

CHAPTER 13

DOMESTIC VIOLENCE AND TRIBAL COURTS¹

I. INTRODUCTION

In recent years, there has been improvement in enforcement of domestic violence protection orders across tribal and state jurisdictions. Strong communication and relationships between state and tribal jurisdictions, including courts and service providers, result in better outcomes.

However, for many judges, contact with tribal people, tribal courts, or tribal court-issued protection orders may be rare—or at least not something of which they are often aware. This chapter is designed to provide general information about Native American communities, tribal courts in Washington, and the role of state courts in enforcing tribal court protection orders.

“It is critical to have state law enforcement and courts enforce our court orders.”

Chief Judge Mark Pouley, Swinomish Tribal Court

II. NATIVE AMERICAN COMMUNITIES IN WASHINGTON STATE

There are twenty-nine federally recognized Indian tribes located in Washington State.² Each tribe is a sovereign entity with a governing body that is responsible for the administration of justice, promulgation of laws, and law enforcement for the tribe. Each

¹ This Chapter was updated in 2022 and based on the 2014 version written by Randy Doucet, Chief Judge of the Lummi Nation Tribal Court, and Mark Pouley, Chief Judge of the Swinomish Tribal Court with input from Tom Tremaine, Presiding Judge at the Kalispel Tribal Court. The 2021-2022 update relied on interviews with Dee Koester, M.S, Founder and First Executive Director of Washington State WomenSpirit Coalition; Jennifer Yogi, Northwest Justice Project, Native American Unit; Randy Doucet, Chief Judge of the Lummi Nation Tribal Court; Josh Williams, Judge at the Sauk-Suiattle Tribal Court; Mark Pouley, Chief Judge at the Swinomish Tribal Court; Justice Barbara Madsen, Washington Supreme Court; Justice Susan Owens, Washington Supreme Court; Annie Forsman-Adams (Suquamish), Policy Analyst MMIWP Task Force, Office of the Attorney General; Cindy Smith, Chief Judge for Suquamish Tribal Court and judge for Hoh Tribal Court; and James Lovell, Development Director, Chief Seattle Club. The amendments and interviews for this edition were compiled by Sophie Asher, JD, mclaw. The original chapter, written in 2001, was completed with input from a Reviewing Committee consisting of former Chief Judge Mary Wynne, Colville Federated Tribes; Judge Julian Pinkham, Children’s Court of the Yakama Nation; Commissioner Katherine Eldemar, Whatcom County Superior Court; Justice Susan Owens, Washington Supreme Court; Dan Kamkoff, Director of the Lummi Victims of Crime; Dr. Anne Ganley, Domestic Violence Expert; Gloria Hemmen, Office of the Administrator for the Courts; and Margaret Fisher, Project Director, Office of the Administrator for the Courts, and updated in 2005 by Randy Doucet.

² See <https://goia.wa.gov/tribal-directory/federally-recognized-indian-tribes-washington-state>.

of these tribal communities varies in geographic size, economic resources, language, customs and traditions, population, and natural resources.

The term *Indian tribe* is defined at various places in the United States Code. In 25 U.S.C. § 1301, the Chapter addressing the constitutional rights of Indians, Congress defined the term as “any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government; ‘powers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”

“Tribes are not a monolithic entity. Every tribe is unique. They each have their own culture and traditions. Every tribe has its own laws. They each have different resources and capabilities.”

Chief Judge Cindy Smith, Suquamish Tribal Court, Judge
Hoh Tribal Court

In 2020, the U.S. Census Bureau counted an increase of 86.5% of people who identify partially or fully as Native American, from 5.2 million people in 2010 to 9.7 in 2020.³ In 2010, the U.S. Census Bureau counted over half of Native Americans and Alaska Natives as living in ten states.⁴ Washington State ranked ninth with a population of 103,869 Native Americans and Alaska Natives.⁵ In 2018, it was reported that Washington State had a population of 226,099, or 3% of the population, who identified as American Indian or Alaska Native.⁶

Urban Indians are defined as tribal members currently living in U.S. cities, outside of federally defined tribal lands.⁷ They may have moved to urban areas by choice, perhaps for jobs, education, or housing opportunities, but many Urban Indians have long lived in

³ N. Jones. *2020 Census Results on Race and Ethnicity* (U.S. Census Bureau, 2020) (Powerpoint Presentation), available at <https://www.census.gov/content/dam/Census/newsroom/press-kits/2021/redistricting/20210812-presentation-redistricting-jones.pdf>.

⁴ T. Norris, P. Vines, & E. Hoeffel, *The American Indian and Alaska Native Population: 2010* (Washington, DC: U.S. Census Bureau, January 2012) (Census 2010 Brief), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

⁵ *Id.*

⁶ *Native Americans and the US Census: How the count has changed*, USA Facts, (Nov. 21, 2019, updated Jan 20, 2020), <https://usafacts.org/articles/native-americans-and-us-census-how-count-has-changed/>.

⁷ Urban Indian Health Institute, Seattle Indian Health Board (2021) Seattle Urban Indian Health Program: Community Healthy Profile & Individual Site Report. Seattle, WA; Urban Indian Health Institute, available at <https://www.uihi.org/uihp-profiles/seattle/>.

metropolitan areas due to mandated relocation by the United States government, primarily in the 1950s when a policy of busing Native people or disbanding reservations forced many people to cities. In a 2021 report, data showed that 71% of American Indians and Alaska Natives lived in or near cities. Further, in the past thirty years, more than 1 million American Indians and Alaska Natives have moved to metropolitan areas. Finally, per the 2021 report, approximately 45,661 (2.2%) people in the Seattle area identified themselves as American Indian or Alaska Native.

The number of tribally enrolled people who live in urban areas often surprises people. Many people hold a vision of Native people on reservations, apart from city life. Indeed, the majority of federal resources available to Native people are available only on tribal lands. Many Native people frequently travel between urban areas and Indian lands to access these resources, and to visit family and attend religious or cultural events. However, many of the Indigenous people who live in Washington’s urban areas are not citizens of a tribe of Washington State, but rather, come from other states to make Seattle, Tacoma, or another urban area their home.⁸ Moreover, most people are unaware that a large part of Tacoma is within the Puyallup Reservation, and the Muckleshoot Reservation significantly overlaps with Auburn, creating rare areas of urban Indian Country. Finally, many significant cultural sites are within urban areas and may be visited for cultural practices. For these reasons, judges may expect to see cases that cross jurisdictional boundaries. Developing relationships with tribal court counterparts will allow courts to better support the families that exist in both worlds.

“Assume you will have Indigenous folks in your courtroom.”

Annie Forsman-Adams (Suquamish), Policy Analyst MMIWP Task Force, Office of the Attorney General

A. Tribal Governments

Generally, modern tribal governments are structured in such a way that the voting membership of each tribe, sometimes known as the general council, elects a tribal council or business committee that represents the interests of the tribe. Depending on tribal law, the tribal council may elect from among its membership an executive committee, which often consists of a chairperson, vice-chairperson, secretary, and treasurer. The powers of each elected tribal representative, including any executive committee, tribal council and general council, are matters of tribal law and are usually different between tribes. Moreover, some tribes retain attributes of traditional governance.

⁸Interview with James Lovell, Development Director, Chief Seattle Club (Dec. 9, 2021).

An example of a tribe that has combined traditional and modern organizational practices in governing is the Yakama Nation located in Toppenish, Washington. The Yakama government is divided into three levels, each with its own functions. The tribal council establishes policy and preserves treaty rights. The administrative level supervises the administration and planning of the government. The operations level directs programs designed to meet the needs of the community. Finally, the general council oversees the entire government structure through regular meetings.

B. Tribal Law

Tribal governments have the authority to adopt laws to govern activity within the jurisdiction of the tribe. This authority includes establishing legal structures and judicial forums for administration of justice. Tribes exercise personal jurisdiction over member and non-member Indians, as well as non-Indians under certain circumstances. Tribes may exercise subject matter jurisdiction over areas such as criminal, juvenile, and civil actions.

It is not uncommon for tribes to adopt legal codes from other tribes and jurisdictions. Some tribes hire legal professionals as code writers to assist in drafting codes that better suit the particular needs and circumstances of each tribal community. Each tribe may have different areas of law over which it exercises jurisdiction. However, most tribes have adopted codes for criminal and civil actions, as well as criminal and civil procedure. In addition, tribes have codes for enrollment, elections, natural resources protection, juvenile delinquency and dependency actions, and domestic relations. Some tribes may allow for the use of federal law, state law, common law, or traditional law when there are gaps in their own tribal codes. In complex cases, some tribal courts may allow parties to stipulate to the use of state or federal rules of evidence or civil procedure.

Usually, tribal criminal laws are similar to criminal laws adopted by the state, although there may be differences in the penalties due to the limitations placed on tribes by the Indian Civil Rights Act. In criminal matters tribes tend to place an emphasis on rehabilitation over punishment. Tribal court procedures tend to be streamlined to provide easy access to justice for *pro se* litigants. Finally, parties are encouraged to resolve civil disputes in a non-adversarial manner whenever possible.

The majority of tribes have constitutions, which establish the basic framework of the tribal government. In some instances, the constitutions contain the provisions for membership in the tribe. The Indian Civil Rights Act provides civil rights protections for tribal citizens. Sometimes tribes incorporate civil rights into their tribal constitutions or tribal codes.⁹ For instance, the Confederated Tribes of the Colville Reservation located in Nespelem, Washington have their own civil rights code.

⁹ The Indian Civil Rights Act of 1968 is available at: <https://www.law.cornell.edu/uscode/text/25/1302>.

C. Tribal Courts

Currently there are twenty-eight tribal courts serving the twenty-nine federally recognized tribes in Washington State.¹⁰ Tribal judges are generally appointed to serve a specific term, although some tribes elect tribal judges.¹¹ Although most tribal judges are attorneys, some tribes allow for non-lawyers to serve as judges. There are tribal judges who speak both their tribal language and English. Not all tribes require tribal judges to be members of the tribe, although there is a preference to have tribal members or Native Americans from other tribes serve as judges. Some tribes have standing trial courts, while others convene trial courts as necessary. Some judges work for multiple tribal courts.

Appeals from tribal trial courts are brought before each tribe's own appellate court. Similar to some lower court structures, some tribes have standing appellate courts, or convene appellate courts as necessary. Some tribes contract with the Northwest Intertribal Court System for their appellate court.¹² Appellate panels might be made up of appointed appellate judges, or tribal judges from other tribes, or in some cases tribes may appoint attorneys familiar with Indian law to serve as appellate judges.

For criminal matters, most tribes employ both prosecutors and public defenders. A 2014 study reported almost 90 percent of tribal courts nationally had a prosecutor, while 61 percent had a public defender.¹³ However, smaller court systems may have neither, because of insufficient funding. Legal representation may be provided by attorneys licensed in Washington, or persons familiar with the laws, customs, and traditions of the tribe.

Tribal courts use court procedures similar to those found in state and federal courts. Tribal courts do have limitations on their authority over certain acts and persons based on United States Supreme Court decisions and by federal law. Tribal courts handle a variety of cases ranging from civil infractions, domestic relations, natural resource violations, dependency and juvenile delinquency actions, criminal, and general civil litigation. There is not a separation between levels of trial courts as found in the state judicial system, such as the district and superior courts. However, some tribes have established separate juvenile and administrative courts.

¹⁰ Washington State Tribal Directory, Governor's Office of Indian Affairs, available at: <https://goia.wa.gov/tribal-directory>.

¹¹ The Lummi Nation Code of Laws, 1.03.020, provides for a six (6) year appointment for each judge by the Tribal Council.

¹² The Northwest Intertribal Court System (NICS) is a consortium of Native American Indian Tribes in the Pacific Northwest region of the United States. Each tribe has its own independent court and codes. NICS provides trial and appellate judges, assistance with code development, training and technical assistance. NICS was founded in July of 1979 and incorporated on March 11, 1980.

¹³ U.S. Dept of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Tribal Courts in the United States, 2014 – Statistical Tables* (2014, republished 2021).

Few tribes have their own jails or juvenile detention facilities. Therefore, many tribes contract to use local county jail facilities, or they contract with other tribes that have jail facilities.

D. Tribal Resources

Tribal communities have historically faced, and continue to face, disparities of the basic necessities of daily life, and this can have impacts on their access to the courts. For instance, as our society relies more heavily on internet usage to attend court, access court forms, and call for help, it should be noted that 2019 data from the Federal Communications Commission (FCC) “shows that over 99% of housing units in U.S. urban areas have access to broadband service, but only 65% of housing units on rural AI/AN lands have the same level of access.”¹⁴ Further, few tribes have public transportation systems and many tribal people do not have reliable transportation. The distances tribal people travel to get to court can also be significant. In one Washington community, stakeholders report that the nearest state court is almost two and half hours away from the reservation, the nearest grocery store is half an hour away, and all treatment options are at least half an hour away. While these problems affect many underserved and rural communities, tribal people face these issues in addition to the jurisdictional gaps highlighted in this chapter.

III. DOMESTIC VIOLENCE IN TRIBAL COMMUNITIES

A. Victims in Tribal Communities

For an overall presentation of domestic violence issues, see Chapter 2, *Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases*, of this manual.

According to the National Intimate Partner and Sexual Violence Survey (NISVS), four out of every ten American Indian or Alaska Native women (43.7%, and 46% respectively) have been the victim of rape, physical violence, and/or stalking by an intimate partner in their lifetime. In addition, nearly half of American Indian or Alaska Native men report experiencing rape, physical violence and/or stalking by an intimate partner during their lifetime.¹⁵

A similar study showed comparative rates of intimate partner violence amongst ethnicities. According to the U.S. Centers for Disease Control, 39 percent of

¹⁴ U.S. Dept. of the Interior, Bureau of Indian Affairs, Office of Indian Economic Development, *Expanding Broadband* (2021).

¹⁵ Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J. & Stevens, M.R. (2011). *The National Intimate Partners and Sexual Violence Survey. (NISVS): 2010 Summary Report*, Atlanta, GA. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

American Indian and Alaska Native women will be subjected to violence by an intimate partner in their lifetimes, compared to 29 percent of African American women, 27 percent of White women, 21 percent of Hispanic women, and 10 percent of Asian women.¹⁶

Following statutory directive in section 904 of the 2005 Violence Against Women Reauthorization Act of 2005, Pub.L. No.109-162, 119 Stat. 2960 January 5, 2006, the U.S. Department of Justice, National Institute of Justice (NIJ), commissioned a study and report on the literature and research on violence against American Indian and Alaska Native Women, which was issued in August of 2008.¹⁷

The report noted, that in addition to legal barriers that may impede American Indian and Alaska Native victims from obtaining assistance from the legal system to address domestic violence, there are numerous other barriers victims face in obtaining safety. Some American Indian and Alaska Native reservations are physically isolated, posing a significant geographical barrier to victims residing on these reservations from obtaining many services that may be available to urban women. Many victims do not have the financial resources to leave the reservation and reestablish a household in another community to leave a domestic violence situation. In addition, due to limited tribal government resources, there is often a lack of “safe houses” or shelters on reservations, as well as other victim services.

In some of these communities, transportation and telephone services are difficult to access. American Indian and Alaska Native women who reside on very rural and isolated reservations must often travel great distances to obtain medical care.¹⁸

Native American victims may be reluctant to seek assistance from tribal victim service agencies because of confidentiality concerns about their victimization being shared through the community. Even in urban communities, these fears are often shared, where a local urban American Indian and Alaska Native community may be similar in closeness to a rural village.

Many Native American victims are also reluctant to access non-Native sources of support and help.¹⁹ To help overcome the reluctance of Native American victims to seek assistance, some reservations have implemented accessible on-reservation

¹⁶ “Adverse health conditions and health risk behaviors associated with intimate partner violence -- United States, 2005,” *Morbidity and Mortality Weekly Report (MMWR)* 57(05): 113-117, Centers for Disease Control and Prevention. February 8, 2008, *available at* www.cdc.gov/mmwr/preview/mmwrhtml/mm5705a1.htm#tab1.

¹⁷ Bachman, R., Zaykowski, H., Kallmyer, R., Poteyeva, M. & Lanier, C., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* (National Institute of Justice, August 2008), Doc. 223691 [hereinafter NIJ Report], *available at* www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

¹⁸ *Id.* at 114.

¹⁹ *Id.* at 115.

assistance programs that have increased culturally relevant advocacy resources for victims.^{20 21}

B. Domestic Violence Perpetrators in Tribal Communities

In the criminal context, the 2022 Violence Against Women Act (VAWA) Reauthorization Act expands the jurisdiction of tribal authorities in “participating tribes”²² over non-Indians who commit a certain “covered crimes” in Indian country.²³ Covered crimes include: assault of tribal justice personnel, child violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violations of protection orders.²⁴

Pursuant to RCW 10.92.020(1), tribal police officers are recognized and authorized to act as general authority Washington peace officers, and have the same powers as any other general authority Washington peace officer to enforce state laws in Washington, including the power to make arrests for violations of state laws if they meet the requirements of RCW 10.92.020(2). If there is no general authority, tribal law enforcement does have the authority to stop and detain non-Indians for state authorities.²⁵

VAWA also recognizes tribes’ authority to issue and enforce civil protection orders against any person that commits acts of violence in the territory of the tribe. Among Native American women who are victims of rape and assault, an average of 63% describe the offender as non-Native.²⁶

C. Missing and Murdered Indigenous Women and Girls (MMIWG)²⁷

In the past decade, significant steps have been taken by grassroots activists and tribal, state, and federal leaders to address the epidemic of unsolved cases of missing and murdered Indigenous women and girls. Per a 2018 report by the Urban Indian Health Institute,²⁸ 5,712 cases of Missing or Murdered Indigenous

²⁰ *Id.* at 126-127.

²¹ For a list of on and off Reservation culturally relevant resources, please see Attachment 1 to this chapter.

²² “The term ‘participating tribe’ means an Indian tribe that is designated under section 813(d)(1) as a participating tribe to exercise special Tribal criminal jurisdiction.” Section 812(3) of the Violence Against Women Act Reauthorization Act of 2022, S. 3623, 117th Cong.

²³ Section 804 of the

²⁴ *Id.*

²⁵ *State v. Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931 (1993), and *United States v. Cooley*, 593 U.S. ___, 141 S. Ct. 1638 (2021). In some jurisdictions tribal police officers are cross-deputized and can make an arrest utilizing their state authority.

²⁶ *See supra* note 14.

²⁷ In some instances of use, “Men,” “Boys,” “People,” or “Relatives,” and others, may be included in the acronym. Interview with Annie Forsman-Adams (Suquamish), Policy Analyst MMIWP Task Force, Office of the Attorney General (Dec. 10, 2021).

²⁸ Annita Lucchesi (Southern Cheyenne) & Abigail Echo-Hawk (Pawnee), *Missing and Murdered Indigenous Women & Girls: A Snapshot of data from 71 urban cities in the United States*, Urban Indian

Women and Girls on and off tribal lands were reported in 2016. Murder is the third leading cause of death amongst American Indian and Alaska Native Women. Sixty-six out of 506 MMIWG cases out of urban areas have so far been tied to domestic and sexual violence; but many are as yet undetermined. Nationally, Seattle is the urban area with the highest number of MMIWG cases at 45. Tacoma has 25. The total for Washington is 71. These numbers are presumed to be significantly undercounted.

There are multiple reasons why there is such a high number of unsolved cases, and so little data on the trends within the cases. First, like many minority communities, there have only recently been efforts at all levels of government to dedicate and coordinate resources to this issue. Second, unlike all other communities, Native people face the jurisdictional maze that makes reporting someone missing or murdered difficult to record across multiple law enforcement agencies. For instance, a Native person may be reported to their tribe's jurisdiction, but it may not get reported to a state system, and the person missing may be physically outside of their tribe's jurisdiction. Finally, when missing or murdered victims are found, many Native people are incorrectly identified as some other ethnicity, or there may be data entry issues where one jurisdiction records Native American one way, and another uses a different system.²⁹

In October 2020, the Not Invisible Act of 2020 was signed into law.³⁰ This law created an advisory board in the Interior Department to track MMIWG cases. Also, in October 2020, Savanna's Act directed the Department of Justice to develop law enforcement protocols to address missing or murdered Native Americans.³¹ In May 2021, the Washington State Attorney General formed a task force to investigate the MMIWG cases in the State and provide recommendations to address them.³² Many investigative efforts are currently undertaken by tribes, families, and Indigenous organizations to cover the gap in services.

Those who practice domestic violence law know the strong correlations between domestic violence and murder of victims. Seeking a protection order is one of the most common ways victims seek help from the legal system. Registering tribal protection orders when victims appear in court, accurately recording the people involved, coordinating with the other courts involved, and ensuring the orders are enforced are all ways to weave one more layer of safety into a person's life.

PRACTICE NOTE: Invite your local tribal court judges and practitioners to workgroups on domestic violence practice.

Health Institute, (2018), *available at* <https://www.uihi.org/resources/missing-and-murdered-indigenous-women-girls/>.

²⁹ *See supra* note 26.

³⁰ Pub. L. No. 116-166, 134 Stat. 766 (Oct. 10, 2020).

³¹ Pub. L. No. 116-165, 134 Stat. 760 (Oct. 10, 2020).

³² Press Release, Wash. Att'y Gen., Attorney General's Office to coordinate task force on Missing, Murdered Indigenous Women (May 5, 2021) *available at* <https://www.atg.wa.gov/news/news-releases/attorney-general-s-office-coordinate-task-force-missing-murdered-indigenous-women>.

IV. TRIBAL DOMESTIC VIOLENCE LAWS AND TRIBAL PROTECTION ORDERS

“Registration of tribal protection orders by state courts is paramount. Those workarounds save lives.”

Annie Forsman-Adams (Suquamish), Policy Analyst MMIWP Task Force, Office of the Attorney General

A. Tribal Domestic Violence Laws

Some tribes have adopted specific domestic violence codes. There is no uniform tribal domestic code; therefore, tribes that have adopted domestic violence codes may have differing provisions, differing procedures, legal standards, and remedies. Many tribal codes are now available online. If tribal laws cannot be found online, copies can usually be obtained by contacting the tribal court clerk’s office.

B. Tribal Court Protection Orders

Not all Indian tribal domestic violence protection orders are issued pursuant to each tribe’s domestic violence laws. Generally, domestic violence protection orders may be issued pursuant to tribal civil domestic violence codes, while other tribes rely on general criminal or civil statutes to address the issue.

For example, the Lummi Nation, located near Bellingham, has an extensive domestic violence code, which was revised in 2005. Protection order cases begin with an *ex parte* temporary domestic violence protection order. Prior to issuance of an *ex parte* domestic violence protection order, the petitioner is required to provide sworn testimony as to the specific facts of the alleged domestic violence incident and the necessity for immediate issuance of a protection order without notice to the respondent. If the judge determines that an emergency does exist, a temporary order of protection may be issued that same day. Typically, within 14 days after issuance of the temporary *ex parte* protection order, the court will hold a hearing with both parties present.

The temporary *ex parte* order usually expires on the day set for the hearing. After a hearing, if supported by the facts and law, the Lummi Tribal Court will issue a “permanent” domestic violence protection order. Although titled “permanent,” these orders usually expire one year after issuance and can be renewed by the court if warranted.

The Lummi Nation domestic violence code requires that tribal law enforcement provide for the safety of victims and family members by arresting the primary physical aggressor and by confiscating any weapons that may have been used to perpetrate domestic violence. The code provides that the tribal police are to assist the victim to obtain transportation to a shelter or medical facility. Finally, tribal police are to provide the victim with notice of the rights of the victim and remedies and services available. Examples of similar provisions for advising victims of their rights and providing transportation can be found in the Spokane Tribal Code, Puyallup Tribal Code, and Quinault Tribal Code.

Common relief provisions authorized in tribal court domestic violence protection orders include:

- Restraining the perpetrator from committing further acts of domestic violence, family violence, dating violence, or stalking.
- Excluding the respondent from the residence, workplace, school, and grounds of the dwelling of the petitioner.
- Awarding temporary custody and/or establishing temporary visitation rights, or restraining the respondent from interfering with child custody or removing a child from the jurisdiction of the court.
- Awarding temporary use of a shared residence or vehicle.
- Restraining one or both parties from transferring, encumbering, concealing, or disposing of property.

PRACTICE NOTE: Be aware tribal court protection orders might be entered into the National Crime Information Center (NCIC) and/or state criminal database systems such as WACIC.³³

V. ENFORCEMENT OF PROTECTION ORDERS

The following scenarios illustrate some of the difficulties that victims have encountered historically and may continue to face when trying to have protection orders enforced across tribal and state jurisdictions

- A tribal court issues a protection order to a Native American victim against her Native American ex-boyfriend. She travels off the reservation to a local shopping center. Upon returning to her car she notices a note placed under her windshield wiper. When she looks around to see who might have left the note, she sees her ex-boyfriend sitting in a car watching her. She immediately calls the local police. A city police officer

³³ Washington Crime Information Center

arrives, reviews the protection order, and attempts to access it in a state database. However, the officer cannot find the order and informs the victim that if it is not registered, it cannot be enforced. *Under federal and state full-faith and credit, registration of the order is not required.*

- A Native American woman obtains a tribal court protection order with a visitation schedule. Later, she files to modify the visitation in state court but the state court judge does not know a visitation schedule was contained in a protection order and does not ask if there are any other orders related to the case. The woman does not realize that she needs to bring up the tribal court order. The state court judge orders a visitation schedule in conflict with the tribal court order's visitation schedule, and the family and police are not sure which order to follow.
- A Native American man files for a protection order in his tribe's court, and his abuser files a competing order in state court. The police do not know which order controls and do not enforce either.
- A tribal court has dismissed a protection order because the parties have reconciled. However, the order had been registered in state court, and that order remains in place.

The continuation of any of these issues should be of mutual concern to both tribal and state officials. Jurisdictional issues on reservations are complex. Determining who has jurisdiction often depends on location of the incident, type of crime, whether the protection order is civil or criminal, and whether the offender is Native American or non-Native American.

The jurisdictional maze that is found on many reservations often prevents effective law enforcement. In emergency situations, there is little time to work through complex jurisdictional issues. Further, because of a lack of effective communication, procedures, and agreements between tribal and state or local governments, there are instances when authorities who have jurisdiction may not be the nearest law enforcement agency, while closer law enforcement agencies may not be called to respond because they lack jurisdiction. Historically, some tribal judges felt compelled to recommend that tribal members also obtain a protection order in state court, to avoid the possibility that the tribal protection order may not be enforced outside the boundaries of the reservation, especially if the batterer is a non-Indian. Changes in state and federal law do not require obtaining a second protection order and this alleviates the need to direct victims of violence to take these extraordinary steps, but it will require continued development of the law, and education of law enforcement, the courts, and the public to the expanded authority of tribal courts to protect the citizens of tribal communities.

What follows is an overview of federal and state laws, opinions, projects, and rules that aim to address enforcement issues, as well as flagging potential enforcement issues.

A. Violence Against Women Act (VAWA)

The Violence Against Women Act (VAWA),³⁴ which was reauthorized and expanded in 2000, 2005, 2013, and 2022,³⁵ has increased protections for native victims in civil protection order proceedings. Codified at 18 U.S.C. 2265, VAWA directs that states, U.S. territories, and Indian tribes enforce valid civil and criminal protection orders issued by sister states, territories, and tribes as though they had been issued by the non-issuing, enforcing state or tribal court. VAWA does not require prior registration or pre-certification of an order of protection in an enforcing state in order to receive full faith and credit. The only requirement for interstate or inter-jurisdictional enforcement of a protection order is that the foreign order be valid as defined by VAWA.³⁶

The rationale is simple: Victims who receive protection from any court, tribal or state, are entitled to protection throughout the United States and Indian country.³⁷ Whether a victim of domestic violence is crossing state or reservation lines for business, pleasure, or fleeing from her batterer, she is entitled to the protections afforded by the original state or tribal protective order.³⁸

The 2013 reauthorization of VAWA recognized tribes' inherent authority to issue orders of protection against any person that commits acts of violence within that tribe's Indian land jurisdiction. Under 18 U.S.C. §2265 (e):

(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

³⁴ Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub.L. No.103-322, 108 Stat. 1902 (September 13, 1994), reauthorized in 2000 in Division B of the Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, Pub.L. No. 106-386, 114 Stat. 1491, (October 28, 2000), in 2005, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R.3402, Pub.L. No. 109-162, 119 Stat. 2960 (Jan.5, 2006), and again in the Violence Against Women Reauthorization Act of 2013, Pub.L. No. 119-4, 127 Stat. 54 (March 7, 2013).

³⁵ "At the end of FY2018, authorizations for appropriations for all VAWA programs expired; however, all VAWA programs funded in the last year of authorization (FY2018) have continued to receive funding each year since." Emily J. Hanson & Lisa N. Sacco, *The Violence Against Women Act (VAWA) Reauthorized: Issues for Congress* 1, R46742 (2021).

³⁶ 18 U.S.C.A. § 2265, available at <https://www.law.cornell.edu/uscode/text/18/2265>.

³⁷ Byron R. Johnson and Neil S. Websdale, eds., *Full Faith and Credit: Passport to Safety* (Reno, NV: National Council of Juvenile and Family Court Judges, 1997), 88.

³⁸ *Id.*

Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

In addition, this statutory amendment addresses potentially ambiguous language found in the 2000 amendments of VAWA, and overturns a holding in the Federal District Court of Western Washington that appeared to limit tribal court jurisdiction to protect victims of violence that occurs in Indian Country.³⁹ Washington adopted a statute that addresses the enforcement of foreign (out-of-state) protection orders in 1999.⁴⁰

B. Foreign Protection Order Full Faith and Credit Act—Washington State

Washington’s Foreign Protection Order Full Faith and Credit Act removes barriers faced by persons entitled to protection under foreign protection orders by clarifying the duties and responsibilities of state agents.⁴¹ The act also provides for criminal prosecution of violators of foreign protection orders.

The act provides that protection orders issued by tribal courts are to be given full faith and credit by Washington courts. The act defines foreign protection orders as injunctions or other orders related to domestic or family violence, harassment, sexual abuse, or stalking, for the purpose of preventing violent or threatening acts or harassment against another person issued by a court of another state, territory, or possession of the United States, Puerto Rico, or the District of Columbia, or any United States military tribunal, or a tribal court, in a civil or criminal action.

To be enforced, a foreign protection order must be valid. The act prescribes that a foreign order is valid if it meets the following criteria:⁴²

- If the issuing court had jurisdiction over the parties and subject matter under the law of the state, territory, possession, tribe, or U.S. military tribunal.
- There is a presumption in favor of validity where an order appears authentic on its face.

³⁹ Subsection (e) merely “confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians.” *Statement of Thomas J. Perrelli, Assoc. Attorney General Before the Committee on Indian Affairs, United States Senate Legislative Hearing on Senate Bills 872, 1192, and 1763*, page4, November 10, 2011. *See also*, Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, American Constitution Society for Law and Policy (March 2009). This affirmation of prior Congressional intent “would effectively reverse a 2008 decision from a Federal district court in Washington state”, in reference to the UNREPORTED decision in *Martinez v. Martinez*, No. C09-5503 FDB (W.D. Wash 2008), *Perrelli testimony at p. 4*.

⁴⁰ Laws of 1999, ch. 184, §1.

⁴¹ The act amended RCW 26.10.220, 26.26.138, 26.50.010, and 10.31.100, adding a new chapter to RCW Title 26.

⁴² RCW 26.52.020.

- A person under restraint must be given reasonable notice and the opportunity to be heard before the order of the foreign state, territory, possession, tribe, or United States military tribunal was issued; provided, in the case of *ex parte* orders, notice and opportunity to be heard was given as soon as possible after the order was issued, consistent with due process.

Division III of the Washington Court of Appeals has upheld a criminal prosecution by the State of Washington for a violation of a tribal protection order. *State v. Esquivel*, 132 Wash. App. 316, 132 P.3d 751 (2006). The Court of Appeals held that a defendant could be prosecuted by the State for violating a restraining order issued by a tribal court, if the order was entered consistent with tribal law, even if it was inconsistent with Washington State protection order requirements.

RCW 26.52.050 provides for peace officer immunity. “A peace officer or a peace officer’s legal advisor may not be held criminally or civilly liable for making an arrest under this chapter if the peace officer or the peace officer’s legal advisor acted in good faith and without malice.”

RCW 26.52.030 provides that out-of-state courts may send a facsimile or electronic transmission to the clerk of the state court as long as it contains a facsimile or digital signature by any person authorized to make such transmission. Because some tribal courts are located at great distances from county superior courts, procedures for registration of foreign protection orders should include a provision for filing of a faxed copy or e-mail of the original protection order from tribal courts. These provisions will prevent delays due to transportation problems or inclement weather.

C. Washington State Office of the Attorney General’s clarification of Full Faith and Credit⁴³

In 2018, the Washington State Office of the Attorney General issued a letter opinion in response to two questions (below) from Justices Madsen and Owens of the Washington Supreme Court. The brief answers to these questions, also provided below, emphasize that while there might be confusion over what powers or obligations state courts and law enforcement have with tribal court orders, the State absolutely has a duty to enforce tribal court orders and they do not need to be registered to be enforced:

- Does Washington have an obligation to enforce protection orders issued by the courts of other states or by Indian Tribal Courts?

⁴³ Letter from the Washington State Office of the Attorney General’s Office to Justice Barbara Madsen and Justice Susan Owens of the Wa. Supreme Court (Aug. 28, 2018), AGO 2018 No. 5, available at: <https://www.atg.wa.gov/ago-opinions/state-obligation-enforce-protection-orders-issued-courts-other-states-or-tribal-courts>

Yes. Federal law, 18 U.S.C. § 2265, requires that any protection order issued by the court of a state or Indian tribe be accorded full faith and credit and enforced by the court of another state or Indian tribe, if the protection order is consistent with 18 U.S.C. § 2265(b). The Washington Foreign Protection Order Full Faith and Credit Act, RCW 26.52, implements this requirement in Washington.

- If Washington State has such an obligation, is registration of a protection order in a Washington state court prerequisite to enforcement?

No. Under 18 U.S.C. § 2265(d)(2), a protection order issued by a state or Indian tribe must be accorded full faith and credit regardless of whether it is registered or filed in the court of the enforcing state or Indian tribe. Washington law permits protection orders to be filed without cost, but filing is not a prerequisite to enforcement. RCW 26.52.030.

D. Information-Sharing Between State and Tribal Courts About Protection Orders

Even if the law is clear, the reality is that tribal court protection orders face a major hurdle: unless a tribal protection order is entered into the state Judicial Information System (JIS), a state court judge will not be aware of the tribal order. There is no uniform way to register or access tribal court orders by state officers or courts. Few tribes have registries that are searchable on the internet or available after hours. Many tribes do not have access to federal registration systems. Some tribal court judges or advocates suggest that parties register a protective order with a state court after receiving it from a tribe, but this is inconsistently applied and an extra burden on tribal members. Some tribal and state courts work together, so when a tribal court order is issued, the tribal court clerk will contact a neighboring state court who will register the order in the state system. While this works for many communities, it is another additional step for tribal communities and reliant on the relationships particular people have between the courts. Further, when tribal court orders are registered in the state system, they are often registered as having originated in the state court order without acknowledgment of origin in a tribal court.

Pursuant to E2SHB 1320 Sec. 36(1)(e), signed into law in April 2021, the Gender and Justice Commission, in partnership with the Tribal State Court Consortium was tasked with developing best practices to address information sharing between state and tribal courts and reporting to the Legislature by December 1, 2021.⁴⁴

⁴⁴ Chapter 215, Laws of 2021.

The stakeholder group, comprised of judicial officers, court administrators, clerks, victim advocates, attorneys, and personnel from the Administrative Office of the Courts, identified two potential solutions to this issue:

- Entry of tribal court orders into the Washington State Judicial Information System (JIS), or
- Allowing Washington State courts to obtain access to the National Crime Information Center (NCIC) database.

A full discussion of these issues, as well as other potential best practices are contained in the report entitled *Civil Protection Orders: E2SHB 1320 Stakeholder Group Recommendations to Support Access and Safety* (2021).⁴⁵

PRACTICE NOTE: Ask every party that comes before you if there is another court order related to this matter, anywhere, including from tribal courts.

E. Washington’s Civil Rule (CR) 82.5

In 1990, the Washington State Forum to Seek Solutions to Jurisdictional Conflicts Between Tribal and State Courts recommended the adoption of Civil Rule (CR) 82.5. Retired Chief Justice Vernon R. Pearson, serving as chairperson of the Forum, submitted the proposed rule.⁴⁶ In 1995, the Washington Supreme Court adopted the rule, with minor modifications, which provides for full faith and credit for tribal court orders and judgments.

CR 82.5 provides that superior courts shall recognize, implement, and enforce the orders, judgments, and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment, or decree: (1) lacked jurisdiction over a party or the subject matter; (2) denied due process as provided by the Indian Civil Rights Act of 1968; or (3) does not reciprocally provide for recognition and implementation of orders, judgments, and decrees of the superior courts of the state of Washington.

In 2019, CR 82.5 was updated again to emphasize and facilitate communication between superior courts and tribal courts—not just a procedure for the transfer of cases, as in the original rule. The change recognized that many cases were co-occurring in multiple jurisdictions, and communication amongst the courts would better serve the parties. In some circumstances the communication may be done

⁴⁵ Available at https://www.courts.wa.gov/subsite/gjc/documents/1320_Report_to_legislature_12.1.21.pdf.

⁴⁶ *Washington State Forum to Seek Solutions to Jurisdictional Conflicts Between Tribal and State Courts: Final Report* (Conference of Chief Justices National Coordinating Council, 1990), 2 (hereinafter C CJNCC Final Report).

with the knowledge by the parties and facilitated by them, and a record made, and in other cases without input by the parties or a record.

PRACTICE NOTE: Although the parties should be asked for the respective court’s identity, contact information, and case or docket number, a list of tribal court contact information is available at <https://goia.wa.gov/tribal-directory/washington-state-tribal-courts>.

F. Enforcement - Washington’s Project Passport

To provide greater consistency in the enforcement of protection orders across jurisdictions, many tribes and Washington State, along with many other states, have adopted uniform conventions of placement of certain information on the first page of a protection order. The relative uniformity is intended to assist law enforcement officers in identifying that a court order is a domestic violence protective order and thus should be given full faith and credit.

G. Oregon and Idaho

Besides requirements from VAWA, Oregon will extend full faith and credit to federally recognized Indian tribes under its own law and strengthen other protections as of January 1, 2022, through Senate Bill 183. However, many judges and law enforcement officers have not yet received education on the issues.⁴⁷ Idaho affords full faith and credit to tribal court orders through judicial decisions, and has done so since 1982.⁴⁸

H. Conflicts between tribal and state court orders regarding custody and visitation.

Occasionally, conflicts in tribal and state court orders occur when a custody case has been filed in one jurisdiction and a protection order petition has been filed in another. Tribal courts have authority to make temporary orders regarding custody and visitation in domestic violence protection orders. Temporary relief regarding custody and visitation is granted with the expectation that the parties will address the custody matter in a separate custody case. Tribal courts usually allow modification of the relief ordered in the domestic violence protection order to conform to the custody and visitation orders. The main concern is that the custody and visitation order issued in the custody case has taken into consideration

⁴⁷ Janay Hass, *Strengthening Tribal Justice: State and Tribal Cooperation Lead to Changes in Oregon Law*, Or. State Bar Bulletin, Aug/Sept 2021 at 15.

⁴⁸ Angelique EagleWoman et al., State of Idaho Judicial Branch Tribal State Court Forum, *Idaho Tribal-State Court Bench Book 22* (2014).

the incident leading to the issuance of the domestic violence protection order.

PRACTICE NOTE: Ask for a copy of the orders from the other jurisdiction to review the specific language of the foreign order to determine if there are actually conflicts in the orders.

VI. Criminal Jurisdiction in Indian Country

Domestic violence may involve major crimes and less serious crimes to persons or property. This section discusses the authority by which tribal courts can enforce tribal criminal laws. Tribal courts are limited in the types of crimes and persons over which they can exercise criminal jurisdiction. There are also limits on sentences that can be imposed upon people convicted of crimes taking place within reservation boundaries.

A. Indian Civil Rights Act of 1968⁴⁹

In 1968, Congress passed the Indian Civil Rights Act (ICRA).⁵⁰ The ICRA provided for civil rights for all persons who are subject to the jurisdiction of tribal governments. The ICRA also placed limits on the maximum penalties that tribal courts could impose for each criminal offense. The maximum penalty for any one offense is limited to one (1) year in jail, and/or a fine of \$5000.

In 2010, the Tribal Law and Order Act⁵¹ was approved, providing tribes with expanded sentencing authority of three (3) years in jail and/or a fine of \$15,000 for any one offense with a maximum of nine (9) years in jail. However, Tribes must opt in to this expanded sentencing authority, and are allowed to do so only if they meet the following additional provisions the TLOA added to the ICRA:

- The offense is one that would be punishable by more than a year if prosecuted in state or federal court;
- Defendants have a right to effective assistance of counsel, appointed at no expense if indigent;
- The judge assigned to the matter must be licensed by any jurisdiction and possess sufficient legal training to hear criminal matters;
- The tribe's laws must be publicly available for review; and
- The tribal court must maintain a record of all proceedings.

⁴⁹ 25 U.S.C.A. § 1301-03.

⁵⁰ Pub. L. 90-284, title II, 82 Stat. 77 (Apr. 11, 1968).

⁵¹ Pub.L. No. 111-211, H.R. 725, 124 Stat. 2258, (July 29, 2010).

B. Indian Major Crimes Act⁵²

The Indian Major Crimes Act provides that any Indian committing a felony against the person or property of another Indian or other person—namely, murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in Section 1365 of Title 18), assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under Section 661 of Title 18 within Indian country—shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. These crimes may be investigated by the FBI and referred to the U.S. Attorney’s Office for prosecution in federal district court. Tribes may prosecute cases both when the federal government does or does not prosecute,⁵³ with the penalty limitations imposed by the ICRA.

C. Non-Native Americans⁵⁴

The 2013 reauthorization of the Violence Against Women Act (VAWA) amended the Indian Civil Rights Act to recognize and affirm tribes’ inherent authority to exercise special domestic violence criminal jurisdiction over all persons, including non-Indian perpetrators. This expanded jurisdiction was effective after March 7, 2015, was limited to a specific nature of crime, and required tribes to assure defendants prosecuted were afforded due process.

In 2022, Congress amended the provision of VAWA regarding “special domestic violence criminal jurisdiction” over certain defendants to recognize “special Tribal criminal jurisdiction” over an expanded list of “covered crimes.” Covered crimes include, in addition to domestic violence, assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking. These VAWA amendments also eliminated the previous “sufficient ties” requirements to warrant the exercise of tribal jurisdiction over non-Native perpetrators of domestic violence, sexual assault, child abuse, stalking, sex trafficking, obstruction of justice, and assaults on tribal law enforcement officers on tribal lands.

VAWA and its companion law, the Tribal Law and Order Act (TLOA) (2010) were created as attempts to lessen the limitations of the Indian Civil Rights Act and caselaw. VAWA can be thought of as an expansion of *who* can be prosecuted, and TLOA can be thought of *how* they can be punished. While these laws have begun to allow tribes to protect their people from domestic violence perpetrators, it must be remembered that not all tribes enact VAWA and/or TLOA. Currently,

⁵² Ch. 341, 23 Stat. 385 (Mar. 3, 1885), codified at 18 U.S.C.A. § 1153.

⁵³ *United States v. Wheeler*, 435 U.S. 313 (1978).

⁵⁴ This section includes a discussion of both the 2013 reauthorization of VAWA and the subsequent 2022 amendments. Both are left in because some tribes may elect not to expand to the 2022 amendments.

six Washington tribes have implemented VAWA, including the Confederated Tribes of the Chehalis Reservation, Lower Elwha Tribe, Port Gamble S’Klallam Tribe, Quinault Nation, the Suquamish Tribe, the Swinomish Tribe, and the Tulalip Tribes.⁵⁵ One of the main reasons not all tribes implement VAWA and/or TLOA is because of a lack of resources. Many tribes do not have the ability to pay for the enhanced protections afforded to a defendant under VAWA/TLOA, including indigent defense or holding jury trials with non-Indians in the jury pools.

Concurrent Jurisdiction

What happens when a tribe is unable to prosecute a non-Native defendant, or has maximized the punishment it can impose on a defendant? Tribes refer cases to the federal government, which has jurisdiction over non-Indians under the Major Crimes Act and the General Crimes Act, which can re-prosecute Native offenders without violating double jeopardy,⁵⁶ and which can prosecute all non-Native offenders. States have jurisdiction over crimes committed by non-Natives against non-Natives on reservation land.

Even with the ability of the federal government to prosecute cases, cases referred from tribes to the Department of Justice do not always get prosecuted. In the Department of Justice’s 2019 annual report to Congress on Indian Country Investigations and Prosecutions,⁵⁷ it was reported that 35 % of the cases opened by the FBI after a tribe referred them for prosecution were not referred for prosecution to the U.S Attorney. The main reason for declining to prosecute a case was insufficient evidence (79%). There has been a historical difficulty that tribes are underserved by the federal law enforcement agencies designated to provide another layer of protection. There are too few officers who are too far away—the federal officers assigned to Washington tribes are located in Seattle. Because of this complicated jurisdictional framework involving federal, state, and tribal entities, and the scarcity of resources, many perpetrators are never caught or prosecuted.

Checkerboard land

A final issue for state court judges to be aware of is “checkerboard” land. Starting in 1887, the Dawes Act, or General Allotment Act, divided Indian reservations into plots of land for individual Indian landowners. Each was assigned a plot, and any left-over plots were sold or transferred to non-Indians but were still within the borders of the reservation. The type of land—whether held in trust for a tribe or individual Indian, or fee simple owned by a non-Native—created a

⁵⁵ National Congress of American Indians, *SDVCJ Today: Currently Implementing Tribes* (updated February 2021).

⁵⁶ *See supra* note 52.

⁵⁷ U.S. Dept. of Justice, *Indian Country Investigations and Prosecutions* (2019), at 2, *available at* <https://www.justice.gov/otj/page/file/1405001/download>.

“checkerboard” of jurisdiction. To this day, this means that jurisdiction can change parcel by parcel across reservations.⁵⁸

D. Tribal Exclusion or Banishment

Tribes have a unique remedy they may exercise, often known as exclusion for non-members and banishment for members. This remedy, sometimes guaranteed by treaty, permits tribes to exclude or banish unwanted persons from their reservations. The power of exclusion might be viewed as quasi-criminal, and can be exercised against non-Indians.⁵⁹ Tribes do not have authority to exclude from their reservations federal officials engaged in carrying out their duties. Non-members may be excluded, and members may be banished, from within the exterior boundaries of reservations for violating tribal law or for felony convictions in state or federal court. However, owners of land may not be excluded from the land they own.⁶⁰ Depending on tribal law, persons to be excluded or banished are often given notice and the opportunity for a hearing before the tribal court. The person to be excluded or banished may often appeal an unfavorable decision to the Tribal Court of Appeals. Those persons excluded or banished who refuse to obey the order may be referred to the United States Attorney or state law enforcement agencies. However, enforcement of banishment and exclusion face the same challenges as other remedies.

VII. Child Custody and Visitation Issues

Some tribal domestic violence codes provide for temporary child custody arrangements to be made through protection orders and VAWA also specifically recognizes tribal authority to include custody provisions in tribal court protection orders. Child custody and visitation issues can make for complex problems when issuing and enforcing domestic violence protection orders when there are conflicting orders issued by two jurisdictions.

A. Tribal Court Jurisdiction to Issue and Enforce Domestic Violence Protection Orders

In protection order cases involving non-Indians, the Violence Against Women Reauthorization Act of 2013 clarifies that tribal courts have full civil jurisdiction to both issue and enforce domestic violence protection orders:⁶¹

- Regardless of whether they involve member Indians, non-member Indians, or non-Indians;

⁵⁸ Indian Land Tenure Foundation, Issues: Checkerboarding, available at <https://iltf.org/land-issues/issues/>.

⁵⁹ William C. Canby, Jr., *American Indian Law in a Nutshell*, 3rd ed. (St. Paul, Minn.: West Group, 1998), 165.

⁶⁰ Alexander Tallchief Skibine, *The Tribal Right to Exclude Non-Tribal Members from Indian-Owned Lands*, Utah Law Digital Commons, 3 at footnote 7 (2020).

⁶¹ 18 U.S.C. § 2265(e).

- In matters arising anywhere within the Tribe’s “Indian Country.” (This includes all tribal trust, individual trust, and fee land within the exterior borders of the Tribe’s reservation, as well as other lands described in 18 U.S.C. § 1151).

B. Full Faith and Credit for Child Custody Provisions in Tribal Court Domestic Violence Protection Orders

Washington’s Foreign Protection Order Full Faith and Credit Act provides that, “any disputes regarding provisions in foreign protection orders dealing with custody of children, residential placement of children, or visitation with children shall be resolved judicially. The proper venue and jurisdiction for such judicial proceedings shall be determined in accordance with RCW 26.27 and in accordance with the parental kidnapping prevention act, 28 U.S.C.A. § 1738A.”⁶²

Washington’s Foreign Protection Order Full Faith and Credit Act plainly states that venue and jurisdiction issues concerning child custody are decided in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)⁶³ and further provides that law enforcement officers shall not remove a child from his or her current placement unless:

- There is a writ of habeas corpus to produce the child issued by a superior court of Washington State, or
- There is probable cause to believe the child is abused or neglected and the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.

This was consistent with VAWA as originally passed in September of 1994. At that time, the definition of “protection order” specifically excluded child custody orders.⁶⁴ However, in the 2006 amendments to VAWA, Congress expanded the definition of covered protection orders:

[A]ny support, *child custody or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or stay away 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, dating violence, sexual assault, or stalking. 18 U.S.C. § 13925 (a)(24)(B) (emphasis added).

⁶² RCW 26.52.080.

⁶³ RCW 26.52.080. Note also that the UCCJEA does not apply to tribes.

⁶⁴ Pub.L. No. 103-322, § 40221, 108 STAT. 1931 (Sept 13, 1994).

Therefore, child custody and visitation provisions of tribal court protection order entered in accordance with 18 U.S.C. § 2265 (b) are entitled to full faith and credit to the same extent as all other provisions of the order.

PRACTICE NOTE: When child custody or visitation is presented as an issue within a protection order request, judges should question the parties about the existence of a current custody or visitation order from another court. At a minimum, judges should note the existence of the previously issued custody or visitation order in the protection order.

“It’s common to have a protective order, child support order, and custody order, each from different jurisdictions.” Jennifer Yogi, attorney, Northwest Justice Project, Native American Unit.

VIII. State and Tribal Courts Working Together

The Foreign Protection Order Full Faith and Credit Act and the Violence Against Women Act are designed to provide legal mechanisms for the cross-jurisdictional enforcement of protection orders between tribal and state courts, which will ultimately assist victims of domestic violence in navigating a jurisdictional maze to obtain needed protection to prevent further acts of domestic violence.

In recent years, there have been efforts to improve enforcement of protection orders across jurisdictions.⁶⁵ Some tribal courts have adopted uniform domestic violence orders and cover sheets similar to those used by state courts in order to assist law enforcement officers to find critical information on protection orders issued by other jurisdictions. In addition, there is increased training for state judges and law enforcement regarding recognition and enforcement.

The Tribal State Court Consortium (TSCC) is a joint effort between state and tribal court judicial officers and other members of the judicial branch to expand communication and collaboration. Co-chaired by Chief Judge Cindy Smith and Judge Lori K. Smith, the TSCC provides a forum whereby stakeholders can come

⁶⁵ The 1989, the Washington Centennial Accord sought to build confidence in the viability of true government-to-government relations with tribes and to serve as the foundation for further agreements. One purpose of the Accord was to improve the delivery of services to all individuals represented by all parties by improving communication at the agency level. In 1990, the Washington State Forum to Seek Solutions to Jurisdictional Conflicts between tribal and state courts issued its final report. The report recommended that tribal and state agencies should, to the extent permitted by resources and subject matter, work to create agreements resolving and reducing jurisdictional conflicts.⁶⁵ The report suggested that resolution of jurisdictional conflicts between state and tribal courts could be accomplished by interpersonal contacts between judges. In August 2002, the Conference of Chief Justices adopted Resolution 27, “To Continue the Improved Operating Relations Among Tribal, State, and Federal Judicial Systems.” The Conference endorsed the principle that tribal, state, and federal courts should continue cooperative efforts to enhance relations and resolve jurisdictional issues. They also endorsed the principle that tribal, state, and federal authorities should take steps to increase the cross-recognition of judgments, final orders, laws, and public acts of the other two jurisdictions. The Conference gave support to intergovernmental agreements that provide for cross-utilization of facilities, programs, the exchange of justice system records information, and extradition to and from Indian Country.

together to discuss jurisdictional issues, gaps in services, and the development of partnerships. Some of the issues on which the TSCC is currently focused include domestic violence and sexual assault issues, protection order enforcement, dependency cases involving Indian children, and the disproportionate number of Indian youths in the juvenile justice system.⁶⁶

⁶⁶ For more information, the TSCC webpage is available at:
<https://www.courts.wa.gov/index.cfm?fa=home.sub&org=tsc>

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3. [Washington State Superior Court Civil Rule \(CR\) 82.5—Tribal Court Jurisdiction, amended 2019.](#)
4. Indian Civil Rights Act of 1968 - [25 U.S. Code § 1302 – Constitutional Rights.](#)
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