



PROTECTION ORDERS

NATIONAL CENTER ON PROTECTION
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Drafting an Enforceable Tribal Protection Order Involving a Non-Member

Revised 2024

Updated Information Guide and Checklist

BWWJP

Using This Guide and Checklist

The following general information guide and checklist suggest topics/issues for Tribal victim advocates to discuss with each victim regarding preparing to file a Tribal protection order and drafting an enforceable Tribal protection order in cases involving non-members. The Guide and Checklist is also a useful tool for Tribal victim advocates to be mindful of the importance of drafting protection orders to be enforceable in any jurisdiction according to 18 U.S.C. § 2265. A short glossary of terms is provided at the end of the Guide.

The federal definition of a protection order is broad, including a variety of different offender behaviors including but not limited to domestic violence, sexual assault, harassment, and stalking. This checklist has a focus on domestic violence but can be useful for other types of protection orders.

The U.S. Supreme Court placed restrictions on a Tribe's civil and criminal jurisdictional authority in matters occurring in Indian country involving non-members. The information that follows also connotes the possible enforcement of the protection order by the exercise of Special Tribal Criminal Jurisdiction, formerly, Special Domestic Violence Criminal Jurisdiction. Note that each victim's case will present varying degrees of danger and different safety factors so 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.

Background Information

Tribal Civil Jurisdiction to Issue and Enforce Protection Orders- Things May Have Changed

In 1981, the U.S. Supreme Court announced that Tribes have limited civil authority over non-Indians in Indian country unless the matter is tied to Tribal self-governance or controlling internal relations (*Montana v. United States*, 450 U.S. 544 (1981)). To exercise Tribal civil authority over non-members, the Tribe must meet at least one prong of a two-prong test known as the “Montana Rule.” Basically, the Tribes retain inherent civil authority over non-members:

1. To regulate by taxation, licensing or other means, activities of non-members who enter into consensual relationships with the Tribe or its members, as by commercial dealings; and
2. To regulate conduct of non-Indians that threatens or directly affects the political integrity, the economic security, or the health or welfare of the Tribe.

The majority of cases that followed *Montana* seemed to narrow the rule even further. Thus, Tribal courts issuing protection orders in matters involving a non-member had to meet the “Montana Rule” prior to issuing the civil protection order.

18 U.S.C. § 2265(e) appears to at least partially overrule *Montana* regarding a Tribe’s civil authority to issue and enforce protection orders involving all persons. The statute reads:

“(e) Tribal Court Jurisdiction.—

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.”

The only case that sheds some light on whether the text of 18 U.S.C. § 2265(e) partially overruled *Montana* as it applies to civil jurisdiction to issue and enforce protection orders over non-members is *Spurr v. Pope*. In *Spurr*, the 6th Circuit held that the federal statute upheld Tribal civil authority to issue civil protection orders in matters involving all persons. Note that the federal statute requires that the matter arise in Indian country or is otherwise within the authority of the Indian Tribe. To be clear, this may still be an open question of law and the checklist below still includes the “Montana Rule” for Tribes that do not interpret 18 U.S.C. § 2265(e) as a partial overruling of *Montana* in cases involving non-members.

Tribal Criminal Jurisdiction to Enforce Violations of Protection Orders Involving Non-members- Things Have Changed

Congress and the U.S. Supreme Court have limited the inherent criminal jurisdiction in one area very relevant to this checklist – Tribal criminal authority over non-Indians.

However, in 2013 and again in 2022, Congress passed Violence Against Women Act reauthorizations and relaxed some but not all of the restrictions set out in the *Oliphant* case in certain circumstances. The language that follows explores the possible criminal enforcement of protection orders by the exercise of VAWA 2022 Special Tribal Criminal Jurisdiction over non-Indian violators of protection orders in Indian Country.

The specific federal statute reads:

“(17) Violation of a protection order

The term “violation of a protection order” means an act that—

(A) occurs in the Indian country of a participating tribe; and

(B) violates a provision of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18.”

It is important to read the statute carefully and realize that only violations of certain provisions of a protection order are covered. Tribes must have implemented Special Tribal Criminal Jurisdiction to prosecute non-Indians for violating protection orders in Indian country.

Checklist

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: _____

[It might be useful to also include 18 U.S.C. § 2265 here as well for Tribes still preferring to use *Montana* put those findings here.]

- 2) Personal jurisdiction over respondent in civil matters has been reviewed.

Citation: _____

- 3) Tribal statutes pertaining to how to serve the respondent have been reviewed.

Citation: _____

- 4) Tribal statute 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 any 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 (Please note this information may differ depending on forms being used by each tribe)

- 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 (Please note this information may differ depending on forms being used by each tribe)

Includes:

- 1) which judge presiding over the case;
- 2) date court hearing is being held;
- 3) names of parties appearing and indicates 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 U.S.C. § 1151) (Note to protect client information if necessary);
- 7) attorneys' names and addresses and which party the attorney represents (or lay advocates if applicable);
- 8) citations of applicable Tribal constitutional provisions and Tribal statutes listed above.

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 U.S.C. § 2265(e).
- 3) If the Tribal court prefers, 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 is applying *Montana* and 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.

E. Jurisdiction Over the Parties

- 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.

G. Findings of Fact

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

H. Conclusions of Law

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 as defined by the tribal code.
- 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 for Tribal Victim Advocates

- 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 that the petitioner cannot violate the protection order.

Common Terms:

Default Protection Order: An order that is issued when the respondent fails to respond to the protection order petition or to show up for the hearing. This order meets the requirements for full faith and credit as long as the respondent had notice and an opportunity to appear.

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 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. Some jurisdictions also use the term "emergency protection order" for orders that are issued on an emergency basis when the court is closed.

"Violence Against Women Act (VAWA) Protection Order: The term "protection order" includes— (A) any injunction, restraining order, or any other order issued by a civil or criminal court 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 (B) 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)."

Final 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. The tribal judge will determine the length of the protection order pursuant to Tribal law. This checklist uses the terms restraining orders and protection orders interchangeably.

For technical assistance and additional resources please contact NCPOFFC at (800) 903-0111, prompt 2, or email: ncffc@bwjp.org, or visit our website: www.fullfaithandcredit.org.

ENDNOTES

1 18 U.S.C. §2266(5).

2 For civil restrictions, see *Montana V. United States*, 450 U.S. 544 (1981) but see 18 USC §2265(e) discussed below.

3 For tribal criminal jurisdiction over non-Indians restrictions, see *Oliphant v. United States*, 435 U.S. 191 (1978) but see 25 USC §1304 discussed below.

4 Special Tribal Criminal Jurisdiction comes from the [Violence Against Women Act of 2022 \(VAWA 2022\)](#) and refers to the exercise of criminal jurisdiction by tribal governments over non-Indians who commit certain crimes on Tribal lands. See, [Indian Civil Rights Act](#).

5 To list a few of these cases utilizing the ‘Montana Rule’, see *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492, U.S. 408 (1989) the only case in this series where the Court held that the Tribe had the authority to zone non-member fee lands in the closed portion of the reservation. See also *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), utilizing Montana to rule that the Tribal court lacked civil jurisdiction over an accident that occurred in Indian country involving two non-members, *Atkinson Trading Co., v. Shirley*, 532 U.S. 645 (2001) utilizing the “Montana Rule” to hold that the Tribe lacked civil jurisdiction to tax non-Indian activities on non-Indian land with the reservation; and *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) utilizing the “Montana Rule” to hold that the tribe had no civil regulatory jurisdiction over a non-Indian’s sale of fee land within the reservation.

6 Note that 18 U.S.C § 2265(e) was enacted in Section 905 of the Violence Against Women Reauthorization Act of 2013. The statute remained unchanged in VAWA 2022.

7 *Spurr v. Pope*, 936 F.3d 478 (6th Cir. 2019), Petition for Cert to the U.S. Supreme Court 18-2174 denied (Jan. 13, 2020).

8 *Oliphant v. United States*, 435 U.S. 191 (1978) holding that Tribes lack inherent criminal power to prosecute non-Indians.

9 25 U.S.C. §1304.

10 Special Tribal Criminal Jurisdiction (STCJ) is optional for Tribes. Tribes implementing STCJ over non-Indians for covered crimes must meet the requirements set forth in 25 U.S.C. 1304. VAWA 2022 also included a provision specific to the tribes in Alaska. See [Tribal Justice and Safety | Violence Against Women Act 2022 Reauthorization - Alaska Pilot Program](#).

11 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.”

12 18 U.S.C. 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. 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.***

13 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 U.S.C. § 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).

14 Recall that the findings of fact may be 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 Tribal 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.

15 For additional information on protection orders, including definitions, please contact the National Center on Protection Orders and Full Faith & Credit at www.fullfaithandcred.org.



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