

# Enforcing Protection Orders Against Non-Indians Under the Expanded Criminal Jurisdiction in VAWA 2013.

14th National Indian Nations Conference: Justice  
for Victims of Crime.  
December 11, 2014

Hon. Steven D. Aycock (Ret.)

Judge-in-Residence National Council of Juvenile and Family Court Judges

Victoria Sweet

Senior Policy Analyst National Council of Juvenile and Family Court Judges

## Learning Objectives

*As a result of this session, you will be better able to:*

- 1) Identify the general rules of expanded criminal jurisdiction by Tribes over non-Indians;
- 2) Apply specific requirements to prosecute non-Indians for violating protection orders; and,
- 3) Craft protection orders to enhance the ability of courts to criminally enforce them.

## EARLY RECOGNITION OF CRIMINAL JURISDICTION

- ▶ “If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands allotted to the Wiandot (sic) and Delaware nations in this treaty, except on the lands reserved to the United States in the preceding article, such person shall forfeit the protection of the United States, and the Indians may punish him as they please.”

Treaty with the Wyandot, Delaware, Chippewa, and Ottawa, Jan. 21, 1785, 7 Stat. 16

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## EARLY RECOGNITION, CONT'D

- ▶ “Between 1776 and 1825, for the first fifty years of the nation’s existence, the United States often explicitly acknowledged and accepted tribal exercise of criminal jurisdiction over non-Indian United States citizens who resided in the territory of many tribal nations. This exercise of authority was not conferred on tribal nations by the federal government, but rather was an acknowledgement of the inherent powers of tribal nations that persisted after United States’ founding.”
- ▶ M. Brent Leonhard, *Closing A Gap In Indian Country Justice: Oliphant, Lara, And DOJ’s Proposed Fix*, 118 Harvard Jrnl On Racial & Ethnic Justice, VOL. 28, 2012

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## OLIPHANT V. SUQUAMISH INDIAN TRIBE

- ▶ 1978
  - Using selective history and ignoring history, Supreme Court said Tribes never have exercised such a power and don't have the power.
  - “. . ., Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.”

*OLIPHANT v. SUQUAMISH INDIAN TRIBE*, 435 U.S. 191 (1978)

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## VAWA 2013

- ▶ Criminal
  - The powers of a self-government of a participating Tribe include the **inherent power** of that Tribe, which is hereby **recognized and affirmed**, to exercise special domestic violence criminal jurisdiction over **all persons**. 25 USC 1304(b)(1)

Participating tribe - means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe. 25 USC 1304(a)(4)

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## DEFINITIONS

### ▶ Domestic violence

- Means violence committed by a:
  - current or former spouse or intimate partner of the victim,
  - person with whom the victim shares a child in common,
  - person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or
  - person similarly situated to a spouse of the victim under the domestic or family violence laws of the Indian tribe exercising jurisdiction.

- ▶ Must occur within the Indian country of the exercising Tribe.

25USC 1304(a)(2)

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## DEFINITIONS

### ▶ Spouse or Intimate Partner

- spouse or former spouse of the abuser,
- person who shares a child in common with the abuser,
- person who cohabits or has cohabited as a spouse with the abuser,
- person who is or has been in a social relationship of a romantic or intimate nature with the abuser.

18 USC 2266(7)

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## DEFINITIONS

### ▶ **Dating violence**

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
  
- Determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

25 USC 1304(a)(1)

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## DEFINITIONS

### ▶ **Protection order (for SDVCJ only)**

- Any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing:
  - violent or threatening acts or harassment against,
  - sexual violence against,
  - contact or communication with, or
  - physical proximity to, another person.

25 USC 1304(a)(5)

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## CONDUCT COVERED

- ▶ Must fall into one of two categories:
  - Domestic violence and dating violence, or
  - Violations of a protection orders

25 USC 1304(c)

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## VIOLATIONS OF PROTECTION ORDERS

- ▶ Violates the portion of a protection order that 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.
- ▶ Was issued against the defendant.
- ▶ Is enforceable by the participating tribe and occurs in their Indian country.

25 USC 1304(c)(2)

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## DUE PROCESS

- ▶ Issuing jurisdiction had:
  - Jurisdiction over the parties and subject matter
  - Defendant had reasonable notice and an opportunity to be heard that protects due process rights
  - Ex parte orders:
    - Notice and an opportunity to be heard must be provided within:
      - Time required by law of issuing jurisdiction
      - Reasonable time sufficient to protect due process

18 USC 2265(b)

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## RELATIONSHIP TO TRIBE

- ▶ Defendant must -
  - reside in the Indian country of the participating tribe;
  - be employed in the Indian country of the participating tribe; or
  - be a spouse, intimate partner, or dating partner of—
    - a member of the participating tribe; or
    - an Indian who resides in the Indian country of the participating tribe.

25 USC 1304(b)(4)(B)

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## RELATIONSHIP SCENARIO

1. Can you prosecute Cindy for the rape? For domestic violence? For violation of the protection order?
2. Does Cindy have the necessary relationship to the Tribe to be prosecuted?
3. Does it matter that Sylvia is not Cindy's spouse?
4. Prior to the rape, did Cindy and Sylvia have a dating relationship?
5. Does the rape make them intimate partners?
6. Does it matter that the Tribe does not recognize same-sex marriages?

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## WHO CAN BE A VICTIM

- ▶ For purposes of enforcing a protection order violation under SDVCJ:

“Victim” means a person specifically protected by a protection order that the defendant allegedly violated.

25 USC 1304(b)(4)(A)(ii)

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## VICTIM SCENARIO

### QUESTIONS:

1. Is Twila a victim?
2. The dog?
3. The children?
4. If the court had listed the children on the Protection Order, does that change your decision about the children being victims?

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## RIGHTS OF DEFENDANTS

- ▶ All rights under VAWA 2013
- ▶ If imprisonment is **possible**, all rights in section 25 USC 1302(c)
- ▶ Right to trial by impartial jury – drawn from sources that –
  - Reflect fair cross section of community
  - Does not systematically exclude and distinctive group in community including non-Indians
- ▶ All other right necessary under the Constitution in order for Congress to recognize and affirm this exercise of jurisdiction

25 USC 1304(d)

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## 25 USC 1302(c) RIGHTS

- ▶ 25 USC 1302(c): (for TLOA only if sentence of more than one year is **imposed**):
- ▶ Right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- ▶ Provide an indigent defendant, at the expense of the Tribe, the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

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## 1302(c) Cont'd

- ▶ Require that the judge presiding over the criminal proceeding—
  - Has sufficient legal training to preside over criminal proceedings; and
  - Is licensed to practice law by any jurisdiction in the United States;
- ▶ Prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
- ▶ Maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

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## What PO Violations Cannot Be Enforced Under SDVCJ?

- ▶ Support, visitation, and custody
- ▶ Other financial relief (rent, mortgage, insurance, gas, customary or traditional relief)
- ▶ Health care provisions
- ▶ This should not stop you from putting these types of relief into a PO against a non-Indian. It can still be enforced civilly.

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## Domestic Violence Crime v. PO Violation Jurisdiction

- ▶ Tribal members and non-member Indians – no difference.
- ▶ Non-Indians:
  - Sexual Assault – no under DV crime; yes under PO enforcement.
- ▶ If a threat of sexual assault, advise to get a PO.
- ▶ Court should explicitly state no acts of sexual assault (your statute can define this as including rape) in the PO.
- ▶ Can define several different sentences depending upon the seriousness of the violation – sexual assault could be 3 years; physical proximity could be 1 year – JUST EXAMPLES.

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## VAWA 2013

- ▶ Civil
  - “[A] court of an Indian Tribe shall have full civil jurisdiction to **issue and** enforce protection orders involving any person . . . .”

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## CIVIL PROTECTION ORDER

- ▶ Any injunction, restraining order or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical contact proximity to another person.
- ▶ **Any support, child custody or visitation provisions, orders, remedies or relief issues as part of a protection order.**
- ▶ NO INTIMATE PARTNER REQUIREMENT

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## FULL FAITH AND CREDIT

- ▶ Any protection order issued by the court of one Indian tribe, State, or Territory **shall be accorded full faith and credit** by the court of another Indian tribe, State, or Territory and enforced by the court and law enforcement personnel of the other Indian tribal government, State or Territory as if it were the order of the enforcing Indian tribe, State, or Territory.

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## EVERY jurisdiction *both* enforcing and issuing jurisdiction!

### ISSUING

- ▶ Issue orders that will be carried to other jurisdictions & require enforcement there
- ▶ Should issue clear orders to facilitate enforcement & protect residents when they go to other jurisdictions

### ENFORCING

- ▶ (Law Enforcement & Courts)
- ▶ Court determines whether order violated under law of issuing jurisdiction
- ▶ Court uses enforcing state process & punishment for violations

## Which Jurisdiction's Laws Apply?

### The **ISSUING** Jurisdiction Determines:

- ✓ whom the order protects
- ✓ terms and conditions of the order
- ✓ duration

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## Which Jurisdiction's Laws Apply?

### The **ENFORCING** Jurisdiction Determines:

- ✓ how order is enforced (e.g. whether it is contempt of court or crime)
- ✓ the arrest authority of responding law enforcement
- ✓ detention & notification procedures
- ✓ penalties & sanctions for violations

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## FF&C SCENARIO

### QUESTIONS:

1. Can Morongo enforce this order now that it is December 2014?
2. Can Morongo criminally enforce this order?
3. Based upon these facts, are there any federal crimes that Brutus may have committed?
4. Assume Mandy and Brutus have a 10 year old child. The Order only reads as above. If Brutus contacts the child, is it a violation for Tribal criminal prosecution purposes?

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## CRAFTING PROTECTION ORDERS

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## What Should The Order Include?

Safety orders should include:

- ▶ No violent acts
- ▶ No sexual assault
- ▶ No physical contact
- ▶ No threats
- ▶ Specific geographic limitations – locations and distance

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## Safety Cont'd

- ▶ No communication by way of direct contact, electronic contact, third party contact, social media
- ▶ No stalking or tracking
- ▶ No harassment
- ▶ No engaging in other conduct that would place a person reasonable fear of bodily injury

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## ORDER

- ▶ Custody, visitation, support;
- ▶ Pets;
- ▶ Firearms;
- ▶ Other financial relief (rent, mortgage payment, utilities, car payment, car and home insurance, etc.);
- ▶ Other relief allowed under statute including catch-all clauses.

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## ORDER

- ▶ A finding that the person subject to the order represents a credible threat to the physical safety of the protected party, **or**
- ▶ An explicit prohibition against the use, attempted use, or threatened use of physical force against the protected party which would reasonably be expected to cause bodily injury.

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## Order

- ▶ The full names of the victim and respondent and their relationship, if available.
- ▶ A numeric identifier for the respondent (date of birth, Social Security number, driver's license number, or VIN number) to facilitate entry into the Protection Order File of the National Crime Information Center (NCIC POF).
- ▶ Language demonstrating compliance VAWA Full Faith and Credit provisions.
- ▶ VAWA-mandated notification to the respondent that federal firearms prohibitions may apply

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## How Should it Read?

- ▶ Be specific and clear.
- ▶ Think as if there are three main reasons for the P.O.
  - 1) Safety of the victims, children, property and pets.
  - 2) Accountability of the perpetrator.
  - 3) To be enforced in case of a violation. Is it specific and clear enough to be enforced as you meant it to be? How will it look to an enforcing court?
- ▶ Don't just say "no contact."
- ▶ Make it clear on page 1 that you have jurisdiction, have given notice and an opportunity to be heard (or will shortly).

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## How Should it Read?

- ▶ “The court has subject matter jurisdiction under Tribal code AA.aa and 25 USC 2265(e).”
- ▶ “The court has personal jurisdiction based upon the following facts: .”
- ▶ “Respondent has been served with proof of service in the file (or, will be served within a reasonable time).
- ▶ Respondent will be given an opportunity to be heard at a hearing set for December 15 (or, was present at the hearing on December 8, or, was not present after having been served with proof of service in the file for the hearing on December 8).

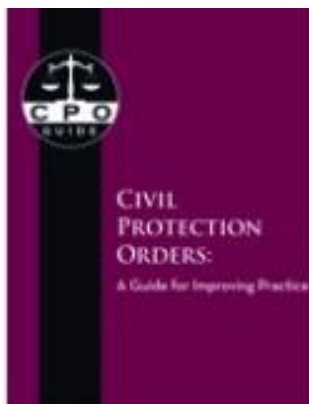
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## Passport to Safety



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## Civil Protection Orders: A Guide for Improving Practice



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## Contact Information

- ▶ Steve Aycock
  - 775-784-4463
  - [steven\\_aycock@ncjfcj.org](mailto:steven_aycock@ncjfcj.org)
  - Contact for training or technical assistance on Protection Orders, Full Faith and Credit or Firearms.
  
- ▶ Victoria Sweet
  - 775-784-6257
  - [vsweet@ncjfcj.org](mailto:vsweet@ncjfcj.org)
  - Contact for
  
- ▶ NCJFCJ
  - [www.ncjfcj.org](http://www.ncjfcj.org) (go to Resource Library, then Publications, then Domestic Violence)

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