

Drafting an Enforceable Tribal Protection Order Involving a Non-member

Information Guide and Checklist

Using this checklist: The following general information guide and checklist suggests topics/issues for advocates to discuss with each victim relative to preparing to file a tribal protection order and drafting a tribal protection order in cases involving non-members. Recall that the U.S. Supreme Court has placed restrictions on a tribe's civil and criminal jurisdictional authority in matters occurring in Indian country involving non-members.¹ The language that follows also connotes the possible enforcement of the protection order by the exercise of Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian violators of protection orders in Indian Country.² Note that each victim will present varying danger/safety factors and the importance of ongoing lethality assessments and safety planning cannot be overstated. Additionally, victim-centered advocacy requires that the victim determine what remedies and options are needed.

Caution: *The information provided is not legal advice and advocates should take care to consult with attorneys that are trained in the subject matter and trauma-informed, victim-centered service delivery. The following checklist does not include the language necessary to invoke the federal firearms prohibition. The checklist is not jurisdiction specific, so the advocate should consult local rules, statutes and procedures in applicable jurisdictions and consult with legal counsel.*



¹ For civil restrictions see *Montana V. United States.*, 450 U.S. 544 (1981) and for criminal restrictions see *Oliphant v. United States*, 435 U.S. 191 (1978).

² Special Domestic Violence Criminal Jurisdiction is optional for tribes. Tribes implementing SDVCJ over non-Indians for dating violence, domestic violence and/or violations of a protection order crimes must meet the requirements set forth in 25 USC 1304.

Common Terms³

Emergency Protection Order: A temporary protection order that will expire in a short time, usually ordered after hearing only the Petitioner's side of the story, without notice to the respondent.

Petition for a Protection Order: The document making the request to the court for a protection order

Petitioner: Individual making a request of the court

Respondent: Individual being sued or accused in court

Protection Order: A court order that is issued to prevent acts of domestic violence against a person or to prevent a person from stalking, intimidating, or harassing another person. Orders are issued by both civil and criminal state courts. The terminology referring to a protection order and the information contained in them vary from jurisdiction to jurisdiction. This checklist uses the terms restraining order and protection order interchangeably.

Temporary Protection Order: A temporary protection order that will expire in a short time, usually ordered after hearing only the Petitioner's side of the story, without notice to the respondent.

Violence Against Women Act (VAWA) Protection Order: The term "protection order" includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court whether obtained by filing and independent action or as a pendent elite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking found at 18 U.S.C. §2266(5).

Permanent Protection Order: a final court order that is issued to prevent acts of domestic violence against a person or to prevent a person from stalking, intimidating, or harassing another person. Orders are issued by both civil and criminal state courts. The terminology referring to a protection order and the information contained in them vary from jurisdiction to jurisdiction. This checklist uses the terms restraining orders and protection orders interchangeably.

³ For additional information on protection orders, including definitions, please contact the National Center on Protection Orders and Full Faith & Credit.

A. Tribal Statutory Review

Please place the tribal constitution and/or tribal statutory citation in the blanks below.

1. Subject matter jurisdiction over civil matters involving non-member Indians has been reviewed.
Citation: _____
2. Personal jurisdiction over respondent in civil matters has been reviewed.
Citation: _____
3. Statutes pertaining to how to serve the respondent have been reviewed.
Citation: _____
4. Timelines setting forth the time-period for a full hearing have been reviewed.
Citation: _____
5. Party qualifies to file a protection order under the tribal statute.
Citation: _____
6. Party meets any residency requirement under the tribal statute.
Citation: _____
7. Party meets any relationship requirement under the statute.
Citation: _____
8. Elements necessary to meet the requirements of the tribal protection order statute have been reviewed with client.
9. Remedies necessary to meet the needs of the client have been reviewed and are allowed by the tribal protection order statute. (this includes custody of the children)
10. Confidentiality of client's location has been reviewed in the statute.
11. Protection Order forms located in the tribal statutes or tribal court forms have been gathered.

B. Drafting the Style or Heading of the Protection Order

1. Court exercising jurisdiction is identified and contact information such as address and phone number to the court is listed.
2. Names of the parties are listed and spelled correctly (include any aliases).
3. Type of case is listed (for example: petition for a protection order, emergency *ex parte* protection order, permanent protection order).

4. Court docket number appears on the document unless the document is a petition and the clerk will assign a docket number and place the docket number on the petition.
5. National Crime Information Center (NCIC) identifiers are listed on the document (usually a small grid on the face of the document that includes information such as respondent's date of birth, race, height, weight, hair color, eye color and scars/tattoos)

C. Protection Order Introductory Paragraph

Includes:

1. which judge presiding over the case;
2. date court hearing is being held;
3. names of parties appearing, and indicates if appearance is with or without counsel (note that counsel may include a tribal lay advocate where tribal code allows);
4. whether each party is a member Indian or a non-member Indian, and indicates tribal affiliation;
5. the filing or pleading that brings this matter before the court and the date the pleading was filed;
6. whether each party resides in Indian country (18 USC §1151)⁴ and the county (if required by tribal statutes);
7. attorneys' names and addresses and which party the attorney represents;
8. citations of applicable tribal constitutional provisions and tribal statutes listed above.

⁴ 18 U.S.C. 1151. Except as otherwise provided in sections 1154 and 1156 of this title, the term "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.

D. Subject Matter Jurisdiction Language in the Protection Order

1. Tribal Constitution and Tribal Code provisions provide the tribal court with authority to hear civil protection orders involving non-member Indians should be clearly stated in the protection order (citation should be in section “A” above).
2. Clearly state Violence Against Women Act (VAWA) codified at 18 USC 2265(e).⁵
3. Clearly addresses the Montana test, which requires the tribal court to find either that:
 - a. the parties entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or “other arrangements”; or
 - b. the conduct (in this case domestic violence) threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.

Note: if the tribal court does not find that either or both Montana factors are present, outside jurisdictions may hold that the tribe lacked civil jurisdiction over non-members on non-Indian lands within Indian country and the protection order may be held unenforceable in outside jurisdictions.

⁵ 18 USC 2265 (e): “For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.” *Note that the text states full tribal civil authority to issue protection orders involving any person in matters arising anywhere in the Indian country or otherwise within the authority of the tribe so arguably this is a federal statute that. Therefore, the issue of jurisdiction may revolve around where the domestic violence (as that term is defined in tribal law and may include fear or emotional abuse) has or continues to occur. Additionally, for tribes with checkerboarded land bases the use of the Montana v. United States, 450 U.S. 544 (1981) factors should establish subject matter jurisdiction where domestic violence has occurred outside of Indian country but where the domestic violence continues on Indian lands. Though Montana addressed the tribe’s civil regulatory authority over non-members on non-Indian fee land within a reservation, the case has been extended to apply to the tribe’s authority to adjudicate matters involving non-members on fee land in Indian country via Strait v. A-1 Contractors, 520 U.S. 438 (1997) and upheld in Plains Commerce Bank v. Long Family Land and Cattle Co., (554 U.S. 316 (2008)). In Plains Commerce Bank, the Court narrowly construed the Montana’s first factor to matters that had a discernable effect on tribes or its members and narrowly construed the second factor to require a showing of more than injury to the tribe but and required a showing that the issue would imperil the subsistence of the tribal community (a catastrophic consequence). The Montana factors may also establish subject matter jurisdiction in cases where 19 USC 2265(e) is held not to have relaxed federal restriction placed tribal subject matter jurisdiction over non-members on non-Indian lands within a tribe’s reservation via the Montana cases.*

E. Jurisdiction Over the Parties⁶

1. A detailed list of all contacts the petitioner and the respondent have to the tribe. (Examples include membership, married to or having a child in common with a member, employment with the tribe or tribally owned entities, child is a member, tribal car tags, health care benefits and any other benefit that flows from the tribe).
2. A detailed list of any other contacts to demonstrate a high likelihood the petitioner would seek help from the tribe.
3. Details outlining the respondent's presence in the court after proper service according to the tribal law and excepting appearances to contest jurisdiction.

F. Due Process

1. Respondent has been served with a copy of the petition requesting a protection order in the manner provided by tribal law.
2. Timelines regarding hearings has been adhered to according to tribal law OR the judge has made a good cause finding (with language in the order) to allow the timelines to vary and the judge's timelines are being followed.
3. Respondent appeared in person, with/without counsel or did not appear despite being duly served or did not appear and was not served.
4. Respondent was provided a copy of the petition for a protection order and supporting documents and was provided an opportunity to be heard and ask questions of the petitioner in open court.

⁶ Personal jurisdiction over a respondent usually requires that the party respondent has certain minimum contacts with the forum in which the court sits. International Shoe v Washington, 326 US 310 (1945). Note that federal caselaw may not apply directly to Indian country but this case is cited to provide guidance as to what the federal and state systems view as minimum contacts. Recall that 18 USC 2265 (e) requires personal jurisdiction over the respondent but that term is not defined in the federal statute. Note that there is a split among circuit courts with some courts requiring the respondent have contacts with the forum exercising jurisdiction while other courts are finding that domestic violence cases are akin to status cases similar to custody cases and do not require personal contacts with the forum. See Cody J. Jacobs, *The Stream of Violence: A New Approach to Domestic Violence Personal Jurisdiction*, Vol. 6 UCLA Law Rev. Issue 3, (Dec. 2017).

G. Findings of Fact⁷

1. Detail facts that demonstrate petitioner is a proper person to request a protection order under tribal law.
2. Detail facts that demonstrate petitioner meets any residency requirements (if any).
3. Detail the relationship necessary to obtain an order of protection (if any).
4. Detail facts of service of the petition for a protection order, notice of hearing on the respondent, and respondent was provided an opportunity to be heard regarding the allegations.
5. Detail facts that demonstrate the respondent entered a consensual relationship with a non-member Indian or member Indian.
6. Detail facts that demonstrate the petitioner has contacts with Indian country.
7. Detail facts that demonstrate the respondent has contact with Indian country.
8. Detail facts that demonstrate reasonable foreseeability that the petitioner might file an action seeking protection in the tribal court.
9. Detail facts that domestic violence has a direct effect on the political integrity, economic security, and/or the health or welfare of the tribe. (National statistics should be cited where appropriate as well as local statistics that may be provided by the clerk of the tribal court or the tribal victim advocate, also federal law such as the VAWA may also be useful here).
10. Detail all facts the judge believes to be true regarding the allegations set forth in the petition for a protection order.
11. Detail all the facts the judge believes to be true regarding the oral testimony during the hearing.
12. Detail all facts the judge believes to be true regarding any additional evidence admitted during the hearing.

⁷ Recall that the findings of fact are critical to the case and may alert law enforcement to the level of physical violence and/or lethality related to the case. The findings of fact may also engage presumptions regarding custody and visitation and may provide some of the elements necessary for holding a non-Indian batterer accountable for violations of the protection order that occurred in Indian country if the enforcing tribe is exercising Special Domestic Violence Criminal Jurisdiction. The findings of fact may also bolster a habitual offender charge in the federal system by providing details on the violence. Consider requesting that the judge make these findings of fact in the protection order. If necessary, have a prepared order with findings of fact ready for the judge as a convenience courtesy.

13. Detail all facts the judge believes is necessary to support the requested remedies.

H. Conclusions of Law

1. Judicial determination that all findings of facts listed in Section “G” above support the necessary conclusions of law:
 - a. Conclude subject matter jurisdiction is proper over non-member.
 - b. Conclude personal jurisdiction over the respondent is proper.
 - c. Conclude due process regarding service of the petition for a protection order and notice of hearings are properly made on the respondent, hearing timelines has been established.
 - d. Conclude Petitioner is person allowed to file a petition for a protection order pursuant to tribal law.
 - e. Conclude residency requirements (if any) have been met.
 - f. Conclude that Domestic violence has occurred
 - g. Conclude Petitioner (and possibly the children) need(s) protection.

I. Remedies

1. Cite to the remedies section of the tribal code.
2. Draft each remedy tightly enough to withstand the scrutiny of a prosecutor who must demonstrate a violation of the remedy beyond a reasonable doubt.
3. Tailor each remedy to meet the needs of the victim and/or children with safety at the forefront of the remedy.

J. Other Matters

1. The protection order has been served on the respondent in the manner provided by tribal law.
2. The victim has been instructed to consult with the advocate on where to store or hold certified copies of the protection order.
3. Clerk or other personnel should be instructed to enter the protection order in NCIC or other national criminal justice registry.

4. Provide warnings in the protection order and verbal warnings that the protection order is entitled to full faith and credit across all jurisdictional boundaries.
5. Provide warnings in the protection order and verbal warnings to the respondent that indicate possible criminal sanctions for violations and any applicable tribal firearm prohibitions.
6. Provide warnings to the respondent in the protection order and verbal warnings that the protection order is directed to the respondent the petitioner cannot violate the protection order

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