

## **RESTRAINING ORDERS/INJUNCTIONS IN TRIBAL COURT**

This page explains what a permanent and temporary restraining order is and how to defend against it in court. Please review Civil Procedures in Title 4, Rule 65 of the Rosebud Sioux Tribe Law and Order Code.

**PURPOSE.** These forms are to be used when you have been physically abused or assaulted or threatened by someone other than a household member, spouse or former spouse. Please use the **Petition for Protection Order** if you were physically abused by a household member, spouse or former spouse. There are also forms for answering and/or counterclaiming against a restraining order if you are served with a summons and complaint and you want to contest the request for restraining order.

### **HOW TO START AN ACTION FOR RESTRAINING ORDER IN COURT.**

Most actions or claims are started in court by filing a Summons and Complaint with the clerk of court. This would include filing for restraining order.

**What is a Summons?** A summons is a document that is served with the complaint on the opposing party(s). A summons notifies the opposing party that an action in the form of a complaint has been filed against them and that the opposing party must answer in writing to both you and the court that they deny your claims in the complaint. If the opposing party(s) fail to answer or appear you may seek a default judgment. If you are filing your claim in the Rosebud, you must prepare your own summons and file them both with the clerk of courts.

**What is a Complaint?** A complaint sets out your cause of action or claim against the opposing party. A complaint puts the court and the opposing party on notice of what a plaintiff's claims are. If you file a summons and complaint you are called the plaintiff. The person you are seeking restraining order against is called the defendant. In this case it is letting the defendant know that the plaintiff has filed for a restraining order and any other claims the plaintiff has against the defendant.

**Filing and service fees.** The court will require payment of a filing fee unless waived to file your summons and complaint with the court. There is also a fee to have your summons and complaint served on the defendant. It is required by law that your summons and complaint be personally served on the defendant. This can be by the Court Process Server which will incur a service fee to have them serve your papers. You can file a motion to waive the filing and service fees if you can show you are indigent or don't have the resources to pay the fees. Use the **Motion to Waive Filing and Service Fees** form to ask the court to waive those costs or for a partial waiver. You can also have a tribal member over the age of 18 and not a party to the action serve the defendant with the summons and complaint and they may do it free. If you go this route, have the person who serves the court papers on the defendant complete the **Affidavit of Service** form and you must file the affidavit with the court as proof the defendant was served.

**Jurisdiction.** In order for a particular court to hear your claim that court must have jurisdiction. First, the court must have jurisdiction over the people involved, that means the court must have

jurisdiction over you and the opposing party(s). Second, the court must have jurisdiction over the subject matter of your claim. This means the court has jurisdiction to hear type of claim you filed such as divorce or paternity. In tribal courts, one of the parties should be a tribal member and there must be a connection between your cause of action and the reservation you are filing your action. If you are filing for divorce you must be a resident of the reservation you are filing and one of the parties to the marriage must be a tribal member.

**How to file a summons and complaint.** A summons and complaint is filed when you take them to the courthouse and file them along with the filing fee with the clerk of courts. When you file your complaint or petition with the clerk, please date and sign the form in front of the clerk so they can notarize your signature.

**What happens if the opposing party fails to Answer.** If the opposing party fails to answer your summons and complaint within a specified time after being served with the summons and complaint, you can ask the court for a default judgment.

### **TEMPORARY RESTRAINING ORDER**

Upon request the court may issue you an ex parte temporary restraining order if the court feels you are danger before a hearing can be held on your request preliminary and/or permanent restraining order. The court may or may not grant you an ex parte restraining order (an order issued with a hearing or notice to the opposing party) depending on the circumstances. If the court grants you an ex parte restraining order the opposing party can not have any contact or abuse you once the opposing party is served with the order. The court will then hold a hearing on your request for Preliminary Restraining Order, usually within 10 days, where you will have to prove your allegations for your request for Preliminary Restraining Order.

### **PERMANENT RESTRAINING ORDER**

Regardless whether the court grants you a temporary restraining order, you should then have a final hearing on your request for a Permanent Restraining Order.

**PLAINTIFF'S BURDEN OF PROOF.** If you file for a Restraining Order, you have the burden of proving that claim in court. In a typical civil case you have the burden of proving your claim by a **preponderance of the evidence**. This means that by representing your self in a legal matter it is your responsibility to prove your case. Don't expect the judge to prove your case for you. Proving something by a preponderance of the evidence means evidence with greater weight or that is more convincing than the evidence of the opposing party(s). The plaintiff has the burden of proving by a preponderance of the evidence the following to the court:

1. That defendant committed a wrongful or illegal act against you. This would include any assaults, harassment, verbal abuse, verbal threats of bodily injury or damage to your property.
2. That you have no other adequate legal remedy to prevent any future harm by defendant(s). This is normally the case when you have been assaulted or threatened with bodily injury.

3. That you have exhausted all administrative remedies. If there is any administrative remedy, such as work-place grievance, you must go through the grievance procedure first before going to court. More often than not there are no administrative remedies available to you.

4. That you will suffer irreparable harm (harm that cannot be repaired) that cannot be solved by awarding you money damages against defendant(s). This is normally the case when you have been assaulted or threatened with bodily injury.

5. In order to get a temporary restraining order without notice to defendant(s) before the hearing for preliminary or permanent injunction, you must show the court that you will suffer irreparable injury or damage before hearing can be held and notice given to defendant(s). This can be done by pleading that defendant has engaged in assaultive behavior or threatened you with bodily harm or that you fear retaliation against you by defendant(s) for filing this action.

## **HOW TO DEFEND AGAINST A RESTRAINING ORDER**

**This section explains what to do if you are served with a summons and complaint.** If you are served with a summons and complaint for restraining order the opposing party is requesting that you have no contact with them. As a result you must file an **ANSWER or ANSWER AND COUNTERCLAIM** with the court and a copy on the plaintiff within 30 days if you are served with a summons from the Rosebud Sioux Tribal Courts or you are in default. Read the summons and complaint carefully. The summons will tell you how long you have to file an answer from the date you are served with the summons and complaint. The complaint will tell you what the plaintiff(s) claims are against you.

**What is an Answer.** An Answer is a pleading (a legal paper you file with the court) where the defendant responds to the plaintiff's complaint. You can answer the plaintiff complaint by denying and/or admitting to any parts or all of plaintiff allegations in the complaint. If you have any affirmative defenses to plaintiff complaint you must specifically plead these affirmative defenses in your answer. If you fail to raise any affirmative defenses you may have you will be barred from using such a defense. This means that if you fail to raise an affirmative defense you waive the right to use such a defense. Affirmative defenses include accord and satisfaction (meaning you already settled this matter with the opposing party), arbitration and award (meaning an independent arbitrator already decided the case before the court did) assumption of the risk, contributory negligence, discharge in bankruptcy, duress (you were forced or threatened to do something you did not want to do), estoppel (meaning the other party can complain against their own actions), failure of consideration, fraud, injury by fellow servant, illegality, laches (meaning the other party waited too long to bring the action), license, payment, release (meaning the other party released you from any obligation), res judicata (meaning the court has already heard and decided the matter in an earlier case involving the same thing as this case), statute of frauds, statute of limitations (meaning the other party did not bring the action in the time set out in the code) and waiver (meaning the other party waived any claim they had). You must prove any affirmative defenses you raise in your Reply by a preponderance of the evidence at trial.

If you don't have a counterclaim against the plaintiff use the **Answer form**.

**You may also need to file a counterclaim with your answer.** A counterclaim is like the plaintiff(s) complaint in that it sets out your causes of action against the plaintiff. You must file a counterclaim on any claim you have against the plaintiff if it arises out of the same transaction or occurrence raised in the plaintiff complaint. Failure to do so could result in the court barring your claim. If there are children involved in the divorce and you want custody of the children you must counterclaim for custody and child support. Use the **Answer and Counterclaim form** if you have a counterclaim against the plaintiff.

**How to file an Answer or Answer and Counterclaim.** You must file an Answer or Answer and Counterclaim to the plaintiff's summons and complaint by filing the original with the court and by mailing a copy to the plaintiff if they are not represented by legal counsel or to their attorney if the plaintiff is represented. Look at the summons you received with the complaint, it will tell you where to mail your answer and counterclaim.

**What happens if you fail to Answer plaintiff's summons and complaint within time period prescribed by law.** If you fail to Answer plaintiff's complaint within 7 days of the date of service you are in default and the plaintiff may seek a default judgment against you. This means that if you fail to answer, the plaintiff may be awarded what they ask for in their complaint and you cannot object or present your side of the issue. **Warning.** You must answer plaintiff's complaint within 7 days. If you fail to do so a default judgment could be entered against you.

**DEFENDANT'S BURDEN OF PROOF.** If you filed a counterclaim you have the burden of proving that claim in court. In a typical civil case you have the burden of proving your counterclaim **by a preponderance of the evidence**. This means that by representing your self in a legal matter it is your responsibility to prove your case. Don't expect the judge to prove your case for you. Proving something by a preponderance of the evidence means evidence with greater weight or that is more convincing than the evidence of the opposing party(s). Defendant has the burden of proving by a preponderance of the evidence the following to the court if you counterclaim for temporary and/or permanent restraining order:

1. You must prove any affirmative defenses it alleges in its answer. Be sure to raise any of affirmative defenses at trial.
1. You must prove any allegations in your counterclaim.
2. That plaintiff committed a wrongful or illegal act against you. This would include any assaults, harassment, verbal abuse, verbal threats of bodily injury or damage to your property.
3. That you have no other adequate legal remedy to prevent any future harm by plaintiff(s). This is normally the case when you have been assaulted or threatened with bodily injury.
4. That you have exhausted all administrative remedies. If there is any administrative remedy, such as work-place grievance, you must go through the grievance procedure first before going to

court. More often than not there are no administrative remedies available to you.

5. That you will suffer irreparable harm (harm that cannot be repaired) that cannot be solved by awarding you money damages against plaintiff. This is normally the case when you have been assaulted or threatened with bodily injury.

6. In order to get a temporary restraining order without notice to plaintiff(s) before the hearing for preliminary or permanent injunction, you must show the court that you will suffer irreparable injury or damage before hearing can be held and notice given to plaintiff(s). This can be done by pleading that plaintiff has engaged in assaultive behavior or threatened you with bodily harm or that you fear retaliation against you by defendant(s) for filing this action.

### **WHAT HAPPENS IF DEFENDANT FILES A COUNTERCLAIM WITH THEIR ANSWER.**

This section explains what to do if you receive a counterclaim in the defendant's answer. You should read defendant's answer carefully. It will tell you what parts of your complaint the defendant admits and what parts defendant denies. The answer will tell you if the defendant is filing a counterclaim against you. If the answer contains a counterclaim you must reply to the counterclaim. As a result you must file a Reply with the court and a copy to the plaintiff within the time period prescribed by law or you are in default to defendant's counterclaim. If you receive an Answer from the defendant and it contains a counterclaim you must reply to defendant's counterclaim within 20 days of service of the counterclaim upon you or you are in default. Use the **Plaintiff's Reply to the Defendant's Counterclaim** form if you received an answer and counterclaim from the defendant.

**What is a Reply.** A Reply is your answer to the defendant's counterclaim. This means you must admit or deny each of the defendant's allegations in the counterclaim. If you have any affirmative defenses to plaintiff(s) complaint you must specifically plead these affirmative defenses in your answer. If you fail to raise any affirmative defenses you may have you will be barred from using such a defense. This means that if you fail to raise an affirmative defense you waive the right to use such a defense. Affirmative defenses include accord and satisfaction (meaning you already settled this matter with the opposing party), arbitration and award (meaning an independent arbitrator already decided the case before the court did) assumption of the risk, contributory negligence, discharge in bankruptcy, duress (you were forced or threatened to do something you did not want to do), estoppel (meaning the other party can complain against their own actions), failure of consideration, fraud, injury by fellow servant, illegality, laches (meaning the other party waited too long to bring the action), license, payment, release (meaning the other party released you from any obligation), res judicata (meaning the court has already heard and decided the matter in an earlier case involving the same thing as this case), statute of frauds, statute of limitations (meaning the other party did not bring the action in the time set out in the code) and waiver (meaning the other party waived any claim they had). You must prove any affirmative defenses you raise in your Reply by a preponderance of the evidence at trial.

### **What happens if you fail to Reply to defendant's counterclaim within time period**

**prescribed by law?** If you fail to Reply to defendant's counterclaim within 20 days of service of the counterclaim upon you, you are in default and the defendant may seek a default judgment against you on their counterclaim. This means that if you fail to reply to the defendant's counterclaim the defendant may be awarded what they ask for in their counterclaim and you cannot object or present your side of the issue. **Warning.** You must reply to defendant's counterclaim within a specified period of time. If you fail to do so a default judgment could be entered against you.

**How to file a reply.** You must file a Reply to the defendant's Answer and Counterclaim by filing the original with the court and by mailing a copy to the plaintiff if they are not represented by legal counsel or to their attorney if the plaintiff is represented.

## **WHAT DO I DO WHEN I GO TO COURT FOR A TRIAL**

The party bringing any claim or counterclaim has the burden of proving their claim or counterclaim by a preponderance of the evidence. The plaintiff (the party who brings the first claim to court) presents their evidence first and then defendant or respondent presents their evidence to the court.

**How to present your Evidence to the Court.** There are several ways of presenting your evidence and case in court. The best way is through live testimony of witnesses. This would include you (you need to testify to your claim) and any other person who has personal and relevant knowledge of the facts of your claim. It is your responsibility to get your witnesses to court and to ask them questions about their knowledge of the facts. In order to compel or force your witnesses to testify at your trial or hearing you may need to subpoena each of your witnesses well before the trial or hearing or hearing date (Use the **Motion to Subpoena Witnesses** form to request the court to issue a subpoena to compel a witness to appear at your trial or hearing if they won't voluntarily appear). You can also subpoena a person or witnesses to bring evidence such as documents to your hearing or trial (Use the **Motion to Subpoena a Person to Bring Evidence to Court** form to request the court to issue a subpoena to compel a person to appear at your trial or hearing and bring specified evidence with them if they won't voluntarily appear). Once you and your witnesses testify the opposing party can cross examine you and your witness. This means that they can ask you and your witnesses questions.

It will be your responsibility to directly ask questions (direct examination) of your witnesses and to get your evidence introduced into the record. You can only ask questions during direct examination. Do not attempt to make statements or comments when you ask questioning witnesses. Your witnesses should be asked who they are, what they know and how they know it or anything they might have observed. Like cross examination you should prepare your questions for each of your witnesses well before the trial and take notes of any strong points testified to that you can use in your closing arguments to the Court.

It will also be your responsibility to get objects and other physical evidence, such as documents, introduced into the record. You do this by laying the foundation for the admissibility of the evidence by questioning the person you subpoenaed to bring the objects or pieces of evidence

you want introduced into evidence. Ask the Court to mark the evidence as an Exhibit. Then you must ask this person who they are, what objects or pieces of evidence they brought to the Court, a description of the objects or pieces of evidence, how the evidence came into that persons possession and if the evidence are documents then you must ask if the documents are kept in the ordinary course of business. Then you must ask the Court to have the evidence introduced and accepted as evidence. Only evidence accepted by the Court after it is ruled admissible will be seen or considered by the Court.

You must cross examine the opposing party's witnesses to cast doubt on the opposing party's claims, counterclaims or defenses. Cross examination is your chance to ask questions of the opposing party's witnesses. You can only ask questions of the opposing party's witnesses during cross examination. Do not attempt to make statements or to testify during cross examination of another witness, the Court will shut you off from doing so.

**Be courteous in Court.** When you go to court the judge will control the proceedings. The plaintiff presents their case first. Then the defendant presents their side of the case. Do not interrupt the other side when they are testifying unless you have an objection. Both sides will have an opportunity to cross examine the other party and their witnesses. Be courteous to the other side. If you disrupt the proceedings the judge could hold you in contempt and throw you in jail.