedies—and thus fails to satisfy a prerequisite to our exercise of jurisdiction—we need not decide whether Dodge and Majumdar are the proper respondents or are otherwise entitled to judicial immunity. *See Grand Canyon Skywalk Dev.*, 715 F.3d at 1200.

2. We DENY Dodge and Majumdar's motion to take judicial notice (ECF No. 11).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, DATED JUNE 3, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C19-1263-JCC

ELILE ADAMS,

Petitioner,

v.

BILL ELFO, *et al.*,

Respondents.

June 3, 2021, Decided;
June 3, 2021, Filed

THE HONORABLE JOHN C. COUGHENOUR

ORDER

This matter comes before the Court on Petitioner Elile Adams' objections (Dkt. No. 70) to the third Report and Recommendation (R&R) of the Honorable Michelle Peterson, United States Magistrate Judge (Dkt. No. 69). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby OVERRULES Petitioner's objections and ADOPTS the R&R for the reasons explained herein.

Appendix B

The Court described the facts of this case in prior orders, (*see* Dkt. Nos. 43, 54), and will not repeat them here, except as relevant to the instant R&R and related objections. Following Petitioner's motion for reconsideration (Dkt. No. 56), the Court referred the matter to Judge Peterson to consider the following issue: "whether the fact that Public Law 280 predates federal recognition of the Nooksack Tribe impacts [Judge Peterson's] determination that the Nooksack Tribal Court did not plainly lack jurisdiction over the Suchanon allotment at the time of [Petitioner's] arrest." (Dkt. No. 62 at 2.) Following supplemental briefing, Judge Peterson issued a third R&R (Dkt. No. 69). In it she concluded that, even if Public Law 280 predated federal recognition of the Nooksack Tribe, the Tribal Court did not plainly lack jurisdiction over the Suchanon allotment at the time of Petitioner's arrest. (*See id.* at 10-11.) Petitioner again objects to Judge Peterson's recommendation. (Dkt. No. 70.)

A district court reviews *de novo* those portions of a report and recommendation to which a party objects. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Objections are required to enable the district court to "focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). General objections, or summaries of arguments previously presented, have the same effect as no objection at all, since the Court's attention is not focused on any specific issues for review. *See United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

Appendix B

Petitioner lodged a number of general objections to Judge Peterson's third R&R, which the Court need not address. *See Ali v. Grounds*, 236 F. Supp. 3d 1241, 1249 (S.D. Cal. 2017) (citing *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984)). At issue is Petitioner's specific objection that Judge Peterson erred in failing to consider that Congress's 1970 amendment to Public Law 280 granted state governments "exclusive jurisdiction" over Indian crimes on enumerated Indian lands. (Dkt. No. 70 at 4 (citing 18 U.S.C. § 1162(c).) Petitioner is correct that Washington does have jurisdiction over the Suchanon allotment. *See State v. Cooper*, 130 Wn. 2d 770, 928 P.2d 406 (Wash. 1996). But the notion that this jurisdiction is exclusive of the Nooksack Tribal Court's is not supported by the legislative history of Public Law 280 or courts' interpretations of the statute.

The legislative history of Public Law 280 indicates that its purpose was a jurisdictional transfer between the state and federal government, not between the state and tribal governments, and it was done to supplement tribal authority, not divest it. *See, e.g.*, S.Rep. No. 699, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409, 2412 ("[T]here has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.") As the Assistant Secretary of the Interior stated to Congress in 1970, "[the] new language . . . [was] not intended . . . to have any bearing on actual or potential arrangements between States and the tribes which [sic] respect to the allocation of law enforcement responsibility between

them . . . [and] *no effect on whatever inherent jurisdiction particular tribes may have retained in states* which were given or have assumed jurisdiction pursuant to . . . [Public Law 280] as amended." 116 H. Cong. Rec. 37,354 (1970) (emphasis added).

Similarly, the Supreme Court has consistently emphasized that Public Law 280 is not a divesture statute. *See Bryan v. Itasca County*, 426 U.S. 373, 383-390, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). In addition, the Ninth and Eigth Circuits have held that Public Law 280 establishes *concurrent* jurisdiction between tribes and states. *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548 (9th Cir. 1991) ("Public Law 280 was designed not to supplant tribal institutions but to supplement them."); *Walker v. Rushing* 898 F.2d 672, 675 (8th Cir. 1990) ("Public Law 280 did not divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."). This view has also been professed by the Washington State Supreme Court, which indicated that "both the state and tribe may have jurisdiction in any given criminal case, and prosecution by one does not bar the other from also charging an offender with a crime arising out of the same conduct." *State v. Shale*, 182 Wn. 2d 882, 345 P.3d 776 (Wash. 2015) (*citing State v. Moses*, 145 Wn. 2d 370, 37 P.3d 1216 (Wash. 2002)).

Accordingly, Judge Peterson did not err in concluding that the Nooksack Tribal Court did not plainly lack

jurisdiction over the Suchanon allotment, irrespective of whether federal tribal recognition predated Public Law 280. This is because Public Law 280 has no impact on the Tribe's authority over the allotment, regardless of the "exclusive" language presently contained in the statute.

For the foregoing reasons, Petitioner's objections to the R&R (Dkt. No. 70) are OVERRULED. The Court ADOPTS the Judge Peterson's third R&R (Dkt. No. 69) and DENIES Petitioner's motion for reconsideration (Dkt. No. 56).

DATED this 3rd day of June 2021.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED APRIL 13, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C19-1263 JCC-MLP

ELILE ADAMS,

Petitioner,

v.

BILL ELFO, *et al.*,

Respondents.

April 12, 2021, Decided;
April 13, 2021, Filed

REPORT AND RECOMMENDATION

I. INTRODUCTION

This matter is before the Court on remand from the Honorable John C. Coughenour for consideration of whether the fact that Public Law 280 ("P.L. 280") predates federal recognition of the Nooksack Tribe impacts the Court's determination that the Nooksack Tribal Court did

not plainly lack jurisdiction over the Suchanon allotment at the time of Petitioner's arrest. (Order (Dkt. # 62).) Having considered the parties' submissions, the balance of the record, and the governing law, the Court recommends Petitioner's habeas petition be DISMISSED.

I. BACKGROUND

A. Procedural Background

Petitioner Elile Adams filed a petition for writ of habeas corpus pursuant to the federal Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, seeking relief from a Nooksack Tribal Court warrant. (Second Am. Pet. (Dkt. # 21).) Petitioner names Respondents Deanna Francis, Betty Leather, Nooksack Indian Tribe, and Nooksack Tribal Court ("Nooksack Tribe Respondents"), and Nooksack Tribal Judges Raymond Dodge and Pro Tem Judge Rajeev Majumdar ("Judge Respondents") in her petition. (*Id.*) Respondents moved to dismiss the petition, arguing that Petitioner failed to exhaust tribal court remedies and named improper respondents, that the Nooksack Tribe Respondents are entitled to sovereign immunity, and that the Judge Respondents are improper respondents and entitled to judicial immunity. (*See* Dkt. ## 25, 28.)

The Undersigned issued a Report and Recommendation recommending dismissal of Petitioner's habeas petition because she did not exhaust her tribal court remedies. (Dkt. # 35.) Petitioner submitted a motion for reconsideration, construed by the Court as objections to

the Report and Recommendation, arguing, *inter alia*, that exhaustion would be futile because Respondents lacked jurisdiction over the Suchanon allotment where she was arrested, and that Respondents acted in bad faith. (Dkt. # 36.) Petitioner also submitted new evidence with her objections that the Court considered. (Dkt. # 43 at 3.) The Court overruled Petitioner's objections regarding bad faith and remanded the matter to determine whether the Nooksack Tribal Court lacked jurisdiction over Petitioner at the time of her arrest on allotted land outside of the reservation and to consider Respondents' alternative grounds for dismissal. (*Id.* at 4-5.)

The Undersigned issued a second Report and Recommendation. (Dkt. # 45.) The Undersigned found that while it is clear from the case law that the State has jurisdiction over the disputed off-reservation allotted lands, the Undersigned could not conclude that it is clear there i no concurrent tribal jurisdiction. (*Id.*) The Undersigned thus found that tribal jurisdiction was not plainly lacking and that Petitioner had failed to exhaust her tribal court remedies, and therefore recommended dismissal. (*Id.*) The Undersigned further recommended dismissal based on Respondents' various alternative grounds for dismissal. (*Id.*)

Petitioner filed objections to the Report and Recommendation and a supplement to her objections. (Dkt. # 46, 48.) Petitioner argued the Report and Recommendation erred, *inter alia*, in finding the Nooksack Tribal Court did not plainly lack jurisdiction over Petitioner. (Dkt. # 46.) The Court found authority

regarding tribal jurisdiction is mixed, and that because P.L. 280 is not a divestiture statute, "reason dictates that a tribe's jurisdictional rights to trust lands before Public Law 280 would, indeed, survive Public Law 280." (Dkt. # 54 at 3-4.) The Court therefore adopted the Report and Recommendation and dismissed Petitioner's habeas petition.[1] (*Id.*)

Petitioner filed a motion for reconsideration, arguing the Court committed manifest error by concluding that the Nooksack Tribe's jurisdictional rights to allotted lands before P.L. 280 would survive P.L. 280 and that the Court overlooked Petitioner's objection that the bad faith exception to exhaustion applied. (Dkt. # 56.) The Court ordered the Nooksack Tribe Respondents to respond to Petitioner's motion for reconsideration. (Dkt. # 59.) The Nooksack Tribe responded, arguing Petitioner had not demonstrated bad faith. (Dkt. # 60.) They did not address Petitioner's jurisdictional claims. (*Id.*)

The Court granted in part and denied in part Petitioner's motion for reconsideration, and remanded the

1. In adopting the Undersigned's second Report and Recommendation, the Court found the issue of jurisdiction was far from plain and therefore concluded Petitioner was not excused from exhausting her tribal court remedies. (Dkt. # 54.) The Court's order does not directly address the Report and Recommendation's findings regarding Respondents' alternative grounds for dismissal. For the reasons previously discussed (Dkt. # 45 at 12-17), the Undersigned recommends Respondents Nooksack Indian Tribe, Nooksack Tribal Court, Leathers, Francis, and Judge Dodge be alternatively dismissed as improperly named respondents and that Respondent Pro Tem Judge Majumdar be dismissed due to judicial immunity.

case to the Undersigned to address the limited question of whether "the fact that Public Law 280 predates federal recognition of the Nooksack Tribe impacts its determination that the Nooksack Tribal Court did not plainly lack jurisdiction over the Suchanon allotment at the time of Ms. Adams' arrest." (Dkt. # 62 at 2.)

On remand, the Undersigned issued an order directing the parties to submit briefing regarding the jurisdictional issue, and whether it should be certified to the Washington State Supreme Court. (Dkt. # 64.) The parties timely submitted their briefing, and all parties argued the question should not be certified to the Washington State Supreme Court. (Dkt. ## 65 (Nooksack Resp.), 66 (Judge Resp.), 67 (Pet.'s Resp).)

B. Factual Background

The full set of facts regarding this matter are set forth in the previous Reports and Recommendations. (Dkt. ## 35, 45.) Below is a summary of the facts relevant to the limited question now before the Court.

After conducting an investigation, Nooksack Tribal law enforcement cited Petitioner with ten counts of interference with child custody for failing to comply with a Nooksack Tribal Court Parenting Plan. (Nooksack Tribe Return (Dkt. # 25), Ex. A at 57 (Tribal Police Report), 62 (Police Citation).) As a result, the Nooksack Tribal Court charged Petitioner with four counts of custody interference and one count of contempt of court. (*Id.*, Ex. A at 59-61 (Criminal Complaint).) On July 11, 2019, Petitioner

failed to appear at a scheduled hearing. (*Id.*, Ex. A at 41 (Minute Order).) After failing to execute a promise to appear for the next hearing, the Nooksack Tribal Court issued a warrant for her arrest. (*Id.*, Ex. A at 25-26 (Notice of Return on Arrest Warrant), 41 (Minute Order).)

On July 30, 2019, Nooksack Tribal Police arrested Petitioner at her residence pursuant to the warrant and booked her into the Whatcom County Jail. (Nooksack Tribe Return, Ex. A at 29-31 (Police Report); Whatcom County Deputy Sheriff Wendy Jones Decl. (Dkt. # 14) at ¶ 2.) Authorities released Petitioner after she posted bail of $500.00. (Nooksack Tribe Return, Ex. A. at 23 (Whatcom County Jail Bail Receipt).) The Whatcom County Jail subsequently transferred Petitioner's bail to the Nooksack Tribal Court. (*Id.*, Ex. A at 22 (Whatcom County check to Nooksack Tribal Court).) It appears Petitioner has remained out of custody since her release. (Whatcom County Deputy Sheriff Wendy Jones Decl. at ¶ 7.)

II. DISCUSSION

A. Habeas Corpus Legal Standards

Habeas corpus provides the exclusive remedy for tribal members by which enforcement of the ICRA can be obtained in federal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention

by order of an Indian tribe."). Individuals generally are required to exhaust their claims with the appropriate tribal court before turning to federal court. *See, e.g., Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Considerations of comity, along with the desire to avoid procedural nightmares, have prompted the Supreme Court to insist that "the federal court stay[ ] its hand until after the Tribal Court has had a full opportunity ... to rectify any errors it may have made." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). Exhaustion is not "required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* at 857 n.21.

B. Public Law 280

As noted above, this matter is before the Undersigned on the question of whether the Nooksack Indian Tribe plainly lacked criminal jurisdiction over off-reservation allotted lands. The Undersigned has already addressed Petitioner's previously asserted jurisdictional arguments. Specifically, the Undersigned found that while the case law cited by Petitioner found the State has criminal jurisdiction over off-reservation allotted lands, the cases do not address whether the State has exclusive jurisdiction over those lands or whether tribes have concurrent jurisdiction. (Dkt. # 45 at 8-10 (addressing *State v. Cooper*, 130 Wash.2d 770, 928 P.2d 406 (1996),

State v. Clark, 178 Wash.2d 19, 308 P.3d 590 (2013), and *State v. Comenout*, 173 Wash.2d 235, 267 P.3d 355 (2011)).) The Undersigned also found Petitioner's reliance on AGO 63-64 No. 68, an Attorney General opinion that opined the State has exclusive jurisdiction over allotted lands, is unpersuasive as courts are not bound by Attorney General opinions. (Dkt. # 45. at 10-11.) The narrow question before the Undersigned is whether the Nooksack Indian Tribe plainly lacked jurisdiction over the Suchanon allotment because P.L. 280 pre-existed the recognition of the Tribe.

The Undersigned previously outlined a brief history of P.L. 280 and provides the same overview in this Report and Recommendation. In 1953, Congress enacted P.L. 280 to permit states to assume jurisdiction over Indian Country.[2] 4 Pub.L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360) (1953). P.L. 280 gave Washington consent to assume this jurisdiction by statute and/or amendment of its state constitution. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471-74, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979); *In re Estate of Cross*, 126 Wash.2d 43, 47, 891 P.2d 26 (1995).

2. 18 U.S.C. § 1151 defines Indian Country for purposes of federal jurisdiction: "'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (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."

Appendix C

In 1963, Washington amended RCW 37.12 to assert civil and criminal jurisdiction over Indian Country, with exceptions. RCW 37.12.010 provides:

> The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with [Public Law 280], 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, unless the provisions of RCW 37.12.021 have been invoked except for the following:
>
> (1) Compulsory school attendance;
>
> (2) Public assistance;
>
> (3) Domestic relations;
>
> (4) Mental illness;
>
> (5) Juvenile delinquency;
>
> (6) Adoption proceedings;
>
> (7) Dependent children; and

> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

In 1973, the United States recognized the Nooksack Indian Tribe. *Cooper*, 130 Wash.2d at 775 n.5.

Petitioner continues to assert the State, not the Nooksack Indian Tribe, has criminal jurisdiction over off-reservation allotted lands, and therefore the Nooksack Indian Tribe lacked jurisdiction to arrest Petitioner. Petitioner asserts P.L. 280 was meant to confer State jurisdiction over criminal offenses committed in Indian Country, and that in 1963, the State assumed full and complete nonconsensual criminal jurisdiction over Indian Country outside of reservations. (Dkt. # 56; Pet.'s Resp. at 1-2 (citing *Cooper; Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979)).) Petitioner argues this constitutes exclusive State criminal jurisdiction over allotted lands, including the Suchanon allotment. (*Id.*) Petitioner further argues that because the Nooksack Indian Tribe lacked jurisdiction to divest in 1963, prior to the Tribe's recognition, the State continued to exercise exclusive jurisdiction over allotted lands when the United States recognized the Nooksack Indian Tribe in 1973. (*Id.*

at 2-3.) In support of her argument, Petitioner asserts P.L. 280 does not include an exemption for the Suchanon allotment, as Congress has done in other instances. (*Id.* at 3.) Petitioner directs the Court to Congress' 1970 amendment of P.L. 280, P.L. 91-523, that excepted the Metlakatla Indian Community from the State of Alaska's exclusive criminal jurisdiction. (*Id.*) Petitioner argues that because no exemption has been made for the Suchanon allotment, pre-recognition of exclusive State jurisdiction must be assumed. (*Id.*)

Both the Nooksack Tribe Respondents and Judge Respondents argue P.L. 280 is not a divestiture statute, and therefore did not divest the Nooksack Indian Tribe of concurrent criminal jurisdiction. (Judge Resp. at 2-5; Nooksack Resp. at 2-3.) The Nooksack Tribe Respondents argue that regardless of when a tribe is federally recognized, P.L. 280's purpose is to strengthen law enforcement in Indian Country, and that because it does not address tribal jurisdiction, it does not affect tribal jurisdiction. (Nooksack Resp. at 2-3.) In support of their argument, they cite *State v. Schmuck*, 121 Wash.2d 373, 850 P.2d 1332 (1993). (*Id.* at 3-4.) In *Schmuck*, the court found RCW 37.12.010, enacted pursuant to P.L. 280, did not divest the Suquamish Indian Tribe of its inherent authority to stop and detain a non-Indian on a public road in the tribe's reservation. 121 Wash.2d at 396. The Nooksack Tribe Respondents assert that because P.L. 280 does not divest tribal jurisdiction over non-Indians, it does not divest tribal jurisdiction over tribal members such as Petitioner who was a Nooksack Indian Tribe member at the time of her arrest. (Nooksack Resp. at 4-5.) The

Nooksack Tribe Respondents argue that because *Cooper*, decided after *Schmuck*, did not hold that the State had exclusive jurisdiction over off-reservation tribal land, the case law is clear that both the State and tribes have jurisdiction on off-reservation lands unless it has been retroceded. (*Id.* at 5.)

Judge Respondents assert concurrent tribal jurisdiction over off-reservation allotted lands exists because Congress did not include any language in P.L. 280 that the State has exclusive jurisdiction. (Judge Resp. at 2-3.) They assert that when P.L. 280 passed, its language sought to "remove any legal impediment to the assumption of civil and criminal jurisdiction" and said nothing regarding precluding tribal jurisdiction. (*Id.* at 2-5.) Judge Respondents also note that in 1957, the State enacted law allowing it to assume jurisdiction over Indian Country but only with a tribe's authorization. (*Id.* at 3 (citing *Arquette v. Schneckloth*, 56 Wash.2d 178, 351 P.2d 921 (1960); RCW 37.12).) They assert this law demonstrates legislative intent for tribes to retain jurisdiction over Indian Country unless they authorize State jurisdiction. (*Id.*) They further assert that when the State amended RCW 37.12.010 in 1963, the State had the opportunity to include language regarding exclusive State jurisdiction or lack of concurrent tribal jurisdiction but did not include any such language, further indicating a lack of intent to divest tribes of their jurisdiction. (*Id.* at 3-4.) Judge Respondents similarly assert that a subsequent 1968 amendment to P.L. 280 allowed State jurisdiction in Indian Country only when tribes have consented to State jurisdiction, and that the amendment omitted any

language regarding exclusive State jurisdiction. (*Id.* at 4-5.) Lastly, Judge Respondents argue courts have previously held that P.L. 280 does not divest tribal courts of jurisdiction, citing *Schmuck*. (*Id.* at 5-6.)

Here, the question before the Court is whether the Nooksack Tribal Court plainly lacked jurisdiction over the Suchanon allotment at the time of Petitioner's arrest. As discussed above, Petitioner directs the Court to authority establishing that the State has jurisdiction on off-reservation allotted lands, however, the authority does not address whether that jurisdiction is exclusive or if tribes have concurrent jurisdiction. Further, the Court is not bound by AGO 63-64 No. 68. *Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1*, 177 Wash.2d 718, 725, 305 P.3d 1079 (2013); *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993). Neither Petitioner nor Respondents have cited authority directly on point regarding tribal jurisdiction on the off-reservation allotted lands, and the Undersigned is aware of none.

For purposes of determining whether exhaustion is required in the instant habeas matter, the Undersigned again finds that the Nooksack Indian Tribe did not plainly lack jurisdiction over the allotted lands. Nothing in the language of P.L. 280, RCW 37.12, or any relevant amendments appears to have divested the Nooksack Indian Tribe of concurrent jurisdiction. Had Congress or the State intended to divest jurisdiction of tribes federally recognized after the enactment of P.L. 280, they could have included language reflecting that intent, but did not.

While some authority cited by Petitioner may suggest the State has exclusive jurisdiction, the Undersigned cannot find that tribal jurisdiction was plainly lacking as to make exhaustion unnecessary for habeas purposes. That 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. As previously stated, Petitioner requests the federal court insert itself into the Nooksack Tribal Court's criminal system and find it lacks jurisdiction over off-reservation allotted lands. (Dkt. # 45 at 11.) The Undersigned finds that in the interest of comity, this matter should be dismissed, and the tribal court be allowed to consider the question of tribal jurisdiction and rectify any errors it may have made before the federal court takes action.

For the reasons discussed in previous Reports and Recommendations, and the reasons discussed above, the Court recommends dismissing Petitioner's petition without prejudice for failure to exhaust her tribal court remedies.

III. CONCLUSION

The Court recommends Petitioner's habeas petition and this action be DISMISSED without prejudice. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **twenty-one (21) days** of the

date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **May 7, 2021**.

The Clerk is directed to send copies of this Report and Recommendation to the parties and to the Honorable John C. Coughenour.

Dated this 12th day of April, 2021.

/s/ Michelle L. Peterson
MICHELLE L. PETERSON
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED NOVEMBER 4, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C19-1263-JCC

ELILE ADAMS,

Petitioner,

v.

BILL ELFO, *et al.*,

Respondents.

THE HONORABLE JOHN C. COUGHENOUR

ORDER

This matter comes before the Court on Petitioner Elile Adams' motion for reconsideration of the Court's order dismissing Ms. Adams' objections to United States Magistrate Judge Michelle L. Peterson's second Report and Recommendation ("R&R") regarding Ms. Adams' second amended petition for a writ of habeas corpus (Dkt. Nos. 21, 45, 46, 54, 56). The facts of this case have been described by the Court previously and will not be repeated here. (*See* Dkt Nos. 35, 43, 45 54.)

Appendix D

In her motion for reconsideration, Petitioner argues the Court committed manifest error when it overlooked Petitioner's objection to the Report and Recommendation regarding application of the bad faith exception to the tribal exhaustion doctrine and when the Court concluded that the Nooksack Tribe's "jurisdictional rights to trust lands before Public Law 280 would, indeed, survive Public Law 280." (Dkt. No. 56 at 1.) Finding good cause, the Court ordered Respondents Deanna Francis, Betty Leathers, the Nooksack Indian Tribe, and the Nooksack Tribal Court to respond to Ms. Adams' objections. (Dkt. No 59.)

As it relates to the bad faith exception, the Court did not overlook Petitioner's objection. The Court previously overruled Ms. Adams' objections to Judge Peterson's recommendation regarding Ms. Adams' application of the bad faith exception. (*See* Dkt Nos. 43 at 4–5; 45 at 5.) Ms. Adams did not seek timely reconsideration of that order from the Court. *See* W.D. Wash. Local Civ. R. 7(h) (a "motion [for reconsideration] shall be filed within fourteen days after the order to which it relates is filed"). Therefore, no further consideration of that objection is warranted.

However, the Court does find that additional consideration of Ms. Adams' argument that her failure to exhaust was excused based on futility—namely that the Nooksack Tribal Court plainly lacked jurisdiction over her because she was arrested on off-reservation allotted lands—is warranted. (*See* Dkt. No. 54 at 3–4 (the Court's finding that the Nooksack Tribal Court *did not* plainly lack jurisdiction over the allotted lands based on conflicting and unclear authority applying Public Law 280's divestiture

provision to such lands); Dkt. No. 45 at 5–11 (similar finding by Judge Peterson).) Ms. Adams alleges that Public Law 280 predates the United States' recognition of the Nooksack Tribe. (Dkt. No. 56 at 1–2.) Therefore, the import of Public Law 280 and related authority in considering the Nooksack Tribal Court's jurisdiction over the off-reservation Suchanon allotment where Ms. Adams was arrested requires further consideration.

For the foregoing reasons, Ms. Adams' motion for reconsideration (Dkt. No. 56) is GRANTED in part and DENIED in part. The Court REMANDS the R&R in accordance with Federal Rule of Civil Procedure 72(b)(3). On remand, the magistrate judge must consider whether the fact that Public Law 280 predates federal recognition of the Nooksack Tribe impacts its determination that the Nooksack Tribal Court did not plainly lack jurisdiction over the Suchanon allotment at the time of Ms. Adams' arrest.

DATED this 4th day of November 2020.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, DATED SEPTEMBER 23, 2020

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C19-1263-JCC

ELILE ADAMS,

Petitioner,

v.

RAYMOND DODGE, *et al.*,

Respondents.

September 23, 2020, Decided;
September 23, 2020, Filed

THE HONORABLE JOHN C. COUGHENOUR

ORDER

This matter comes before the Court on Petitioner's objections (Dkt. No. 46) to the second report and recommendation ("R&R") of the Honorable Michelle L. Peterson, United States Magistrate Judge (Dkt. No. 45). Having thoroughly considered the parties' briefing and the relevant record, the Court hereby ADOPTS the second R&R and DISMISSES the matter without prejudice for the reasons explained herein.

Appendix E

Following the Nooksack Tribal Court's issuance of a warrant for her arrest, Petitioner filed a series of petitions with this Court for a writ of habeas corpus, seeking relief from the Tribal Court's warrant, pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. (Dkt. Nos. 2, 6, 21.) On November 22, 2019, Respondents moved to dismiss the latest petition—a second amended petition—pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (*See* Dkt. Nos. 25, 28.) Judge Peterson issued the first R&R, recommending that this Court grant Respondents' motion. (Dkt. No. 35). The Court adopted in part and rejected in part the first R&R, remanding to Judge Peterson to consider: (1) whether the Nooksack Tribal Court lacked jurisdiction over Petitioner at the time of her arrest, thereby excusing Petitioner's failure to exhaust her remedies with the Nooksack Tribal Court and (2) the adequacy of the alternate grounds articulated by Respondents for dismissal—primarily sovereign and judicial immunity. (Dkt. No. 43 at 3-5.) Judge Peterson issued a second R&R finding that the Nooksack Tribal Court did not *plainly* lack jurisdiction over Petitioner at the time of her arrest—the relevant standard for purposes of a habeas petition—and that, regardless, judicial immunity would apply here. (*See generally* Dkt. No. 45.) Judge Peterson's R&Rs contain the detailed facts underlying this matter; the Court will not repeat them here. (*See* Dkt. Nos. 35 at 2-5; 45 at 1-4.)

Petitioner lodges the following objections to Judge Peterson's second R&R: (1) Judge Peterson erred in finding that the Nooksack Tribal Court did not plainly lack jurisdiction over Petitioner and (2) Judge Peterson

misapprehended the judicial immunity doctrine. (*See generally* Dkt. No. 46.) A district court reviews *de novo* those portions of an R&R to which a party objects. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Objections are required to enable the district court to "focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

Tribal members must exhaust their tribal court remedies prior to seeking federal habeas relief. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 848, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985); *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). The Court previously adopted Judge Peterson's finding that Petitioner has not met this requirement. (*See* Dkt. No. 43 at 2-3.) At issue, though, is whether Petitioner's failure to do so is excused by the Nooksack Tribal Court's lack of jurisdiction in this matter. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 n.21, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985) (exhaustion is not required if it would be futile "because of the lack of an opportunity to challenge the court's jurisdiction"); *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (a petitioner need not exhaust remedies with the tribal court if it is "plain that the tribal court lacks jurisdiction" thereby making exhaustion "futile").

In her second R&R, Judge Peterson concluded that the Nooksack Tribal Court does not *plainly* lack jurisdiction on Nooksack trust land outside of the Nooksack reservation—the location of Petitioner's arrest. (*Id.* at

5-11.) Petitioner argues that this was error: Washington law applies and, under Washington law, the state has *exclusive* criminal jurisdiction on Nooksack trust land outside of the reservation. (Dkt. 46 at 3-6.)

Even if Washington law controls, this Court finds that authority on the jurisdiction issue is mixed. Petitioner primarily relies on a 1963 opinion from the Washington Attorney General, AGO 63-64 No. 68, and a 1996 Washington Supreme Court opinion, *State v. Cooper*, 130 Wn. 2d 770, 928 P.2d 406 (Wash. 1996). (Dkt. No. 46 at 4-5.) While courts often defer to Attorney General opinions, such opinions are not controlling. *See Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No.1*, 177 Wn. 2d 718, 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). As for *Cooper*, the question before the court was not whether the *tribe's* jurisdiction extended to off-reservation trust lands, but whether the *state's* did. *See* 928 P.2d at 408. While the court found that the state's jurisdiction did extend to off reservation trust lands, it never said that such jurisdiction would be *exclusive. See generally id.* Petitioner also points to *State v. Clark*, 178 Wn. 2d 19, 308 P.3d 590, 596 (Wash. 2013). (Dkt. No. 46 at 6.) That decision does contain language suggesting that Washington's jurisdiction off reservation is exclusive, but like *Cooper*, this was not the issue before the *Clark* court. *See generally Clark*, 308 P.3d at 595-96. And more importantly, this Court cannot square such an assertion with the later statement in the *Clark* opinion that Public Law 280 "did not divest tribes of this sovereignty when delegating federal jurisdiction to the states." *Id.*; *see also*

State v. Schmuck, 121 Wn. 2d 373, 850 P.2d 1332 (Wash. 1993) (similar finding). Public Law 280 is the vehicle that provided Washington its jurisdiction over tribal lands. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471-74, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979). If it is not a divestiture statute, reason dictates that a tribe's jurisdictional rights to trust lands before Public Law 280 would, indeed, survive Public Law 280.

Given this seemingly unclear and conflicting authority, the Court is left with no choice but to conclude that the issue of jurisdiction is far from *plain*, even under Washington law. Judge Peterson did not err in concluding that the Nooksack Tribal Court did not plainly lack jurisdiction in this matter.

Petitioner's first objection (Dkt. No. 46 at 3) to Judge Peterson's R&R (Dkt. No. 45) is OVERRULED. Petitioner is not excused from exhausting her remedies with the Nooksack Tribal Court before bringing her action to this Court. The Court need not reach Petitioner's second objection, as Petitioner's failure to exhaust is fatal to her petition.

The Court DECLINES Petitioner's request to stay the matter while Petitioner continues to seek relief before the Nooksack Tribal Court. (*See* Dkt. No. 46 at 6-7.)

For the foregoing reasons, Judge Peterson's second R&R (Dkt. No. 45) is ADOPTED. Petitioner's second amended petition (Dkt. No. 21) is dismissed without prejudice.

Appendix E

DATED this 23rd day of September 2020.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX F — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED JULY 13, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C19-1263-JCC-MLP

ELILE ADAMS,

Petitioner,

v.

BILL ELFO, *et al.*,

Respondents.

July 13, 2020, Decided
July 13, 2020, Filed

REPORT AND RECOMMENDATION

I. INTRODUCTION

This matter is before the Court on the Honorable John C. Coughenor's Order remanding this matter to the Undersigned for further consideration of whether Petitioner has raised a claim that the Nooksack Tribal Court plainly lacked jurisdiction over her arrest and to

address Respondents' alternative grounds for dismissal. (Order (Dkt. # 43).) Having considered the parties' submissions, the balance of the record, and the governing law, the Court recommends Petitioner's habeas petition be DISMISSED for failure to exhaust tribal court remedies.

II. PROCEDURAL BACKGROUND

Petitioner Elile Adams filed a second amended petition for writ of habeas corpus pursuant to the federal Indian Civil Right Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, seeking relief from a Nooksack Tribal Court warrant. (Second Am. Pet. (Dkt. # 21).) Respondents Deanna Francis, Betty Leather, Nooksack Indian Tribe, and Nooksack Tribal Court filed a return and a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing Petitioner failed to exhaust tribal court remedies, named improper respondents, and that the Nooksack Tribal Respondents are entitled to tribal sovereign immunity. (Nooksack Tribe Return (Dkt. # 25).) Respondents Judge Raymond Dodge and Pro Tem Judge Rajeev Majumdar filed a return, arguing they are improperly named respondents and are entitled to judicial immunity. (Dodge and Majumdar Return (Dkt. # 28).) Petitioner filed a response and Respondents filed replies. (Pet.'s Resp. (Dkt. # 29); Nooksack Tribe Reply (Dkt. # 33); Dodge and Majumdar Reply (Dkt. # 34).)

The Undersigned submitted a Report and Recommendation recommending Petitioner's second amended petition be dismissed for failure to exhaust tribal court remedies. (Report and Recommendation

(Dkt. # 35).) Petitioner filed objections to the Report and Recommendation, primarily rearguing the claims in her petition.[1] (Obj. (Dkt. # 36).) Petitioner also submitted further evidence in support of her arguments. (Second Galanda Decl. (Dkt. # 37), Exs. 1-10.) Respondents Francis, Leathers, Nooksack Indian Tribe, and Nooksack Tribal Court submitted a response (dkt. # 38), Respondents Judge Dodge and Pro Tem Judge Majumdar filed a response (dkt. # 39), and Petitioner submitted a reply (dkt. # 40).

Judge Coughenour issued an Order adopting the Report and Recommendation in part and rejecting it in part. (Order.) The Order found Petitioner may have given rise to a plausible claim that the Nooksack Tribal Court lacked jurisdiction over her based on her assertion that she was arrested on allotted land outside the Nooksack Tribal reservation.[2] (*Id.* at 4.) Judge Coughenour's Order noted the legal authority and evidence submitted with Petitioner's objections. (*Id.* at 4.) Judge Coughenour remanded this matter for further consideration of whether the Nooksack Tribal Court lacked jurisdiction over

1. Petitioner fashioned her pleading as a "Motion for Reconsideration or, Alternatively, Objections to Magistrate's Report and Recommendation." Judge Coughenour construed Petitioner's pleading as objections.

2. The original Report and Recommendation misstated the standard for the jurisdictional exception to exhaustion, stating Petitioner's assertions that jurisdiction is lacking were insufficient to show there is no plausible claim of an absence of jurisdiction. The correct standard is whether the tribal court plainly lacks jurisdiction, as discussed below.

Petitioner at the time of her arrest and for consideration of Respondents' alternative grounds for dismissal.

III. FACTUAL BACKGROUND

The full set of facts regarding this matter are set forth in the Report and Recommendation and will not be repeated herein. Relevant to the question of jurisdiction are the facts regarding Petitioner's arrest, summarized below.

After conducting an investigation, Nooksack Tribal law enforcement cited Petitioner with ten counts of interference with child custody for failing to comply with a Nooksack Tribal Court Parenting Plan. (Nooksack Tribal Return, Ex. A at 57 (Tribal Police Report), 62 (Police Citation).) As a result, the Nooksack Tribal Court charged Petitioner with four counts of custody interference and one count of contempt of court ("Nooksack Criminal Action"). (*Id.*, Ex. A at 59-61 (Criminal Complaint).) On July 11, 2019, Petitioner failed to appear at a scheduled hearing in the Nooksack Criminal Action. (*Id.*, Ex. A at 41 (Minute Order).) After failing to execute a promise to appear for the next hearing, the Nooksack Tribal Court issued a warrant for her arrest. (*Id.*, Ex. A at 25-26 (Notice of Return on Arrest Warrant), 41 (Minute Order).)

On July 30, 2019, Nooksack Tribal Police arrested Petitioner at her residence pursuant to the warrant and booked her into the Whatcom County Jail. (Nooksack Tribe Return, Ex A at 29-31 (Police Report); Whatcom County Deputy Sheriff Wendy Jones Decl. (Dkt. # 14) at ¶

2.) Authorities released Petitioner after she posted bail of $500.00. (Nooksack Tribe Return, Ex A. at 23 (Whatcom County Jail Bail Receipt).) The Whatcom County Jail subsequently transferred Petitioner's bail to the Nooksack Tribal Court. (*Id.*, Ex. A at 22 (Whatcom County check to Nooksack Tribal Court).) It appears Petitioner has remained out of custody since her release. (Whatcom County Deputy Sheriff Wendy Jones Decl. at ¶ 7.)

IV. DISCUSSION

A. Legal Standards

Habeas corpus provides the exclusive remedy for tribal members by which enforcement of the ICRA can be obtained in federal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978); 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."). Individuals generally are required to exhaust their claims with the appropriate tribal court before turning to federal court. *See, e.g.*, *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Considerations of comity, along with the desire to avoid procedural nightmares, have prompted the Supreme Court to insist that "the federal court stay[ ] its hand until after the Tribal Court has had a full opportunity ... to rectify any errors it may have made." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). Exhaustion is not "required where an assertion of tribal jurisdiction

is motivated by a desire to harass or is conducted in bad faith, ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* at 857 n.21.

B. Nooksack Tribal Court's Jurisdiction

Petitioner initially asserted that all three exceptions to exhaustion applied in this action and therefore she was not required to exhaust her tribal court remedies. (Pet.'s Resp. at 14-17.) Judge Coughenour's Order overruled Petitioner's assertions that she lacked the opportunity to exhaust her tribal court remedies and that Respondents harassed her or acted in bad faith. (Order at 3-5.). Thus, the only exception to consider is whether the Nooksack Tribal Court plainly lacked jurisdiction over Petitioner at the time of her arrest. *See Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004).

Petitioner asserts the Nooksack Tribal Court plainly lacked jurisdiction over her because she was arrested on off-reservation allotted lands. (Pet.'s Resp. at 14-15.) In Petitioner's initial response, she asserted she was "arrested at '7094 Mission Road Apartment #4 in Everson, WA'—which is Nooksack allotted — not "tribal" or on-reservation — land and, in any event, is **not** located on within the exterior boundaries of the Nooksack Indian Reservation." (*Id.* (emphasis in original).) In support of her assertion, Petitioner submitted a copy of the "Title Status Report regarding Tract Number T3915-C in Whatcom

County Washington."[3] (Galanda Decl. at ¶ 22, Ex. R.) Petitioner further argued that because her arrest did not arise on the reservation, Nooksack Tribal law enforcement lacked jurisdiction to arrest her. (Pet.'s Resp. at 15.)

The Court previously considered Petitioner's assertion that the Nooksack Tribal Court lacked jurisdiction because she was arrested on off-reservation allotted lands. The Court found Petitioner's brief assertion insufficient, especially in light of the Nooksack Tribal police report regarding her arrest. (*See* Nooksack Tribe Return, Ex. A at 29 (Police Report stating Petitioner's address "is located on Nooksack tribal trust land, and is within the jurisdiction of the Nooksack Tribal Police").) Although Petitioner submitted a copy of the Title Status Report for Tract Number T3915, she did little in the way of establishing that the Nooksack Tribal Court plainly lacked jurisdiction.

In Petitioner's objections to the Report and Recommendation, she reasserted her claim that because she was off-reservation when arrested, tribal jurisdiction was lacking. (Obj. at 6.) In support of her objections, Petitioner submitted, *inter alia*, the following additional evidence: (1) a copy of a Bureau of Indian Affairs Nooksack Reservation parcel map; (2) a copy of a United States

3. Petitioner cited to Exhibit Q of Mr. Galanda's First Declaration (dkt. # 30-17) that is a copy of a Nooksack Indian Tribe Order on Motion to Enforce Contempt Order from August 2016. This order does not discuss Petitioner's residence or whether the Nooksack Tribal Court has jurisdiction over that land. The Court assumes Petitioner intended to cite to Exhibit R.

Census Bureau map of Nooksack Reservation and Off-Reservation Trust Land; (3) a copy of a United States Department of the Interior Bureau of Indian Affairs Title Status Report; (4) a copy of a February 8, 1957 letter to the Whatcom County Assessor from the United States Department of Interior Bureau of Indian Affairs; and (5) a copy of a letter dated July 2, 1958 to Whatcom County Assessor from the United States Department of Interior Bureau of Indian Affairs. (Second Galanda Decl., Exs. 1-5.) Based on Petitioner's submissions, it appears her residence is located on off-reservation allotted lands. However, this does not end the Court's analysis. The next inquiry is whether the Nooksack Tribal Court had jurisdiction over that land.

Although not presented by Petitioner, the Court finds a brief background regarding tribal jurisdiction in Washington informative. In 1953, Congress enacted Public Law 280 to permit states to assume jurisdiction over Indian country.[4] Pub.L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360) (1953). Public Law 280 gave Washington

4. 18 U.S.C. § 1151 defines Indian country for purposes of federal jurisdiction: "'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (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."

consent to assume this jurisdiction by statute and/or amendment of its state constitution. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471-74, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979); *In re Estate of Cross*, 126 Wash.2d 43, 47, 891 P.2d 26 (1995). In 1963, Washington amended RCW 37.12 to assert civil and criminal jurisdiction over Indian country, with exceptions. RCW 37.12.010 provides:

> The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with [Public Law 280], 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, unless the provisions of RCW 37.12.021 have been invoked except for the following:
>
> (1) Compulsory school attendance;
>
> (2) Public assistance;
>
> (3) Domestic relations;
>
> (4) Mental illness;
>
> (5) Juvenile delinquency;

> 6) Adoption proceedings;
>
> (7) Dependent children; and
>
> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

In 1963, the Attorney General's Office issued an opinion, AGO 63-64 No. 68, addressing the question of whether the jurisdiction assumed by the state pursuant to RCW 37.12 is exclusive or concurrent with tribal jurisdiction. The Attorney General's Office opined:

> ... the state has exclusive criminal and civil jurisdiction over (1) all Indians and Indian territory, except Indians on their tribal lands or allotted lands within the reservation and held in trust by the United States; (2) the eight areas specified in the 1963 law, regardless of the ownership of any land involved; and (3) the nine tribes and reservations already under state jurisdiction by virtue of a governor's proclamation under the provisions of chapter 37.12 RCW.

AGO 63-64 No. 68 at 15.

Petitioner cites RCW 37.12.010, AGO 63-64 No. 68, *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996), *State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (Wash. 2013), and *State v. Comenout*, 173 Wn.2d 235, 267 P.3d 355 (Wash. 2011) in support of her assertion that the Nooksack Tribal Court lacked jurisdiction. (Obj. at 6.) In *Cooper*, a Nooksack Indian Tribe member committed a crime on property held in trust by the United States as an Indian allotment outside the Nooksack Reservation. 130 Wn.2d at 772. The Court found that pursuant to RCW 37.12.010, the state assumed full nonconsensual civil and criminal jurisdiction over all Indian county outside the reservation, including allotted or trust lands, and therefore the state had jurisdiction over the land where the crime was committed. *Id.* at 775-76.

In *Clark*, a member of an Indian tribe committed a crime on fee land within an Indian reservation and the state issued and executed a state warrant on the suspect's residence that was located on tribal trust land within the borders of the reservation. 178 Wash.2d at 22. The court found that pursuant to RCW 37.12.010, the state has jurisdiction over crimes committed on fee lands within the borders of a reservation and on trust or allotment lands outside reservation borders, and therefore the state had jurisdiction over the crime. *Id.* at 25. In distinguishing case law raised by the petitioner, the court noted that "unlike crimes committed off-reservation, the State does not have exclusive jurisdiction over crimes by Indians occurring on their reservations." *Id.* at 30. The court

found the tribe and state shared concurrent criminal jurisdiction over the instant crime because it occurred on the reservation. *Id.*

In *Comenout*, members of an Indian tribe sold cigarettes without a license at a store located on trust allotment land outside the reservation. 173 Wash.2d at 236. The court found the state had criminal jurisdiction over the tribal members because the state assumed full nonconsensual criminal jurisdiction over all Indian country outside established Indian reservations, citing RCW 37.12.010 and *Cooper. Id*. at 238-39.

The Nooksack Tribal Respondents argue Petitioner misreads RCW 37.12.010 and *Cooper*. (Dkt. # 38 at 2.) They argue both authorities address whether the state has jurisdiction over off-reservation allotted lands but are silent as to whether tribal courts also have concurrent jurisdiction. (*Id.* at 2-3.) They therefore assert that neither RCW 37.12.010 or the case law cited by Petitioner divests the Nooksack Tribal Court of jurisdiction over her arrest. (*Id.* at 3.) The Nooksack Tribal Respondents further assert that it is controlling precedent in this circuit that Public Law 280 does not divest tribal courts of jurisdiction, citing *Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1992). The Nooksack Tribal Respondents argue the Ninth Circuit has found Public Law 280 was intended to supplement tribal institutions rather than supplant them. *Id.* In *Venetie*, Alaska native villages and members brought an action to compel the state of Alaska to recognize tribal court adoptions under the Indian Child Welfare Act. The court found Public Law 280 and

the Indian Child Welfare Act did not prevent the native villages from exercising concurrent jurisdiction with the state. *Id.* at 562.

Petitioner asserts *Venetie* is inapposite because it involved the Indian Child Welfare Act that is not at issue in this matter and that unlike Washington, Public Law 280 mandatorily conferred jurisdiction over Indian country to Alaska. (Dkt. # 40 at 2-3.) Petitioner also notes the *Venetie* court deferred to Attorney Generals in determining whether state jurisdiction was exclusive. (*Id.* at 3 n.4.)

In the instant matter, the parties do not dispute that the state had jurisdiction over the land where Petitioner was arrested.[5] Rather, the dispute is whether the Nooksack Tribal Court could also exercise jurisdiction. Determining tribal court jurisdiction is not an easy undertaking. *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) ("There is no simple test for determining whether tribal court jurisdiction exists."). In the context of a habeas exhaustion analysis, however, it is unnecessary for the Court to determine whether tribal jurisdiction exists. The Court need only determine if tribal jurisdiction is plainly lacking. If not, the exception to exhaustion does not apply. *Boozer*, 381 F.3d at 935 n.3.

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5. Respondents Judge Dodge and Pro Tem Judge Majumdar did not specifically respond to Petitioner's jurisdictional argument other than to assert Petitioner's bare claim that the Nooksack Tribal Court plainly lacks jurisdiction is insufficient. (Dkt. # 39 at 4.)

Appendix F

Although Petitioner asserts the AGO 63-64 No. 68 "makes plain" that the state has exclusive jurisdiction (dkt. # 40 at 2), the Court finds the cited opinion insufficient to establish tribal jurisdiction is plainly lacking. The opinion acknowledged that the exact jurisdiction of tribes was undefined and further acknowledged that a legal determination of tribal jurisdiction could not be resolved through the opinion. AGO 63-64 No. 68 at 14, 15 ("... a legal determination of the exact nature and extent of 'inherent sovereignty' or 'inherent authority' presently possessed by an Indian tribe within the state of Washington in view of the 1963 legislation for purposes of internal self-government is a federal question which cannot be resolved by the attorney general of the state of Washington. Any authoritative ruling in this area must be made by the Department of Interior or ultimately by the United States Supreme Court"). Indeed, courts are not bound by Attorney General opinions. *Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1*, 177 Wash.2d 718, 725, 305 P.3d 1079 (2013); *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993).

The case law cited by Petitioner is more persuasive. However, despite the language in these cases, it still appears there is room for argument that there is concurrent tribal jurisdiction, as indicated by the Nooksack Tribal Court's apparent belief that it has jurisdiction over the lands at issue. The cases make clear that the state has jurisdiction over off-reservation allotted lands, and imply that the state has exclusive jurisdiction, but Petitioner has not cited any case definitively determining that concurrent Nooksack

Indian Tribe jurisdiction is lacking over these lands. Thus, while it is plainly clear that the state has jurisdiction, the same cannot be said that concurrent tribal jurisdiction is lacking. Accordingly, the Court finds the plainly lacking jurisdiction exception to exhaustion does not apply.

The Court further finds exhaustion is required. Petitioner's 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. Considerations of comity warrant dismissal of this matter to allow the Nooksack Tribal Court a full opportunity to determine the existence and extent of its own jurisdiction in the first instance and rectify any errors it may have made before the federal court takes action. The exhaustion requirement gives way only where the "tribal courts offer no adequate remedy." *Jeffredo v. Macarro*, 590 F.3d 751, 756 (9th Cir. 2009). Here, Petitioner has tribal court remedies available to her to raise her jurisdictional argument and she should be required to exhaust those remedies before seeking federal habeas relief. As noted in the previous Report and Recommendation, Petitioner is not precluded from pursuing a federal habeas petition once she has exhausted her tribal court remedies.

C. Alternative Grounds for Dismissal

As noted above, Judge Coughenour's Order also remanded this matter for consideration of Respondents' alternative grounds for dismissal. The Court will address each ground in turn.

Appendix F

1. Proper Respondents

"The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is 'the person who has custody over [the petitioner].'" *Rumsfeld v. Padilla*, 542 U.S. 426, 434, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (quoting 28 U.S.C. § 2242). "[T]here is generally only one proper respondent to a given prisoner's habeas petition." *Id.* "[T]he default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* at 435. Where the petitioner challenges a form of "custody" other than present physical confinement, the petitioner may name as respondent the entity or person who exercises legal control with respect to the challenged "custody." *Id.* at 438.

2. Nooksack Indian Tribe

Respondent Nooksack Indian Tribe argues it is not a properly named respondent because it is entitled to tribal sovereign immunity. (Nooksack Tribe Return at 10.) Petitioner appears to concede that the Nooksack Indian Tribe is not a proper respondent. (Pet.'s Resp. at 11 ("... to the extent that Respondents submit that the Tribe, as an institution, should be dismissed, Ms. Adams is fine with that—provided someone she has named gives her the unconditional freedom she seeks.").)

As a matter of law, Indian tribes are not subject to suit unless a tribe waives its sovereign immunity or Congress expressly authorizes the action. *Kiowa Tribe of Oklahoma*

v. Manuf. Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). A waiver of immunity must be expressed unequivocally and cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58. "An application for writ of habeas corpus is never viewed as a suit against the sovereign," and "§ 1303 does not signal congressional abrogation of tribal sovereign immunity, even in habeas cases." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899-900 (2d Cir. 1996).

Here, Respondent Nooksack Indian Tribe has not expressly waived its tribal sovereign immunity and therefore is not a proper Respondent to Petitioner's habeas petition. Accordingly, the Court recommends that if this action is not dismissed for failure to exhaust, Respondent Nooksack Indian Tribe should be dismissed.

3. Nooksack Tribal Court

Respondent Nooksack Tribal Court argues that as an instrumentality of the Nooksack Indian Tribe, it is also entitled to tribal sovereign immunity. (Nooksack Tribal Return at 10.) In response, Petitioner argues that because the tribal court has an interest in opposing the petition if it lacks merit and has the power to give Petitioner the relief she seeks, it is a proper Respondent. (Pet.s Resp. at 12 (citing *Reimnitz v. State's Attorney of Cook Cty.*, 761 F.2d 405 (7th Cir. 1985)).)

Here, the Court finds the Nooksack Tribal Court is a governmental instrumentality of the Nooksack Indian Tribe and is therefore also entitled to tribal sovereign

immunity. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008) (immunity applies to the tribe's commercial as well as governmental activities) (*citing Kiowa Tribe of Oklahoma*, 523 U.S. at 754-55); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185 (9th Cir. 1998), *cert. denied*, 528 U.S. 877, 120 S. Ct. 185, 145 L. Ed. 2d 156 (1999) (nonprofit health corporation created and controlled by Indian tribe is entitled to tribal immunity because it served as an arm of the sovereign tribes); *Hagen v. Sisseton—Wahpeton Community College*, 205 F.3d 1040, 1044 (8th Cir. 2000) (a tribe's sovereign immunity extends to its agencies). Although courts have been found to be proper respondents (*see Reimnitz*, 761 F.2d 405; *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973)), the Court is unaware of any case holding a tribal court is a proper Respondent without waiver of tribal sovereign immunity. Further, although tribal officials can be proper respondents, the Nooksack Tribal Court as an entity itself is not a tribal official. *Santa Clara Pueblo*, 436 U.S. at 60 ("Congress clearly has power to authorize civil actions against *tribal officers*, and has done so with respect to habeas corpus relief in § 1303.") Accordingly, if this matter is not dismissed for failure to exhaust, the Court recommends the Nooksack Tribal Court be dismissed.

4. Nooksack Tribal Court Clerks

Respondents Nooksack Tribal Court clerks Betty Leathers and Deanna Francis argue they are improper Respondents because they do not exercise legal control over Petitioner's warrant. (Nooksack Tribe Return at

11.) Petitioner argues they may administer orders to bring Petitioner before the judge and are in control of Petitioner's $500.00 bail, and therefore have control over her "custody."[6] (Pet.'s Resp. at 12.)

The Court finds Respondents Leathers and Francis are not properly named Respondents. Respondents Leathers and Francis submitted evidence demonstrating their lack of legal authority under the Nooksack Tribal Code, Title 20, to quash or otherwise invalidate a bench warrant issued by the Nooksack Tribal Court. (Francis Decl. (Dkt. # 38-1) at ¶ 5, Exs. B, C (job descriptions of Nooksack Tribal Court Clerks).) Based on the evidence submitted, the Court finds Respondents Leathers and Francis do not have legal authority to grant the relief Petitioner seeks. Accordingly, if this action is not dismissed for failure to exhaust, the Court recommends Respondents Leathers and Francis be dismissed.

5. Judge Respondents

Respondents Judge Dodge and Pro Tem Judge Majumdar argue that because they are judges, they are not proper Respondents. (Dodge and Majumdar Return at 9-10.) Specifically, they argue judges never have physical

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6. Petitioner appears to acknowledge the named clerks are not the proper Respondents. (Pet.'s Resp. at 12-13 ("Ms. Adams stands by her decision to name each Respondent, but as long as one of the named Respondents possesses authority to release Ms. Adams from custody ... it does not really matter to her. Thus, to the extent Respondents wish to dismiss those Respondents who truly lack authority ... Ms. Adams does not object ....").)

custody and control of a petitioner, and further cannot produce a petitioner in court, even one released on bail. (*Id.* at 9.) Petitioner argues that because Respondents Judge Dodge and Pro Tem Judge Majumdar possess the authority to modify the order regarding her bail, they are proper Respondents. (Pet.'s Resp. at 12.)

Here, it is not difficult to imagine that the presiding judge in the Nooksack Criminal Action could exercise control over Petitioner's warrant, such as modifying the bail order as suggested by Petitioner. Despite Respondents Judge Dodge and Pro Tem Judge Majumdar's assertion, they need not have physical custody of Petitioner, and in fact, could not exercise physical control as Petitioner is out on bond. Although it may be uncommon, tribal court judges have been found to be proper respondents. *See Coriz v. Rodriguez*, 350 F. Supp. 3d 1044, 1052 (D.N.M. 2018) (finding tribal court judge to be a proper respondent because the trial court record stated the petitioner was detained until his release was ordered by the governor or judge of the tribe). Accordingly, Respondent Pro Tem Judge Majumdar, as presiding judge over the Nooksack Criminal Action, is a proper Respondent.[7] However, the Court finds Respondents Judge Dodge and Pro Tem Judge Majumdar are also entitled to judicial immunity and should therefore be dismissed from this action, as discussed below.

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7. Respondent Judge Dodge recused himself from the Nooksack Criminal Action and appointed Pro Tem Judge Majumdar as the presiding judge. (Nooksack Tribe Return, Ex. A at 10-14 (Notice of Recusal).) Thus, he no longer exercises control over Petitioner's warrant and is not a proper Respondent. The Court recommends he be dismissed from this action on this basis.

Appendix F

a. Judicial Immunity

Respondents Judge Dodge and Pro Tem Judge Majumdar also assert they are entitled to judicial immunity. (Dodge and Majumdar Return at 10-11.) Judicial immunity completely shields a judicial officer from civil liability if the judicial officer acts within the scope of the officer's judicial authority. *Stump v. Sparkman*, 435 U.S. 349, 355-56, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). There are two exceptions to judicial immunity: judicial capacity and absence of jurisdiction. The Court addresses each exception below.

(1) Judicial Capacity

Judges are accorded absolute immunity for actions taken in a judicial capacity. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). When determining if an action is judicial, courts look to whether it is a function normally performed by a judge and to the expectations of the parties. *Stump*, 435 U.S. at 362; *Mireles v. Waco*, 502 U.S. 9, 12, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). The phrase "judicial capacity" has been interpreted broadly by the Supreme Court to include situations where judges are even alleged to have acted "maliciously and corruptly." *Mireles*, 502 U.S. at 11.

Here, the Court finds Respondent Judge Dodge acted in his judicial capacity when issuing Petitioner's bench warrant and related orders in the Nooksack Criminal Action. Issuing warrants and orders are normal, expected functions of a judge. Even if Respondent Judge Dodge

issued the warrant maliciously or corruptly, as alleged by Petitioner, he would have still been acting in his judicial capacity.

Respondent Judge Dodge appointed Pro Tem Judge Majumdar as the presiding judge over the Nooksack Criminal Action after Petitioner's arrest. Petitioner has not asserted any allegations that he has acted outside his judicial capacity, however, to the extent he issues orders in the Nooksack Criminal Action, the Court finds these actions would similarly be performed in a judicial capacity.

(2) Clear Absence of Jurisdiction

A judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Stump*, 435 U.S. at 356-57. "[W]hen a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost." *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980) *overruled on other grounds by Ashelman*, 793 F.2d at 1072.

As discussed above, the Undersigned finds that the Nooksack Tribal Court did not plainly lack concurrent jurisdiction over the off-reservation allotted land at issue and thus finds Respondents Judge Dodge and Pro Tem Judge Majumdar did not act in the face of clearly valid statutes or case law that deprived the Nooksack Tribal Court of jurisdiction. Further, there is no evidence that Respondent Judge Dodge issued the warrant knowing he lacked jurisdiction. Accordingly, Respondents Judge

Dodge and Pro Tem Judge Majumdar are entitled to judicial immunity and the Court recommends they be dismissed from this action.[8]

V. CONCLUSION

The Court recommends Petitioner's habeas petition be dismissed without prejudice for failure to exhaust tribal court remedies. Alternatively, the Court recommends Respondents Nooksack Indian Tribe, Nooksack Tribal Court, Leathers, Francis, and Judge Dodge be dismissed as improperly named Respondents, and that Respondent Pro Tem Judge Majumdar be dismissed due to judicial immunity. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **August 7, 2020**.

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8. Should the Court find that valid case law and/or statutes deprive the Nooksack Tribal Court's jurisdiction over the off-reservation allotted lands, Respondent Pro Tem Judge Majumdar would be the proper Respondent. As noted above, Respondent Judge Dodge is not a proper Respondent due to his recusal.

Appendix F

The Clerk is directed to send copies of this Report and Recommendation to the parties and to the Honorable John C. Coughenour.

Dated this 13th day of July, 2020.

/s/ Michelle L. Peterson
MICHELLE L. PETERSON
United States Magistrate Judge

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, DATED APRIL 21, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C19-1263-JCC

ELILE ADAMS,

Petitioner,

v.

BILL ELFO et al.,

Respondents.

April 21, 2020, Decided;
April 21, 2020, Filed

HONORABLE JOHN C. COUGHENOUR

ORDER

This matter comes before the Court on Plaintiff's objections (Dkt. No. 36) to the report and recommendation of the Honorable Michelle L. Peterson, United States Magistrate Judge (Dkt. No. 35). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby

ADOPTS in part and REJECTS in part the report and recommendation and REMANDS this matter to Judge Peterson for further proceedings for the reasons explained herein.

I. BACKGROUND

Judge Peterson's report and recommendation sets forth the underlying facts of this dispute, and the Court will not repeat them here. (*See* Dkt. No. 35 at 2-5.) On October 18, 2019, Petitioner filed a second amended petition for a writ of habeas corpus pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, seeking relief from a warrant issued by Respondent Nooksack Tribal Court. (Dkt. No. 21.) On November 22, 2019, Respondents moved to dismiss Petitioner's petition for a writ of habeas corpus pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (*See* Dkt. Nos. 25, 28.)

Judge Peterson's report and recommendation recommends granting Respondents' motions to dismiss, finding that Petitioner has failed to exhaust her tribal court remedies. (*See* Dkt. No. 35 at 7, 14-15.) Petitioner filed timely objections to the report and recommendation. (*See* Dkt. No. 36.)

II. DISCUSSION

A. Legal Standard

A district court reviews *de novo* those portions of a report and recommendation to which a party objects. *See*

28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Objections are required to enable the district court to "focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). General objections, or summaries of arguments previously presented, have the same effect as no objection at all, since the court's attention is not focused on any specific issues for review. *See United States v. Midgette*, 478 F.3d 616, 622 (4th Cir. 2007). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

B. Petitioner's Objections

1. Exhaustion of Tribal Court Remedies

"The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). However, tribal members must exhaust their tribal court remedies prior to seeking federal habeas relief. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985); *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998).

The report and recommendation found that Petitioner did not exhaust her tribal court remedies prior to filing the

instant petition, such as by moving for acquittal, moving to strike the warrant and return of bail, and seeking a tribal court writ of habeas corpus or appealing to the tribal appellate court. (Dkt. No. 35 at 11, 14.) In her objections, Petitioner argues that she did not receive a summons and therefore "cannot move for acquittal or strike the warrant and seek return of bail." (Dkt. No. 36 at 5-6) (citing Dkt. No. 37-6 at 10). Taken as true, Petitioner's argument does not refute that other tribal court remedies were available to her when she filed her petition for federal habeas relief. (*See* Dkt. No. 35 at 11.)

Petitioner also argues that she has now exhausted her tribal court remedies, stating that "[h]er only 'available' tribal legal avenue to seek her unconstitutional freedom was tribal *habeas corpus*, but Respondents summarily foreclosed any such opportunity before the Nooksack trial and appellate courts." (Dkt. No. 36 at 6) (citing Dkt. Nos. 37-6, 37-7). The parties submit new evidence on this issue. (*See* Dkt. Nos. 37-6 at 1-22, 37-7 at 1-27, 38-1-38-6.) "[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). The Court exercises its discretion to consider the parties' new evidence relating to this ground of Petitioner's objections. And a review of the evidence shows that Petitioner's tribal court petitions have not been adjudged on the merits; each "has been rejected for filing per Resolution 16-28, which bars Gabriel Galanda and any other attorneys working at the firm of Galanda Broadman, from (1) engaging in business activities within the Nooksack Tribal land, and

(2) practicing in the tribal court." (*See* Dkt. Nos. 37-6 at 1; 37-7 at 1, 6.) And Respondents note that Mr. Galanda and his firm are not authorized to practice before the Nooksack Tribal Court because they do not possess a business license issued from the Nooksack Indian Tribe and that Petitioner's counsel failed to pay the required filing fees for her tribal court petitions. (*See* Dkt. No. 38-1 at 2-4.) Therefore, Petitioner does not demonstrate that she has actually exhausted her tribal court remedies such that she may now seek federal habeas relief on this ground and her objections are OVERRULED on this ground.

2. Tribal Court Jurisdiction and Bad Faith

Exhaustion of tribal court remedies is not required when:

> an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Nat'l Farmers Union Ins. Cos., 471 U.S. at 857 n.21 (quoting *Juidice v. Vail*, 430 U.S. 327. 338, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977)). The report and recommendation found that "Petitioner's conclusory assertions that jurisdiction is plainly lacking because she was not within the bounds of the Reservation at the time of her arrest are insufficient to show that there is no plausible claim of an absence of

jurisdiction, especially given the record." (Dkt. No. 35 at 8) (citing a police report stating that Petitioner's address "is located on Nooksack tribal trust land, and is within the jurisdiction of the Nooksack Tribal police"). The report and recommendation does not acknowledge Petitioner's evidence that her arresting address is located on allotted land outside of the reservation or her argument that the Nooksack Tribal Court consequently lacked jurisdiction over her. (*See* Dkt. Nos. 29 at 14-15, 30-18 at 2.) Therefore, Petitioner's argument, while brief, was not conclusory. And given the legal authority and evidence submitted by Petitioner in support of her objections to the report and recommendation, the fact that she may have been arrested on federal allotted land outside of the reservation may give rise to a plausible claim of a lack of jurisdiction. (*See* Dkt. No. 35 at 8.) Thus, the Court REJECTS and REMANDS the report and recommendation on this ground. On remand, the magistrate judge must determine whether Petitioner has established a plausible claim that her arrest occurred on allotted land outside of the reservation and that therefore the Nooksack Tribal Court lacked jurisdiction over Petitioner at the time of her arrest.

The report and recommendation also rejected Petitioner's argument that she was not required to exhaust her tribal court remedies because Respondents harassed her or acted with bad faith. (*See* Dkt. No. 35 at 10-11.) In her objections, Petitioner asserts that Respondents have again acted in bad faith by precluding her from pursuing tribal court habeas remedies, citing the tribal court's rejection of her new filings. (*See* Dkt. No. 36 at 7) (citing *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu*

Wa Inc., 715 F.3d 1196, 1201 (9th Cir. 2013); *Acres v. Blue Lake Rancheria*, 2017 U.S. Dist. LEXIS 26447, 2017 WL 733114, slip op. at 3 (N.D. Cal 2017); Dkt. Nos. 37-6 at 1; 37-7 at 1, 6.) As discussed above, Petitioner's filings were rejected because Mr. Galanda and his firm do not possess a business license issued by the Nooksack Indian Tribe and thus cannot practice before the Nooksack Tribal Court and because Petitioner's counsel failed to pay the required filing fees for her petitions. (*See* Dkt. No. 38-1 at 2-4.) These reasons do not establish that the tribal court has unjustifiably precluded Petitioner from pursuing her tribal court remedies and do not otherwise rise to the level of bad faith or harassment such that Petitioner is excused from exhausting those tribal court remedies. Therefore, Petitioner's objections are OVERRULED on this ground.

III. CONCLUSION

For the foregoing reasons, Judge Peterson's report and recommendation (Dkt. No. 35) is ADOPTED in part and REJECTED in part. This matter is REMANDED to Judge Peterson for consideration of whether Petitioner has raised a plausible claim that the Nooksack Tribal Court lacked jurisdiction over Petitioner at the time of her arrest and of Respondents' alternative grounds for dismissal of Petitioner's petition for writ of habeas corpus. Fed. R. Civ. P. 72(b); (Dkt. No. 35 at 14-15).

DATED this 21st day of April 2020.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX H — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED MARCH 3, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C19-1263 JCC-MLP

ELILE ADAMS,

Petitioner,

v.

BILL ELFO, *et al.*,

Respondents.

March 3, 2020, Decided;
March 3, 2020, Filed

REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner Elile Adams filed a second amended petition for writ of habeas corpus pursuant to the federal Indian Civil Right Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303, seeking relief from a Nooksack Tribal Court warrant.

(Second Am. Pet. (Dkt. # 21).) Respondents Deanna Francis, Betty Leather, Nooksack Indian Tribe, and Nooksack Tribal Court filed a return and a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing Petitioner failed to exhaust tribal court remedies, named improper respondents, and that the Nooksack Tribal Respondents are entitled to sovereign immunity. ("Nooksack Tribe Return" (Dkt. # 25).) Respondents Judge Raymond Dodge and Pro Tem Judge Rajeev Majumdar filed a return, arguing they are improper respondents and are entitled to judicial immunity. ("Dodge and Majumdar Return" (Dkt. # 28).) Petitioner filed a response and Respondents filed replies. ("Pet.'s Resp." (Dkt. # 29); "Nooksack Tribe Reply" (Dkt. # 33); "Dodge and Majumdar Reply" (Dkt. # 34).) Having considered the parties' submissions, the balance of the record, and the governing law, the Court recommends Petitioner's habeas petition be dismissed without prejudice.

II. BACKGROUND

The parties in this matter have a long and contentious history. Petitioner asserts the Nooksack Indian Tribe and Tribal Court have a vendetta against her and her family over their defense of Nooksack tribal members subjected to disenrollment proceedings since at least 2016. (Second Am. Pet. at ¶¶ 12-23.) Respondents assert Petitioner's habeas matter is just one of many cases filed by Petitioner and her counsel against the Nooksack Indian Tribe and its officials in a campaign to undermine the Nooksack

Indian Tribe's jurisdiction and sovereignty.[1] (Dodge and Majumdar Return at 2-3; Nooksack Tribe Return at 8.) The subject of the instant action is a Nooksack Tribal Court warrant resulting in Petitioner's arrest and subsequent release on bail. The warrant stems from pending criminal charges regarding Petitioner's alleged child custody interference and contempt of court.

In 2014, the father of Petitioner's child initiated a parenting action against Petitioner in Whatcom County Superior Court. ("Second Adams Decl." (Dkt. # 31) at ¶ 4, Ex. A (Petition for Residential Schedule/Parenting Plan, Case No. 14-5-00085-2).) The Whatcom County Superior Court determined Petitioner should remain the primary residential parent, and the father be permitted visitation rights. (*Id.*, Ex. C (Judgment and Order Determining Parentage, Case No. 14-5-00085-2).)

On March 17, 2017, Petitioner sought a protection order against the father of her child in the Nooksack Tribal Court. (*Id.*, Ex. D (Temporary Ex Parte Order for Protection, Case. No. 2016-CI-PO-00).) Petitioner asserts that on March 30, 2017, Respondent Nooksack Tribal Court Judge Dodge, *sua sponte*, converted her petition for a protection order into a child custody action ("Nooksack Parenting Action"). (Pet.'s Resp. at 3.) Respondents

1. Respondents cite to, *inter alia*, *Adams v. Dodge, et al.*, Case No 19-2-01552-37 (Whatcom Sup. Ct.) and *Adams v. Whatcom County, et al.*, Case No. 2:19-cv-01768-JRC (W.D. Wash), which Respondents assert arise out of the same alleged unlawful detention of Petitioner involved in this habeas petition. (Dodge and Majumdar Return at 3.)

assert Petitioner initiated the Nooksack Parenting Action herself. (Nooksack Tribe Return at 5.) The Nooksack Parenting Action gave Petitioner primary custody and the father visitation rights. (*Id.*)

In February 2019, Respondent Judge Dodge requested the Nooksack Tribal Police Department conduct an investigation regarding possible custodial interference by Petitioner. (Nooksack Tribe Return, Ex. A at 53 (Police Report).) At the time of the investigation, Petitioner and her child were members of the Nooksack Indian Tribe and living on Nooksack trust land off the Nooksack Indian Tribe Reservation (the "Reservation").[2] (*Id.* at 3; Dodge and Majumdar Return at 4; Second Am. Pet.'s Resp. at 6-7, 33.) As a result of the investigation, Nooksack Tribal Police cited Petitioner with ten counts of interference with child custody for failing to comply with the father's visitation rights. (Nooksack Tribal Return, Ex. A at 57 (Police Report), 62 (Police Citation).)

In May 2019, Petitioner filed a "Voluntary Non Suit" in the Nooksack Parenting Action, asserting that the Nooksack Indian Tribe lacked a governing body and

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2. Petitioner subsequently relinquished her Nooksack tribal membership. The parties disagree over when her relinquishment went into effect. Petitioner asserts her and her child relinquished their memberships in April 2019 to obtain citizenship with the Lummi Nation. (Second Am. Pet. at ¶ 33.) Respondents assert that Petitioner's relinquishment was not effective until September 10, 2019 when the Nooksack Tribal Council approved her request. ("Charity Decl." (Dkt. # 25-1), Ex. A. (Nooksack Tribal Council Resolution #ER 19-2).)

therefore had no jurisdiction over her or the custody of her child. (Second Adams Decl., Ex. G.) Before receiving a ruling on her pleading, the Nooksack Tribal Court charged Petitioner with four counts of custody interference and one count of contempt of court ("Nooksack Criminal Action"). (Nooksack Tribe Return, Ex. A at 59-61 (Criminal Complaint).)

On July 11, 2019, Petitioner failed to appear at a scheduled hearing in the Nooksack Criminal Action because she was on a Canoe Journey. (*Id.*, Ex. A at 41 (Minute Order); Pet.'s Resp. at 6.) On July 12, 2019, the Nooksack Tribal Court entered an order granting Petitioner seven days from the missed hearing date to appear at the Nooksack Tribal Court and execute a promise to appear for the next hearing. (Nooksack Tribe Return, Ex. A at 41 (Minute Order).) Petitioner did not appear and on July 19, 2019, the Nooksack Tribal Court issued a warrant for her arrest. (*Id.*, Ex. A at 25-26 (Notice of Return on Arrest Warrant).)

On July 30, 2019, Nooksack Tribal Police arrested Petitioner at her residence pursuant to the warrant and booked her into Whatcom County Jail. (*Id.*, Ex A at 29-31 (Police Report); Whatcom County Deputy Sheriff Wendy Jones Decl. (Dkt. # 14) at ¶ 2.) Petitioner posted bail of $500.00 and was released. (Nooksack Tribe Return, Ex A. at 23 (Whatcom County Jail Bail Receipt).) Whatcom County Jail transferred Petitioner's bail to the Nooksack Tribal Court. (*Id.*, Ex. A at 22 (Whatcom County check to Nooksack Tribal Court).) It appears Petitioner has remained out of custody since her release from Whatcom

County Jail. (Whatcom County Deputy Sheriff Wendy Jones Decl. at ¶ 7.)

On the same day as Petitioner's arrest, Respondent Judge Dodge denied Petitioner's "Voluntary Non Suit" in the Nooksack Parenting Action on the grounds that (1) it was not served on all parties; (2) Nooksack Code of Laws does not contain a provision for voluntary non-suits; (3) Petitioner invoked tribal jurisdiction by filing her petition; and (4) voluntary dismissal would be unfair to the parties given the posture of the case. (Second Adams Decl., Ex. H (Order).)

In August 2019, Petitioner and her father filed a tort lawsuit in Whatcom County Superior Court against Respondent Judge Dodge based on Petitioner's arrest in the Nooksack Criminal Action. (*Id.* at ¶ 49.) In response, Respondent Judge Dodge filed a libel counterclaim against Petitioner for statements she made about him to the media. (*Id.* at ¶¶ 50-51.) In October 2019, Petitioner's public defender in the Nooksack Criminal Action moved for disqualification of Respondent Judge Dodge based on the ongoing tort lawsuit. (Nooksack Tribe Return, Ex. A a 15-17 (Amended Motion for Disqualification).) Respondent Judge Dodge recused himself and appointed Pro Tem Judge Majumdar to Petitioner's case. (*Id.*, Ex. A at 10-14 (Notice of Recusal).)

Petitioner also obtained an order for declaratory relief from Whatcom County Superior Court regarding the custody of her child. (Second Adams Decl., Ex. F (Order).) The order declared that Whatcom County Superior Court

made the initial custody determination of Petitioner's child and retains exclusive and continuing jurisdiction over the custody plan pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Chapter 26.27 RCW. (*Id.*)

Petitioner initiated the instant federal habeas matter on August 9, 2019, originally naming the Whatcom County Sheriff and Chief of Corrections as Respondents. (Dkt. # 2.) After Respondents moved to dismiss for failure to state a claim, the parties stipulated to the dismissal of the Whatcom County Respondents. (Dkt. # 19.) On October 18, 2020, Petitioner filed a second amended habeas petition naming the current Respondents. (*See* Second Am. Pet.)

III. DISCUSSION

The Nooksack Indian Tribe is a "'distinct, independent political communit[y] ... retaining [its] original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Indian tribes "are not bound by the United States Constitution in the exercise of their powers, including their judicial powers." *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005). As a result, "tribal proceedings do not afford criminal defendants the same protections as do federal proceedings." *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001). In 1968, Congress utilized its ability to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," to pass the Indian Civil Rights Act ("ICRA") to

extend to tribes most of the civil protections in the Bill of Rights. *See Santa Clara Pueblo*, 436 U.S. at 56-57 (1978).

Habeas corpus provides the exclusive remedy for tribal members by which enforcement of the ICRA can be obtained in federal court. *See Santa Clara Pueblo*, 436 U.S. at 66 (1978); 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."). Individuals generally are required to exhaust their claims with the appropriate tribal court before turning to federal court. *See, e.g., Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Considerations of comity, along with the desire to avoid procedural nightmares, have prompted the Supreme Court to insist that "the federal court stay[ ] its hand until after the Tribal Court has had a full opportunity ... to rectify any errors it may have made." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

As discussed above, Petitioner filed this federal habeas matter seeking relief from her warrant in the pending Nooksack Criminal Action. Petitioner seeks to challenge her detention on the ground that the Nooksack Tribal Court lacks jurisdiction over her. Petitioner's jurisdictional arguments are based on her assertion that the Nooksack tribal police lacked jurisdiction to arrest her because she was not on the Reservation at the time of her arrest. (Pet.'s Resp. at 7, 15.) Petitioner also asserts the Nooksack Tribal Court never had subject matter jurisdiction over the custody of her child due to Whatcom

County Superior Court's continuing and exclusive jurisdiction pursuant to UCCJEA, and therefore it lacks subject matter jurisdiction over the criminal charges arising from the allegedly invalid Nooksack Parenting Action.[3] (*Id.* at 15 (citing Second Adams Decl., Ex. F (Order Granting Declaratory Relief)).) Petitioner also asserts she was denied adequate notice of the charges against her, denied access to counsel, denied adequate time to mount a defense, and denied a public trial. (Second Am. Pet. at ¶¶ 90-99.)

Respondents argue the habeas petition should be dismissed for lack of exhaustion, improperly named respondents, and various immunities. Having reviewed the record, the Court finds Petitioner's habeas petition is premature as she has not exhausted tribal court remedies regarding the pending underlying criminal matter, and therefore should be dismissed.

A. Exhaustion

As discussed above, individuals are generally required to exhaust their claims with the appropriate

3. Petitioner also appears to suggest the Nooksack Tribal Court lacks jurisdiction over her because the United States does not recognize the Nooksack Tribal Council, and by extension the Nooksack Tribal Court. (Second Am. Pet. at ¶¶ 14-17.) Petitioner's argument is unpersuasive as this district has found that the United States Department of the Interior and the Bureau of Indian Affairs now recognize the Nooksack Tribe as a legitimate tribe. *See Rabang et al., v. Kelly et al.*, Case No. C17-88-JCC (W.D. Wash. 2018) (Dkt. # 166 at 4-5.); *Doucette et al., v. Bernhardt et al., (Zinke)*, Case No. C18-859-TSZ (W.D. Wash. Aug. 13, 2019).

tribal court before turning to federal court. Exhaustion is not "required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union Ins.*, 471 U.S. at 857, n.21. Here, Petitioner contends that she is not required to exhaust her tribal remedies because all three exhaustion exceptions apply. (Pet.'s Resp. at 14-17.) The Court will address each exception in turn.

1. Jurisdiction

Petitioner asserts that it is plain that Nooksack Tribal Court is lacking jurisdiction over the Nooksack Criminal Action. (Pet.'s Resp. at 14-15.) Petitioner first argues the Nooksack Tribal Court plainly lacks jurisdiction because her arrest occurred on Nooksack Tribe allotted land outside the exterior boundaries of the Reservation. (Pet.'s Resp. at 14-15.) Similarly, Petitioner argues that because she was not on the Reservation, the tribal law enforcement officers only had jurisdiction to detain her, not to arrest her. (*Id.* at 15.) Respondents argue tribal jurisdiction extends to property held in trust for the tribe outside its reservation, including allotments. (Nooksack Tribe Reply at 2 (citing 18 U.S.C. § 1151(c)).) The Court finds Petitioner's conclusory assertions that jurisdiction is plainly lacking because she was not within the bounds of the Reservation at the time of her arrest are insufficient to show there is no plausible claim of an absence of jurisdiction, especially given the record. (*See* Nooksack Tribe Return., Ex. A at 29

(Police Report stating Petitioner's address "is located on Nooksack tribal trust land, and is within the jurisdiction of the Nooksack Tribal Police".)

Second, Petitioner argues the Nooksack Tribal Court never had subject matter jurisdiction over the Nooksack Parenting Action because the Whatcom County Superior Court had continuing jurisdiction of the custody of Petitioner's child from the first parenting plan pursuant to the UCCJEA. (Pet.'s Resp. at 15.) Petitioner asserts that because the Nooksack Tribal Court lacks jurisdiction over that action, it lacks jurisdiction over the Nooksack Criminal Action arising from it. (*Id.*) Respondents argue that Whatcom County Superior Court cannot divest the Nooksack Tribal Court of its jurisdiction under federal law. (Nooksack Tribe Response at 2-3 (citing *Iron Crow v. Ogallala Sioux Tribe*, 129 F. Supp. 15 (1955) *aff'd* 231 F.2d 89 (8th Cir. 1956)).) Respondents further assert that although the Whatcom County Superior Court relied on UCCJEA in asserting jurisdiction, the Nooksack Indian Tribe is not a party to that UCCJEA and therefore the tribe retains its inherent adjudicatory jurisdiction. (*Id.* at 3.)

The Court finds the considerations of tribal self-governance constrain the Court's ability to grant Petitioner relief of her unexhausted claims, even if her claims may be meritorious in other contexts. Petitioner's argument that the Nooksack Tribal Court lacks jurisdiction over the Nooksack Parenting Action consists of one paragraph that cites to no authority specifically addressing the application of UCCJEA to the Nooksack Tribal Court.

Similarly, Respondents merely cite to Congress' exclusive authority over Indian tribes to establish jurisdiction but do not directly address the application of the UCCJEA. The Court declines to intervene and find that the Nooksack Tribal Court lacks custody over Petitioner's child, and by extension lacks jurisdiction over Petitioner's pending criminal action, before the tribal court itself has had an opportunity to hear this jurisdictional argument.

2. Harassment and Bad Faith

Petitioner argues Respondent Judge Dodge is acting in bad faith and therefore the Nooksack Tribal Court is biased. Petitioner cites to Responded Judge Dodge's alleged conversion of Petitioner's petition for protection into the Nooksack Parenting Action, the number of hearings held in both the criminal and parenting actions, and Petitioner's alleged denial of counsel. (Pet.'s Resp. at 16.) Petitioner also references criticisms of the Nooksack Tribal Court from the National American Indian Court Judges Association, Washington State Bar Association, and Department of Interior. (Pet.'s Resp. at 16-17 (citing Galanda Decl., Exs. M, N, O).)

It is apparent from Petitioner's second amended petition that there are numerous actions by the Nooksack Indian Tribe that Petitioner takes issue with. (*See* Second Am. Pet. at ¶¶ 12-23 (discussing the disenrollment of tribal members and the lack of a legitimate governing body of the Nooksack Indian Tribe), 24-30 (discussing Nooksack Parenting Action), 46-47 (discussing Petitioner's lawsuit against Respondent Judge Dodge), 55-83 (discussing

the sequence of events of Petitioner's arrest).) However, the Court focuses on the circumstances surrounding Petitioner's pending criminal charges and resulting detention, which is at issue in this habeas matter, rather than the past turmoil between the parties.

As discussed above, Respondent Judge Dodge requested the tribal police investigate Petitioner for child custody interference regarding that tribal parenting plan. As a result, Petitioner was criminally charged. Petitioner appeared before Respondent Judge Dodge numerous times for hearings in both her tribal parenting and criminal cases.[4] Respondent Judge Dodge issued an arrest warrant for Petitioner when she missed a court hearing because she was on a Canoe Journey. (*Id.* at ¶ 19.)

Although Petitioner allegations may raise suspicion regarding the tribal criminal and parenting actions, the Court concludes that it does not rise to the level of bad faith or harassment. First, Petitioner's argument that Respondent Judge Dodge is acting in bad faith is unpersuasive as he recused himself from the ongoing criminal matter. Second, it appears the criminal charges were brought with a reasonable expectation of obtaining a conviction. Police reports show that from January 12, 2019 to February 20, 2019, Petitioner failed to exchange custody of her child pursuant to the Nooksack Parenting Action, in violation of Nooksack Code of Laws, Sections 20.03.160, 20.11.020. (Nooksack Tribe Return, Ex. A at

4. Petitioner alleges she was compelled to appear before Respondent Judge Dodge almost monthly between 2017 and 2019. (Pet.'s Resp. at 4, n.20.)

53-58.) Police reports also show Petitioner knew she was required to exchange custody but failed to do so for ten out of twelve planned visitations in a one-month period. (*Id.*)

Regardless of any alleged vendetta of Respondent Judge Dodge or the Nooksack Indian Tribe, tribal police found probable cause to arrest Petitioner for violating NTC 20.03.160. (*Id.*, Ex. A at 57.) Petitioner has not been harassed with multiple criminal cases, but instead has only been charged in the one pending case. Therefore, it appears that this habeas action would unduly interfere with the tribal court criminal proceeding and the Court should abstain from deciding these claims.

3. Futility

Lastly, Petitioner argues any attempt at exhaustion in the tribal courts would be futile. However, the Court finds that because Petitioner is a pretrial detainee in the Nooksack Criminal Action, she can raise her jurisdictional arguments targeting the validity of that action in several ways. As Respondents note, Petitioner could move for acquittal on the grounds the Nooksack Parenting Action is void or could move to strike the warrant and return of bail. (Nooksack Tribe Return at 9, n.32 (citing NTC §§ 10.07.190, 10.07.200).) Petitioner could also seek tribal writ of habeas corpus relief or appeal to the tribal appellate court. (*See* "Roche Decl." (Dkt. # 13), Ex. 4 (Tribal Court System and Court Rules).)

Petitioner raises several arguments challenging the viability of these tribal court remedies. First, Petitioner

argues she cannot obtain relief from the Nooksack Tribal Court in the pending criminal matter because Respondent Judge Dodge is acting in bad faith and therefore the tribal court is not a fair and neutral forum. (Pet.'s Resp. at 15-17.) Specifically, Petitioner argues Respondent Judge Dodge has acted in bad faith because of his alleged conversion of her petition for protection into the Nooksack Parenting Action, Petitioner's numerous hearings in both the parenting and criminal actions, and his alleged denial of Petitioner's request for counsel. (*Id.* at 16.) As discussed above, Respondent Judge Dodge recused himself from the Nooksack Tribal Action and the Court finds Petitioner's argument fails to rise to the level of bad faith.

Petitioner also argues she has no practical way to seek tribal habeas relief because she has been denied her right to counsel of her choosing. (Pet.'s Resp. 8, 16.) In support of her argument, Petitioner alleges that on October 9, 2019, Mr. Galanda, Petitioner's counsel in the instant habeas matter, attempted to attend a hearing on behalf of Petitioner in the Nooksack Parenting Action, but was not allowed to enter the courthouse. (*Id.* at 16 (citing "Galanda Decl." (Dkt. # 30)).) Petitioner also cites to Mr. Galanda's rejected filings of notice of association of counsel in both the Nooksack Parenting Action and Nooksack Criminal Action. (*Id.* (citing Galanda Decl., Exs. J, K).)

The Nooksack Parenting Action is not before the Court, and therefore Petitioner's right to counsel in that matter has no bearing on Petitioner's federal habeas petition. With regard to Mr. Galanda exclusion from the Nooksack Criminal Action, it appears from the 2019

rejected notice of association of counsel that he is barred from practicing in the Nooksack Tribal Court.[5] (Galanda Decl., Exs. J, K.) Petitioner asserts in a conclusory fashion that Mr. Galanda has been wrongfully excluded from the tribal courthouse, citing to a 2016 Tribal Court of Appeals order reinstating Mr. Galanda's ability to practice in the Nooksack Tribal Court pending review before the Nooksack Tribal Court of his claims that his due process rights have been infringed on by being disbarred. (Pet.'s Resp. at 8 (citing Galanda Decl. Ex. C).) It is not clear from the appellate order whether the Nooksack Tribal Court reviewed and affirmed Mr. Galanda's disbarment, or if review is still pending. Regardless, Petitioner's assertions are insufficient to show she unable to pursue tribal habeas relief through a different attorney or as a pro se litigant.

Lastly, Petitioner argues that seeking relief from the Nooksack Court of Appeals would be futile because it has been enjoined and there is no indication that it has become operational.[6] (Second Am. Pet. at ¶ 101; Pet.'s Resp. at 17.) To support her assertion, Petitioner cites to a 2016 Nooksack Tribal Court order finding the Northwest

5. To the extent Petitioner is asserting she has been outright denied counsel in the Nooksack Criminal Action, such argument fails as Petitioner is represented by a public defender. (Second Am. Pet. at ¶ 36; Pet.'s Resp. at 6; Second Adams Decl. at ¶ 19 ("On July 11, 2019, my public defender Matthew Deming appeared before Respondent Dodge for me.").)

6. Petitioner also argues that even if the Nooksack Tribal Appellate Court is operational, it too is unfair and biased like the Nooksack Tribal Court. (Pet.'s Resp. at 15.) Petitioner provides no evidence in support of this conclusory assertion.

Intertribal Courts System ("NICS") and any NICS-engaged appellate panel lack authorization to (1) accept filing from third parties rather than the Nooksack Indian Tribe Clerk; (2) assert original jurisdiction or issue orders as a court of original jurisdiction in Nooksack Indian Tribe matters; or (3) to issue sanctions against Nooksack Indian Tribe officers acting in his or her official capacity. (Pet.'s Resp. at 17 (citing Galanda Decl., Ex. L at 5-14).) Petitioner also cites to the Nooksack Tribal Court website, asserting the lack of a listing for a tribal appellate court proves such court is defunct. (*Id.* at 17.) In response, Respondents cite to the Nooksack Tribal Court System and Court Rules, which contain procedures regarding how to initiate a tribal appeal. (Roche Decl., Ex. 4 (Tribal Court System and Court Rules).)

While the order cited by Petitioner does appear to put limitations on the tribal appellate court, the Court does not agree with Petitioner's assertion that it establishes the tribal appellate court has been fully enjoined. Rather, it appears to limit the tribal appellate court's ability to assert original jurisdiction over Nooksack Indian Tribe matters. The order explicitly states it is not enjoining the attorneys or judges of the appellate tribunal. (Galanda Decl, Ex. L at 7.) Similarly, the Court is not persuaded that the tribal appellate court is nonoperational based on the lack of listing on the tribal website. Regardless, even if the tribal appellate court is enjoined, Petitioner still has other tribal court remedies, discussed above, that are available.

In sum, Petitioner has multiple opportunities in the tribal courts to challenge her detention. The Court is

cognizant of Petitioner's apparent frustration with the Nooksack Tribal Court, and the Nooksack Indian Tribe itself, but her conclusory assertions that she cannot seek relief because there is a vendetta against her, without more, is not enough for the Court to abandon the considerations of comity and insert itself into the ongoing tribal criminal proceedings. Nothing in this finding precludes Petitioner from seeking federal habeas relief in the future should she attempt to utilize the available tribal remedies without success. Accordingly, Petitioner's habeas petition should be dismissed for failure to exhaust tribal court remedies.[7]

B. Alternative Grounds

Respondents also present alternative grounds as to why Petitioner's habeas petition should be dismissed. Respondents Nooksack Indian Tribe and Nooksack Indian Court argue they are entitled to sovereign immunity and therefore should be dismissed from this action. (Nooksack Return at 10.) Respondents Leathers and Francis argue they should be dismissed from this action because as court clerks, they do not have control over Petitioner's detention and therefore are not her custodians. (*Id.* at 11.) Respondents Judge Dodge and Pro Tem Judge Majumdar argue they are entitled to judicial immunity and should

7. "Habeas claims brought under the Indian Civil Rights Act, 25 U.S.C. § 1303, are most similar to habeas actions arising under 28 U.S.C. § 2241," § 1303's "federal law analogue." *Kelsey v. Pope*, 809 F.3d 849, 854 (6th Cir. 2016), *cert. denied sub nom. Kelsey v. Bailey*, ___ U.S. ___, 137 S. Ct. 183, 196 L. Ed. 2d 150 (2016). Because the habeas petition is most similar to those habeas actions arising under 28 U.S.C. § 2241, a certificate of appealability is not included.

therefore be dismissed. (Dodge and Majumdar Return at 10-13.) Lastly, Respondent Judge Dodge argues he should be dismissed from this action because he recused himself from the Nooksack Criminal Action and therefore lacks power to release Petitioner from her detention. (*Id.* at 10.) Because the Court finds Petitioner's habeas petition should be dismissed for failure to exhaust tribal court remedies, the Court need not address Respondents' alternative grounds.

C. Request for Order to Show Cause Regarding Sanctions

Respondents Judge Dodge and Pro Tem Judge Majumdar request the Court order Petitioner to show cause why sanctions should not be imposed on her for bringing this habeas petition. (Respondents Dodge and Majumdar Return at 13-15.) Although habeas relief is not warranted at this time, the Court declines Respondents Judge Dodge and Pro Tem Judge Mujamdar's invitation to impose sanctions.

IV. CONCLUSION

The Court recommends Respondents' Returns should be GRANTED (Dkt. ## 25, 28) and Petitioner's habeas petition be DISMISSED without prejudice for the foregoing reasons. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties

to this suit within **fourteen (14) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **March 20, 2020**.

The Clerk is directed to send copies of this Report and Recommendation to the parties and to the Honorable John C. Coughenour.

Dated this 3rd day of March, 2020.

/s/ Michelle L. Peterson
MICHELLE L. PETERSON
United States Magistrate Judge