Adams v. Elfo, No. C19-1263-JCC, 2020 WL 1929375 (W.D. Wash. Apr. 21, 2020), *on reconsideration*, 2020 WL 6484399 (Nov. 4, 2020), *magistrate judge report and recommendation adopted*, 2021 WL 2253589 (June 3, 2021), *aff'd*, 2022 WL 458394 (9th Cir. Feb. 15, 2022) (non-published op.)

- **Holdings:** Magistrate judge's recommendation concerning dismissal of a suit under the habeas corpus provision of the Indian Civil Rights Act was remanded for determination of whether the lack-of-jurisdiction exception to the exhaustion requirement applied. On reconsideration, the magistrate judge was also directed to consider a Public Law 280 issue concerning whether the Nooksack Tribe had jurisdiction over activity on a non-reservation allotment. The magistrate judge subsequently determined that, regardless of whether Public Law 280 predated the Nooksack Tribe's federal recognition, its inherent authority over the allotment was unaffected. The district court agreed that Public Law 280 did not divest tribes of any such authority and adopted the magistrate judge's recommendation. The Ninth Circuit affirmed in an unpublished opinion.
- **Summary:** Petitioner sought habeas corpus relief under 25 U.S.C.A. § 1303 with respect to a pending criminal proceeding in the Nooksack Tribal Court. Respondents moved to dismiss on the ground that Petitioner had failed to exhaust tribal remedies. The magistrate judge granted the motion, and Petitioner filed objections to the judge's report and recommendations. The district court first rejected Petitioner's assertion that she had exhausted because a summons and complaint had not been served on her. "Taken as true," it stated, "Petitioner's argument does not refute that other tribal court remedies were available to her when she filed her petition for federal habeas relief." No more successful was her contention that the tribal court had "'summarily foreclosed'" any attempt at exhaustion because her counsel's pleadings had been rejected for filing. However, the evidence reflected that counsel 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."

  The court turned then to two exceptions to the exhaustion requirement raised by Petitioner: lack of tribal court jurisdiction and bad faith. It found the first objection—that her arrest had occurred on lands outside tribal reservation's boundaries—potentially meritorious: "[G]iven 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." The court therefore remanded for the magistrate judge "to 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 other exception posited by Petitioner—harassment and bad faith in rejecting her filings—was rejected on the same ground as her second contention that she had exhausted available tribal remedies. On Petitioner's motion for rehearing, the district court also remanded for consideration of a ground not addressed in the earlier order with respect to her need to exhaust tribal remedies: "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." T

The magistrate judge subsequently issued a report and recommendation concluding 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." The district court rejected Plaintiff's objection to the R&R reasoning that "[t]he 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." It added that "the Supreme Court has consistently emphasized that Public Law 280 is not a divestiture statute" and that "the Ninth and Eighth Circuits have held that Public Law 280 establishes concurrent jurisdiction between tribes and states." The court accordingly held that the magistrate judge did not err "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."

- **Relevant (2020) Deskbook Sections:** 4:6; 6:12 n.8
- **Comment:** The Ninth Circuit rejected, in part, Petitioner's reliance on a Washington State attorney general's opinion concluding that the State's Public Law 280 jurisdiction was exclusive. 1963 Wash. Att'y Gen. Op. No. 68 (Nov. 8, 1963). It observed that the opinion "is not controlling authority" and that Petitioner "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."