

# Comments

## THE NEW BATTLEGROUNDS FOR PUBLIC LAW 280 JURISDICTION: SEX OFFENDER REGISTRATION IN INDIAN COUNTRY

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\* Candidate for Juris Doctor, Northwestern University School of Law, 2007; B.A., University of Minnesota, Morris, 2002. I would like to thank Professor Leigh Buchanan Bienen for her guidance throughout my work on this Comment. I also wish to thank all the individuals that have worked on resolving the jurisdictional issue discussed in this Comment who spoke to me during the course of my research. It would have been impossible to write this Comment without their first-hand knowledge of the issue and willingness to share that information with me. All errors are mine. Finally, I would like to thank my wife, Anne, and my son, Andrew, for all their love and support.

## INTRODUCTION

In 2005, the State of Minnesota brought charges against Peter Jones, a convicted predatory offender, for failing to comply with Minnesota's predatory offender registration law.<sup>1</sup> Jones, a Native-American residing on the Leech Lake reservation, violated the State's registration statute when he failed to verify his address with county authorities.<sup>2</sup> Jones challenged the State's subject matter jurisdiction, claiming that the registration law was civil in nature, and therefore exceeded the State's criminal jurisdiction over Native-Americans residing in Indian country.<sup>3</sup> The court granted Jones's motion and dismissed the case, revealing a significant jurisdictional gap in the State's ability to maintain a comprehensive registry of sex offenders and those convicted of other predatory offenses.<sup>4</sup>

Minnesota is one of six states that, following Public Law 280's passage by Congress in 1953,<sup>5</sup> was given jurisdiction over offenses committed by Native-Americans in Indian country.<sup>6</sup> As interpreted by the Supreme Court, Public Law 280 gives these states "criminal/prohibitory" jurisdiction over Native-Americans on Indian reservations, but does not extend state jurisdiction to "civil/regulatory" matters.<sup>7</sup> Since the law's passage in 1953, ten more states have assumed full or partial jurisdiction under Public Law 280.<sup>8</sup> In total, 23% of Native-Americans residing on reservations in the contiguous 48 states and all Alaska natives are subject to Public Law 280.<sup>9</sup>

The *Jones* decision reveals a significant jurisdictional gap in the sex offender registries of Public Law 280 states. As states continue to tighten their sex offender registration requirements, the jurisdictional chasm revealed in *Jones* has important public policy and public safety implications for other Public Law 280 states. Immediately after the *Jones* decision, the Minnesota governor voiced strong concerns that Indian reservations would

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<sup>1</sup> State v. Jones, 700 N.W.2d 556, 558 (Minn. Ct. App. 2005), *reh'g granted*, No. A05-365, 2005 Minn. LEXIS 624 (Oct. 18, 2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 558–59.

<sup>4</sup> *Id.* at 561.

<sup>5</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (2000) (criminal); 28 U.S.C. § 1360 (2000) (civil)).

<sup>6</sup> NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUBLIC LAW 280 AND LAW ENFORCEMENT IN INDIAN COUNTRY—RESEARCH PRIORITIES 3 (2005), *available at* <http://www.ncjrs.gov/pdffiles1/nij/209839.pdf> [hereinafter U.S. DEP'T OF JUSTICE REPORT]. Congress has defined "Indian country" as including (1) all land within any Indian reservation under United States jurisdiction, (2) all dependent Indian communities in the United States, and (3) all Indian allotments where the Indian title to the allotment still exists. WILLIAM CANBY, JR., AMERICAN INDIAN LAW 125–26 (4th ed. 2004) (citing 18 U.S.C. § 1151 (1948)).

<sup>7</sup> California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

<sup>8</sup> U.S. DEP'T OF JUSTICE REPORT, *supra* note 6, at 4.

<sup>9</sup> *Id.*

become unmonitored safe havens for the state's sex offenders.<sup>10</sup> These fears, however, ignore the fact that tribal governments are equally concerned about the public safety risk posed by sex offenders.<sup>11</sup> Although the Minnesota governor has pressed the Minnesota Supreme Court to reverse the *Jones* decision, the Minnesota Attorney General and the Minnesota tribes have developed a more workable solution by entering into political agreements to resolve the issue of predatory offenders residing on tribal reservations.<sup>12</sup>

Tribal-State agreements, like those developed in Minnesota, are able to effectively close the jurisdictional gap revealed by *Jones*, while also overcoming many of the shortcomings of Public Law 280. Public Law 280 has been heavily criticized as being out of sync with the federal government's current policy in favor of tribal sovereignty.<sup>13</sup> Furthermore, the Supreme Court's test for determining whether a law is criminal/prohibitory or civil/regulatory for purposes of Public Law 280 jurisdiction has proved to be unworkable, and has led to inconsistent results from state to state.<sup>14</sup> Political agreements, as the Minnesota experience reveals, allow a state and a tribe to develop mutually beneficial registration requirements that respect tribal sovereignty and are tailored to the tribe's unique cultural values, economic situation, and law enforcement capabilities. At the same time, collaboration between State and tribal law enforcement agencies preserves the existence of a comprehensive, state-wide predatory offender registry without leaving its fate to the unpredictable discretion of the courts.

This Comment will show that political agreements are the ideal method for tribes and states subject to Public Law 280 to address the jurisdictional gap revealed by *Jones* in States' sex offender registries. In doing so, this Comment will analyze the agreements developed between the Minnesota

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<sup>10</sup> Letter from Tim Pawlenty, Governor, State of Minnesota, to Mike Hatch, Attorney General, State of Minnesota (July 28, 2005) (on file with author).

<sup>11</sup> See Press Release, Minnesota Indian Affairs Council, Statement by Kevin Leecy, Chairman Minnesota Indian Affairs Council (July 30, 2005) [hereinafter Leecy Press Release], available at <http://www.pnnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/07-30-2005/0004078681&EDATE=>.

<sup>12</sup> Rachel E. Stassen-Berger, *Tribes to Adopt Offender Law: Deal Extends State's Registration Rules to Indian Reservations*, ST. PAUL PIONEER PRESS, Feb. 8, 2006, at B1, available at <http://www.twincities.com/mld/twincities/13816492.htm>.

<sup>13</sup> See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1415-20 (1997); see also Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Role for the Recognition of Tribal Court Judgment's with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 521 (2004); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 814 & n.197 (2006).

<sup>14</sup> See generally Connie K. Haslam, *Indian Sovereignty: Confusion Prevails—California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987), 63 WASH. L. REV. 169 (1988) (criticizing the *Cabazon* decision as an unpredictable balancing test and proposing a return to traditional Indian preemption analysis).

Attorney General and the Minnesota tribes after the *Jones* decision, arguing that they can serve as an effective model for other states and tribes as they attempt to resolve this important issue.

Part I of this Comment will provide background information on the intersection of federal, state, and tribal criminal jurisdiction. Part II will then provide a basic analysis of how these jurisdictional issues play out with respect to sex offender laws, both before and after *Jones*. Part III will show that tribal–state agreements are the ideal solution to the jurisdictional gap Public Law 280 leaves over the enforcement of sex offender registration requirements in Indian country. To prove this point, Part III will also explore the success of the Minnesota agreements and the lessons they provide to other states and tribes subject to Public Law 280.

#### I. BACKGROUND ON THE INTERSECTION OF FEDERAL, STATE, AND TRIBAL CRIMINAL JURISDICTION<sup>15</sup>

This Part will provide background on the unique jurisdictional issues that exist with respect to crimes committed within Indian Country. It will begin by discussing the scope of federal criminal jurisdiction over Indian tribes. Next, this Part will address Public Law 280, which granted specified states criminal jurisdiction over the reservations within their borders. This will include a discussion of the history of Public Law 280’s passage, the Supreme Court’s interpretation of the law, and courts’ subsequent inconsistent decisions regarding Public Law 280’s jurisdictional reach.

##### A. *Relationship Between the Federal Government and Indian Tribes for Criminal Jurisdiction*

In 1817, Congress passed the General Crimes Act,<sup>16</sup> which allowed the federal government to prosecute federally defined offenses within Indian Country.<sup>17</sup> However, due to recognition of tribal sovereignty, the Act expressly did not apply to offenses between two Indians, offenses already

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<sup>15</sup> The bedrock principles of the unique relationship between the tribal, federal, and state governments were set forth in three early Supreme Court cases, known as the “Marshall Trilogy.” In sum, these three decisions established Congress’s plenary power over Indian tribes, defined the contours of tribal sovereignty, and curtailed States’ power over Indian nations. Jennifer Butts, *Victims in Waiting, How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373, 375–76 (2003–04). The “Marshall Trilogy” also established the “Canons of Construction”—that treaties are to be interpreted as they were understood by the Indians, with any ambiguities in the language being construed so as to favor the Indian tribes. Eileen M. Luna, *The Impact of the Unfunded Mandates Reform Act of 1995 on Tribal Governments*, 22 AM. INDIAN L. REV. 445, 454 (1998).

<sup>16</sup> 18 U.S.C. § 1152 (2000).

<sup>17</sup> Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1650 (1998).

punished by the local law of the tribe, or circumstances where the tribe had secured its jurisdiction over a certain offense through a prior treaty.<sup>18</sup>

More than sixty years after the passage of the General Crimes Act, Congress passed the Major Crimes Act in 1885.<sup>19</sup> The Act granted the federal government jurisdiction over a list of specified serious offenses committed by an Indian within Indian country, against any person, regardless of whether the victim was also Indian.<sup>20</sup> In addition, the law did not prevent Indian tribes from exercising concurrent jurisdiction over the offenses listed in the Act.<sup>21</sup> As a result, crimes against sex offenders can be tried in both federal and tribal court, although generally, the tribes have not exercised their concurrent jurisdiction.<sup>22</sup>

### *B. Relationship Between State Governments and Indian Tribes for Criminal Jurisdiction: Public Law 280*

*1. History and Law Surrounding Public Law 280.*—In 1953, Congress enacted Public Law 280<sup>23</sup> in response to concerns over lawlessness in Indian country.<sup>24</sup> The law attempted to reduce lawlessness by delegating to six “mandatory” states—Minnesota,<sup>25</sup> Alaska, California, Nebraska, Wisconsin, and Oregon—partial criminal<sup>26</sup> and civil<sup>27</sup> jurisdiction over Indian country, thereby impacting more than 350 of the over 550 federally recog-

<sup>18</sup> *Id.* (citing 18 U.S.C. § 1152). Although the General Crimes Act did not specify whether it applied to offenses between two non-Indians occurring in Indian country, the Supreme Court ruled that the states, rather than the federal government, would have jurisdiction in such cases. *Id.* (citing *United States v. McBratney*, 104 U.S. 621 (1881)).

<sup>19</sup> 18 U.S.C. § 1153 (2000).

<sup>20</sup> The list of offenses covered by the Major Crimes Act are “murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 U.S.C. §§ 2241–2244], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title [18 U.S.C. § 1365]), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title [18 U.S.C. § 661].” 18 U.S.C. § 1153(a) (internal citations added).

<sup>21</sup> Jiménez & Song, *supra* note 17, at 1652.

<sup>22</sup> This is largely due to under-funding and Congressionally imposed limitations on tribal sentences. *Id.* at 1655. The Indian Civil Rights Act restricted the sentences imposed by tribal courts to “imprisonment for a term of one year and a fine of \$5,000, or both.” 25 U.S.C. § 1302 (2000).

<sup>23</sup> *See supra* note 5.

<sup>24</sup> Jiménez & Song, *supra* note 17, at 1659; *see Bryan v. Itasca County*, 426 U.S. 373, 379 (1976) (“The primary concern of Congress in enacting Pub. L. 280 . . . was . . . the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”).

<sup>25</sup> Public Law 280 exempted the Red Lake Reservation. *See* 18 U.S.C. § 1162(a) (2000). Later, through retrocession, the Bois Forte Reservation reassumed criminal jurisdiction. *See* Carole Goldberg, Law Enforcement in Public Law 280 States, at 3 n.9 (a paper prepared for Crime & Justice Research in Indian Country Strategic Planning Meeting, National Institute of Justice, U.S. Dep’t of Justice, Oct. 14–15, 1998), available at [www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf); *see also* Washburn & Thompson, *supra* note 13, at 524 n.294.

<sup>26</sup> 18 U.S.C. § 1162(a).

<sup>27</sup> 28 U.S.C. § 1360(a) (2000).

nized tribes.<sup>28</sup> Commentators have criticized Public Law 280's restructuring of the balance between federal, state, and tribal jurisdiction,<sup>29</sup> but the law's passage is not particularly surprising given the historical context in which it was passed.

The period from 1940 to 1962, during which Congress passed Public Law 280, has been called the "Termination Period" with respect to United States' policy towards Indian tribes.<sup>30</sup> The Termination Period is characterized by the federal government's goal to assimilate Native-Americans into U.S. society at large.<sup>31</sup> The underlying goal of assimilation during this period of history, coupled with Congress' pressing concerns over lawlessness in Indian country at the time, spurred the passage of Public Law 280. The law expanded non-Indian control over Indian country by vesting criminal and civil jurisdiction in the states, and shifted responsibility for the welfare of Indians to the states.<sup>32</sup>

President Eisenhower signed Public Law 280 into law, but on the day he did so, he expressed "grave doubts as to the wisdom of certain provisions."<sup>33</sup> Given the law's impingement on tribal sovereignty, President Eisenhower was particularly troubled by the lack of tribal consent, and in his signing statement requested that Congress amend the law the following year.<sup>34</sup> Congress, however, did not amend Public Law 280 until 1968. By that time, nine other states had at least partially assumed the jurisdiction allowed over Indian matters under Public Law 280.<sup>35</sup> While the 1968

<sup>28</sup> Jiménez & Song, *supra* note 17, at 1634.

<sup>29</sup> Carole Goldberg, the preeminent expert on Public Law 280, has taken a position that despite Congress' intent that Public Law 280 reduce lawlessness in Indian country, it has actually had the opposite effect, since tribal courts' power was limited and tribes subject to Public Law 280 were cut out of significant federal funding opportunities. See Goldberg-Ambrose, *supra* note 13, at 1415–20. Public Law 280 has also been criticized for stunting the development of tribal judicial systems and preventing tribal courts from being respected as they were developing. See Washburn & Thompson, *supra* note 13, at 521.

<sup>30</sup> Jiménez & Song, *supra* note 17, at 1662; see also Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. GENDER RACE & JUST. 449, 452 (2004).

<sup>31</sup> See Jiménez & Song, *supra* note 17, at 1664.

<sup>32</sup> See Goldberg-Ambrose, *supra* note 13, at 1416–17. This also had the effect of shifting the costs from the federal government to the States without any offset through federal subsidies or permission for the States to tax the Indian reservations. See Jiménez & Song, *supra* note 17, at 1657.

<sup>33</sup> See Jiménez & Song, *supra* note 17, at 1657–58 (quoting Statement by the President upon Signing Bill Relating to State Jurisdiction over Cases Arising on Indian Reservations, 165 Pub. Papers 564, 564–65 (Aug. 15, 1953)).

<sup>34</sup> *Id.* at 1658 n.172.

<sup>35</sup> The nine States were Nevada in 1955; South Dakota in 1957 (jurisdiction over highways); Washington in 1957 (jurisdiction in eight subject areas); Florida in 1961; Idaho in 1963 (civil and criminal jurisdiction over seven subject matters, which can be expanded with tribal consent); Montana in 1963 (jurisdiction over the Flathead Reservation); North Dakota in 1963 (assuming civil jurisdiction, by tribal consent); Arizona in 1967 (jurisdiction over water quality, repealed in 2003, and jurisdiction over air quality, repealed in 1986); and Iowa in 1967 (civil jurisdiction over the Sac and Fox Tribe). After the

Amendment added a tribal consent clause for future states assuming Public Law 280 jurisdiction, the law did not apply retroactively to any of the states already under the law.<sup>36</sup> Furthermore, the Amendment allowed states to return jurisdiction granted by Public Law 280 back to the federal government, without providing a parallel means for Indian tribes to initiate return of jurisdiction to the federal government.<sup>37</sup> As the law stands today, 10 states in addition to the 6 “mandatory” states have assumed partial or full jurisdiction under Public Law 280, bringing 28% of federally recognized tribes in the contiguous 48 states and 70% of the federally recognized tribes in Alaska under the purview of Public Law 280.<sup>38</sup>

2. *The Supreme Court’s Interpretation of Public Law 280.*—The Supreme Court’s first case dealing with Public Law 280 established that the law did not grant states general civil regulatory authority over Indian reservations.<sup>39</sup> However, it was not until *California v. Cabazon Band of Mission Indians*<sup>40</sup> that the Court addressed how to determine whether a state law was criminal/prohibitory and subject to state jurisdiction, or civil/regulatory and outside the state’s control.<sup>41</sup>

The *Cabazon* case involved the Cabazon and Morongo Bands of Mission Indians, both of which operated bingo games on their reservations.<sup>42</sup> The State of California claimed the tribes’ bingo operations violated California law,<sup>43</sup> which only permitted bingo operations if they were staffed by designated charitable organizations, and required all profits be kept in separate accounts and only used for charitable purposes.<sup>44</sup> The State argued that it had jurisdiction under Public Law 280, but the district court rejected this argument and granted summary judgment to the tribes. The Ninth Circuit affirmed.<sup>45</sup>

In affirming the lower courts, the Supreme Court endorsed the test used by the Ninth Circuit to determine whether a law was criminal/prohibitory or civil/regulatory:

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1968 Amendment, in 1971, Utah became the last state to accept Public Law 280 jurisdiction. Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, THE ADVOCATE (Idaho), Jan. 2005, at 12 nn.17–26.

<sup>36</sup> Garrison, *supra* note 30, at 456.

<sup>37</sup> *Id.* States have exercised this retrocession provision and have returned jurisdiction over approximately 30 tribes to the federal government. U.S. DEP’T OF JUSTICE REPORT, *supra* note 6, at 4.

<sup>38</sup> U.S. DEP’T OF JUSTICE REPORT, *supra* note 6, at 4.

<sup>39</sup> *Bryan v. Itasca County*, 426 U.S. 373, 380–81 (1976).

<sup>40</sup> 480 U.S. 202 (1987).

<sup>41</sup> *Id.* at 208–09.

<sup>42</sup> *Id.* at 204–05.

<sup>43</sup> Cal. Penal Code Ann. § 326.5 (Deering 2006).

<sup>44</sup> *Cabazon Band of Mission Indians*, 480 U.S. at 205.

<sup>45</sup> *Id.* at 206.

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within [Public Law] 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [Public Law] 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.<sup>46</sup>

The Court recognized that the test did not constitute “a bright-line rule,” and acknowledged that in this case an argument could be made that the California law was prohibitory.<sup>47</sup> The Court, however, affirmed the Ninth Circuit's application of the test, reasoning that bingo was a generally permitted activity regulated by the state.<sup>48</sup> The Court noted that California did not prohibit all gambling; to the contrary, the State actively promoted its state-run lottery and permitted horserace betting.<sup>49</sup> Furthermore, a number of private bingo games operated legally in the State. Generally, the law required that bingo games be open to the public; anyone over eighteen could play.<sup>50</sup>

After providing this reasoning, the Court indirectly acknowledged the difficulty in applying this test, since it felt compelled to specify that “nothing in this opinion suggests that cock-fighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California.”<sup>51</sup> The Court added that “the applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory.”<sup>52</sup> As a result, after *Cabazon*, a test to determine whether a law is criminal/prohibitory or civil/regulatory exists, but—by the Court's own admission—it is a difficult test to apply. This is largely due to the ambiguity of the *Cabazon* test; the Court failed to provide any guidance as to how the “conduct at issue,” or “the State's public policy” should be framed.

3. *Inconsistencies in Public Law 280 Adjudication: The Aftermath of Cabazon.*—The outcome in *Cabazon* was a victory for tribal sovereignty, but the Court's own ambiguity in defining the parameters of the test opened the door for future inconsistencies in the reach of state authority over Indian matters.<sup>53</sup> The test rested on whether the “conduct at issue” is

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<sup>46</sup> *Id.* at 209.

<sup>47</sup> *Id.* at 210.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 211.

<sup>51</sup> *Id.* at 211 n.10.

<sup>52</sup> *Id.*

<sup>53</sup> See generally Haslam, *supra* note 14. Haslam argues that the ambiguity of the test allows states, in how they craft their laws, to determine whether a law falls under the purview of Public Law 280 jurisdiction. *Id.* at 184–85. She suggests that the Supreme Court adopt a test where Public Law 280 would only allow States to apply laws “guarding against acts which are *malum in se*, ‘naturally evil,’ as adjudged by the sense of a civilized community.” *Id.* at 191.

generally permitted or prohibited, but the Supreme Court provided no guidance as to whether the “conduct at issue” should be defined narrowly or broadly, even though this is often critical to a law’s classification as criminal/prohibitory or civil/regulatory.<sup>54</sup> Furthermore, the Court’s shorthand test of whether the conduct violates the State’s public policy is so vague that it is subject to manipulation.<sup>55</sup> Due to the test’s ambiguity, courts tend to look at a number of variables outside those listed in the *Cabazon* test in order to determine whether a law is applicable to Indian country under Public Law 280.<sup>56</sup> The difficulty in applying the *Cabazon* test consistently has led courts to reach opposite conclusions as to whether a law is criminal/prohibitory or civil/regulatory in cases involving family law,<sup>57</sup> fireworks,<sup>58</sup> and driving.<sup>59</sup>

Traffic laws provide a good illustration of the confusion surrounding whether a law is criminal/prohibitory or civil/regulatory following *Cabazon*. For instance, Wisconsin and Idaho traffic laws have been interpreted as criminal/prohibitory, while in Washington and Minnesota courts have interpreted these same laws as civil/regulatory.<sup>60</sup> Even the states that have classified general traffic laws as civil/regulatory, furthermore, have characterized laws directed at deterring drunk driving as criminal/prohibitory for Public Law 280 purposes.<sup>61</sup>

In *State v. Stone*, the Minnesota Supreme Court ruled that state traffic laws concerning issues such as failing to provide car insurance, driving with an expired registration, driving without a license, driving with an expired license, speeding, driving with no seat belt, and failure to have a child in a child restraint were all civil/regulatory for purposes of Public Law 280 jurisdiction.<sup>62</sup> In reaching its decision, the court developed a two-step application of the *Cabazon* test, whereby the broad conduct—such as driving generally—is the focus of the test unless the narrow conduct—such as laws prohibiting drunk driving—presents heightened public policy concerns.<sup>63</sup>

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<sup>54</sup> The Minnesota Supreme Court noted this problem with the *Cabazon* test in *State v. Stone*, 572 N.W.2d 725, 729 (Minn. 1997).

<sup>55</sup> See Garrison, *supra* note 30, at 459.

<sup>56</sup> These other variables include whether the penalty was criminal or civil, the title of the code, the number of exceptions to the prohibited conduct, issues of sovereignty, the effectiveness of concurrent jurisdiction, and public policy and specificity. Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333, 1349–59 (1999).

<sup>57</sup> See Garrison, *supra* note 30, at 465–67. Compare *State v. Marek*, 777 P.2d 1253 (Idaho Ct. App. 1989), with *Doe v. Mann*, 285 F. Supp. 2d 1229 (N.D. Cal. 2003).

<sup>58</sup> See Garrison, *supra* note 30, at 467–68. Compare *Quechan Indian Tribe v. McMullen*, 984 F.2d 304 (9th Cir. 1993), with *State v. Cutler*, 527 N.W.2d 400 (Wis. Ct. App. 1994).

<sup>59</sup> See Garrison, *supra* note 30, at 459–65.

<sup>60</sup> *Id.* at 460–62.

<sup>61</sup> *Id.* at 463.

<sup>62</sup> *State v. Stone*, 572 N.W.2d 725, 730–31 (Minn. 1997).

<sup>63</sup> *Id.* at 730.

The Minnesota Supreme Court also interpreted *Cabazon*'s "shorthand public policy test" as pertaining only to "public *criminal* policy" going beyond "merely promoting the public welfare."<sup>64</sup>

Applying its newly developed standard, the court found that none of the particular traffic laws in this case implicated a heightened public policy concern beyond the general public policy of driving laws.<sup>65</sup> Then, applying the broad conduct of driving to the *Cabazon* test, the court found that since driving is generally permitted, subject to regulation, traffic laws were civil/regulatory, and therefore not subject to Public Law 280 jurisdiction.<sup>66</sup>

While *Stone* held that general traffic laws were civil/regulatory, courts' ad hoc application of Public Law 280 is reflected by the Minnesota Supreme Court's opposite conclusion in *State v. Busse*.<sup>67</sup> In that case, Busse, an enrolled tribal member, was charged with a gross misdemeanor for driving after his license was cancelled. The court focused on the narrow conduct of Busse's violation of the specific driving-after-cancellation offense, due to heightened public policy concerns.<sup>68</sup> The court found that heightened public policy concerns existed, since any driving by Busse, regardless of whether he was intoxicated at the time, posed a serious threat to public safety.<sup>69</sup> In applying the *Cabazon* test to this narrow conduct, the court found that unlike general driving laws, which were civil/regulatory, driving after cancellation was inimical to the public safety and therefore a criminal/prohibitory offense over which the State had jurisdiction under Public Law 280.<sup>70</sup>

### C. Summary

The passage of Public Law 280 and its subsequent interpretation by the courts are both highly problematic. Congress passed Public Law 280 during the aberrant "Termination Period" of United States Indian policy. The law's imposition of state criminal jurisdiction upon tribes without tribal consent is contrary to current federal policy supporting tribal sovereignty.

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<sup>64</sup> *Id.* The Minnesota Supreme Court's two-step application of the *Cabazon* test is as follows:

The first step is to determine the focus of the *Cabazon* analysis. The broad conduct will be the focus of the test *unless* the narrow conduct presents substantially different or heightened public policy concerns. If this is the case, the narrow conduct must be analyzed apart from the broad conduct. After identifying the focus of the *Cabazon* test, the second step is to apply it. If the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory. If the conduct is generally prohibited, the law is criminal/prohibitory. In making this distinction in close cases, we are aided by *Cabazon*'s "shorthand public policy test," which provides that conduct is criminal if it violates the state's public policy.

*Id.*

<sup>65</sup> *Id.* at 730–31.

<sup>66</sup> *Id.* at 731.

<sup>67</sup> 644 N.W.2d 79 (Minn. 2002).

<sup>68</sup> *Id.* at 87–88.

<sup>69</sup> *Id.* at 85.

<sup>70</sup> *Id.* at 88.

Furthermore, the Supreme Court's formulation of the *Cabazon* test to determine whether a law is criminal/prohibitory and subject to state jurisdiction, or civil/regulatory and within the tribe's jurisdiction, is vague and has led to inconsistent results within, and among Public Law 280 states. Traffic laws provide a powerful illustration of the inconsistencies surrounding Public Law 280 jurisdiction, and as the next Part will discuss, sex offender registration codes appear to be the new source of Public Law 280 jurisdictional confusion.

## II. OVERVIEW OF THE RELATIONSHIP BETWEEN INDIAN LAW AND SEX OFFENDER REGISTRATION

This Part will address the specific jurisdictional concerns surrounding sex crimes and sex offender registration programs within Indian country. It will begin by examining the interplay of federal, state, and tribal jurisdiction with respect to sex crimes committed by Native Americans in Indian country. Next, this Part will venture into the murky jurisdictional question of whether Public Law 280 states' predatory offender registration codes are applicable to Native-American offenders residing on reservations. This will be done by focusing on the *Jones* decision in Minnesota.

### A. *Jurisdiction in the Prosecution of Sex Crimes Committed by Native-Americans in Indian Country*

Although the *Cabazon* test's ambiguity has led to inconsistent results when applied to driving laws—and, as will be discussed, is unclear regarding sex offender registration requirements—the authority of Public Law 280 states to prosecute serious predatory crimes committed by Native-Americans in Indian country does not appear to have been challenged.<sup>71</sup> As a result, in Public Law 280 states, all state citizens, including Native-Americans, are prosecuted under the same sex-crime laws.

However, in non-Public Law 280 states, where the State does not have criminal jurisdiction over Indian country, the federal government maintains jurisdiction over sex crimes committed by Native-Americans on Indian reservations.<sup>72</sup> The majority of these federal prosecutions occur in the west and southwest of the United States.<sup>73</sup> Because non-Native-American sex of-

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<sup>71</sup> This conclusion comes based upon searches of Lexis and Westlaw conducted in the winter and spring of 2006.

<sup>72</sup> See *supra* Part I.A.

<sup>73</sup> In particular, these federal prosecutions largely occur in Arizona, South Dakota, New Mexico, and Montana. Celia M. Rumann & Jon M. Sands, *Lost in Incarceration: The Native-American Advisory Group's Suggested Treatment for Sex Offenders*, 16 FED. SENT'G REP. 208, 211 n.20 (2004); REPORT OF THE NATIVE AMERICAN ADVISORY GROUP, UNITED STATES SENTENCING COMMISSION 2 (Nov. 4, 2003), available at <http://www.ussc.gov/NAAG/NativeAmer.pdf>; see also Nora V. Demleitner, *Legal Issues and Sociological Consequences of the Federal Sentencing Guidelines: First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87

fenders are generally prosecuted under state law, the majority of federal cases dealing with sex offenses involve Native-American defendants.<sup>74</sup> In fact, although only approximately 1.5% of the United States population is Native-American, during Fiscal Year 2001, over half (132 of 240) of the federal sexual abuse convictions were against Native-Americans.<sup>75</sup>

### B. Jurisdictional Issues Surrounding Sex Offender Registration Laws

Prior to the *Jones* decision, while it was understood that tribes possessed jurisdiction to enforce sex offender registration requirements<sup>76</sup> in non-Public Law 280 states,<sup>77</sup> it was widely assumed by Public Law 280

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IOWA L. REV. 563, 564 (2002) (noting that in 2001, 238 sex offenders were sentenced in federal court compared to 30,000 in state courts throughout the country).

<sup>74</sup> Rumann & Sands, *supra* note 73, at 208.

<sup>75</sup> *Id.* at 211 n.15. The high number of prosecutions against Native-Americans is also tied in part to the high crime rate existing on Indian reservations, where the violent crime rate is more than double the number seen in the rest of the country. Demleitner, *supra* note 73, at 575. This high crime rate can be traced to factors such as high rates of poverty and unemployment on Indian reservations. Rumann & Sands, *supra* note 73, at 209; *see also* Demleitner, *supra* note 73, at 574. It is also important to note that sentences under the Federal Sentencing Guidelines are generally harsher than their State counterparts, and have been criticized as having a disproportionate impact on Native-American sex-offenders. *See generally* Demleitner, *supra* note 73, at 577. For example, in New Mexico, the average federal sentence for sex offenders was 86 months, as opposed to 43 months for state convictions. Gregory D. Smith, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act*, 27 HAMLINE L. REV. 483, 487 (2004).

<sup>76</sup> The Jacob Wetterling Crimes Against Children and Sex Offender Registration Act was passed and amended by Congress in the mid-1990s. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2000); W. Paul Koenig, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law?"*, 88 J. CRIM. L. & CRIMINOLOGY 721, 728 (1998). Congress provided guidelines for states' implementation of sex offender registration and community notification procedures. 42 U.S.C. § 14071 (2005). Congress also established a national database of sex offenders at the FBI, although the responsibility for devising and implementing the sex offender registration and community notification procedures rests with the States. Alan R. Kabat, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 349 (1998); *see* 42 U.S.C. § 14072 (1998).

<sup>77</sup> In non-Public Law 280 states, tribes have jurisdiction over the registration of Indian sex offenders residing on their reservations. *See* Sarah Deer, *Towards an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 129 n.79, 80 (2004). The Center for Sex Offender Management, under the United States Department of Justice, has made some efforts over the years to provide grants to specific Indian tribes in order to assist in implementing programs to treat sex offenders and protect the community. For example, in 2000, federal grants were given to two Indian reservations in Montana. On the Fort Peck Indian Reservation, there were 28 registered sex offenders monitored by the Tribal Probation Department and another seven sex offenders supervised by Federal Probation. The grant in this case assisted in data collection and the development of a consistent and complete registration and community notification system. Center for Sex Offender Management, <http://www.csom.org/activities/mt.html> (last visited Nov. 15, 2006). A grant was also awarded to the Yankton Sioux Reservation in South Dakota in 1999. Part of the grant went towards improving information sharing on sex offenders between federal, State, and tribal agencies, and updating the tribal sex offender registry. Center for Sex Offender Management, <http://www.csom.org/activities/sd.html> (last visited Nov. 15, 2006). Similar grants were also awarded to two Arizona Indian tribes in 2001. Center for Sex Offender Management, <http://www.csom.org/activities/az.html> (last visited Nov. 15, 2006).

states and tribes that the state's jurisdiction over predatory crimes also extended to state jurisdiction regarding sex offender registration laws.<sup>78</sup> The *Jones* decision, however, revealed that sex offender registration laws may be the next source of confusion in Public Law 280 jurisdiction. Although Wisconsin, another Public Law 280 state, determined that Public Law 280 gives the State jurisdiction to civilly commit sex offenders,<sup>79</sup> prior to *Jones*,

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www.csom.org/activities/az.html (last visited Nov. 15, 2006). Although most of these grants went to tribes in non-Public Law 280 states, this was not exclusively the case, since a \$50,000 grant was awarded to the Oneida Tribe of Indians in Wisconsin under the Comprehensive Approaches to Sex Offender Management Grant Program. Center for Sex Offender Management, <http://www.csom.org/pubs/chart.pdf> (last visited Nov. 15, 2006). A key component of many of these grants has been strengthening tribal registration and community notification of sex offenders, as well as facilitating the sharing of information on sex offenders between tribal, State, and federal agencies. While the grants from the Department of Justice are directed at the proper issues, this money has only reached a small handful of tribes. However, Congress' recent reauthorization of the Violence Against Women Act included an award of one million dollars per year for the Attorney General to work with tribes in developing a national tribal sex offender registry, which should facilitate the creation of tribal sex offender registries. Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, § 905(b) (2005).

<sup>78</sup> Melanie Benjamin, *Reservations Aren't Havens for Offenders*, ST. PAUL PIONEER PRESS, Aug. 16, 2005, at 7B ("Minnesota tribes learned of the loophole in the predatory offender law when everyone else did."). Beyond the Public Law 280 issue addressed in this Comment, it is also important that dialog between States and tribes include discussion of whether State registration requirements apply to Native-Americans residing in the State who were prosecuted solely in tribal court. The Jacob Wetterling Act mandates that States' registration laws require residents convicted of sex offenses in federal court to register with the proper State authorities, but does not impose the same requirement for sex offenders convicted in tribal courts. 42 U.S.C. § 14071(7). As a result, while every State requires Native-American sex offenders prosecuted in federal court to register, it is up to the States' discretion whether to extend this registration requirement to Native-American sex offenders prosecuted only in tribal court. Currently, at least twelve States—Arkansas, Georgia, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, Ohio, Oklahoma, and Vermont—require sex offenders convicted in tribal court to register if they reside in the State. Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 273 (2004). For the other 38 States, a jurisdictional gap exists in their sex offender registries, since Indian sex offenders prosecuted in tribal court could come to reside in their State without being subject to any registration requirement.

At the same time, there are concerns with requiring registration of those prosecuted solely in tribal court. These individuals may not be on notice of their duty to register and, furthermore, would be subjected to registration for what would only be a misdemeanor offense. *Id.* at 273–75. The best way to strike a balance between the concerns for those prosecuted solely in tribal court and the State's interest in having a comprehensive registry is to have the State and tribes enter into a dialog on the matter. Collaboration on this issue could be particularly useful in eliminating the concern over lack of notice, since tribal courts could inform offenders of their duty to register with the State.

<sup>79</sup> In *In re Burgess*, the Wisconsin Supreme Court addressed whether a State law permitting the civil commitment of convicted sexually violent persons mentally predisposed to re-offend was criminal/prohibitory or civil/regulatory for purposes of jurisdiction under Public Law 280. 665 N.W.2d 124, 126 (Wis. 2003). Although the court had previously classified the law as civil, the court determined that "the past and potential future [sexual] conduct" that was "at the heart" of the law, was "prohibited and not merely regulated by the State." *Id.* at 132. As such, the court ruled that the State had jurisdiction under Public Law 280. *Id.*

it does not appear that any court in a Public Law 280 state had addressed Public Law 280's applicability to sex offender registration laws.<sup>80</sup>

Jones' successful challenge to the State's subject matter jurisdiction came as a surprise to both the State and Minnesota's Native American communities.<sup>81</sup> While the trial court arguably came to the correct conclusion in the case, the decision was poorly reasoned, since it failed to apply the *Cabazon* test that controlled the case.<sup>82</sup> Instead, although the trial court noted the serious public policy concerns stemming from the jurisdictional gap created by its decision, the court held that since the registration laws were classified as civil in other contexts, the laws must also be civil for purposes of Public Law 280.<sup>83</sup>

On appeal to the Minnesota Court of Appeals, the court formally applied Minnesota's version of the *Cabazon* test and upheld the lower court's decision.<sup>84</sup> Although the appellate court was correct that the *Cabazon* test

<sup>80</sup> This is based upon searches in Westlaw and Lexis conducted during fall 2005.

<sup>81</sup> See Benjamin, *supra* note 78, at 7B.

<sup>82</sup> Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction, *State v. Jones*, K8-04-1154 (Minn. 9th Dist. Dec. 15, 2004) (found in File Order K8-04-1154, *State v. Jones*, at \*2, app. at A.A.8-9 (Minn. 9th Dist. 2005)).

<sup>83</sup> Order, *State v. Jones*, K8-04-1154 (Minn. 9th Dist. Feb. 5, 2004) (found in File Order K8-04-1154, *State v. Jones*, at \*2, app. at A.A.10 (Minn. 9th Dist. 2005)) (citing *Kaiser v. State*, 641 N.W.2d 900, 908 (Minn. 2002)). In reaching its decision to grant Jones' motion, the Minnesota District Court summarized the Minnesota Supreme Court's two-step application of the *Cabazon* test, *id.* app. at A.A.8-9, but never actually applied the test. Instead, the court concluded that the statute was regulatory based upon two prior Minnesota Supreme Court decisions—*Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999), and *Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002)—neither of which dealt with Public Law 280. Order, K8-04-1154, *State v. Jones* (Minn. 9th Dist. Feb. 5, 2004) (found in File Order K8-04-1154, *State v. Jones*, at \*2, app. at A.A.10 (Minn. 9th Dist. 2005)) (citing *Kaiser v. State*, 641 N.W.2d 900, 908 (Minn. 2002)). In both these cases, the Minnesota Supreme Court, using a different test for a different purpose, classified the Predatory Offender Registration Act as regulatory in nature.

Although the district court granted the motion to dismiss, the court went on to say that “allowing predatory offenders to dodge registration requirements based on residency flies in the face of public policy and safety,” and urged that the current law be reexamined in order to prevent offenders from avoiding “registration requirements designed to protect innocent members of society.” *Id.* The court's acknowledgement that the jurisdictional gap created by its decision was contrary to public policy and public safety indicates that the court may have found the law to be criminal/prohibitory if it had actually applied the *Cabazon* shorthand public policy test in its analysis, rather than relying upon *Boutin* and *Kaiser*.

<sup>84</sup> *State v. Jones*, 700 N.W.2d 556 (Minn. Ct. App. 2005). The Minnesota Court of Appeals handed down its decision in *State v. Jones* on July 26, 2005. *Id.* The court began its discussion of the case by quoting the *Cabazon* test and its two-step application under *Stone*. *Id.* at 558-59. The court of appeals then avoided the district court's mistake, and applied the *Cabazon* test to Jones's prosecution. *Id.* at 559-61. In doing so, the court began by applying the first part of the test under *Stone*, which is to determine whether the broad conduct or the narrow conduct was at issue in this case. *Id.* at 559. However, the court of appeals stated that it could not find any “meaningful distinction” between the broad and narrow conduct in this case, and instead defined the conduct at issue as “Jones's failure to keep the authorities apprised of his residence address.” *Id.*

The court stressed that the conduct at issue was Jones's failure to properly report his address, and not the underlying criminal predatory conduct that initially triggered the registration law's applicability to

controlled, it misapplied the test.<sup>85</sup> In part, the appellate court failed to distinguish the *Jones* case from *Busse*, where the court had determined that looking at the underlying offense was permitted when determining whether heightened public policy concerns were implicated.<sup>86</sup>

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*Jones*. *Id.* at 560. When applying the *Cabazon* test to this conduct, the court ruled that, “[i]t is beyond dispute that people living in Minnesota have no general obligation to register their residence addresses with state authorities.” *Id.* As such, the registration requirement for predatory offenders was “an exception to that proposition,” meaning that the conduct was generally permitted subject to regulation, and therefore, the registration requirement was civil/regulatory. *Id.*

In addition to walking through the formal two-part application of the *Cabazon* test, the court also adhered to *Cabazon* by examining the State law in detail. *Id.* While the court’s opinion did not articulate its process of examination, it did conclude that “the essence of the law is regulatory,” since the law’s aim of allowing law enforcement to better monitor predatory felons gave the statute an “investigative” purpose. *Id.* The court said that in contrast, criminal laws prohibited certain conduct in order to prevent harm from occurring. *Id.* The court stated that the registration law could not be considered criminal because, “[f]ailing to reveal an address causes no harm, poses no threat, and jeopardizes no person or property.” *Id.* Additionally, the court noted that “[r]egistration will not prohibit or deter a further crime if the predator chooses to commit one.” *Id.*

Next, the court engaged in the public policy argument emphasized in the Appellant and amicus briefs. *Id.* The court readily acknowledged that predatory crimes were contrary to *Stone*’s definition of criminal public policy, since such acts were “serious breaches in the social fabric that clearly threaten or cause grave harm to people.” *Id.* However, the court said that this did not extend to predatory offender registration requirements, since failing to register only hampered law enforcement investigation, and did not threaten grave harm to anyone. *Id.*

Finally, the court addressed the district court’s reliance on the *Boutin* and *Kaiser* decisions, both of which had classified the registration law as civil/regulatory. *Id.* The court stated that although those cases did not apply the *Cabazon* test, they did make clear determinations that the registration law “does not promote the traditional aims of punishment,” *id.* (quoting *Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. 2002)), and that the law had the “‘clear purpose’ of keeping ‘law enforcement informed as to a predatory offender’s whereabouts.’” *Id.* at 560 (quoting *Kaiser*, 641 N.W.2d at 907). The court then concluded that even though *Boutin* and *Kaiser* did not address Public Law 280 jurisdiction disputes, “it would seem wholly contradictory for any court to classify the statute as regulatory/civil for some purposes and prohibitory/criminal for other purposes.” *Id.* at 560–61. Accordingly, based on its analysis of the predatory offender registration law, the court held that Minn. Stat. § 243.166 (2002) was civil/regulatory, and therefore the State lacked jurisdiction to enforce the law against Jones, or any Native-American residing on a reservation. *Jones*, 700 N.W.2d at 561.

<sup>85</sup> *Jones*, 700 N.W.2d at 559–61.

<sup>86</sup> *See id.* at 560; *see also* *State v. Busse*, 644 N.W.2d 79, 84 (Minn. 2002) (stating that “looking at the underlying basis for a license revocation or, in this case, cancellation, is not prohibited when determining whether the offense involves heightened public policy concerns”). There are also other criticisms of the appellate court’s decision in *Jones*. One area of criticism relates to the fact that under *Stone*’s two-step approach to applying the *Cabazon* test, the court must first determine whether the focus of the *Cabazon* test is on the broad conduct or the narrow conduct at issue in the case. *State v. Stone*, 572 N.W.2d 725, 730 (Minn. 1997). However, the appellate court was unable to find any distinction between narrow and broad conduct, even though a distinction could be drawn between the broad conduct of failing to keep the authorities apprised of one’s residence address, and the narrow conduct of failing, as a predatory offender, to do the same. *See id.*; *see also* *Busse*, 644 N.W.2d at 83.

Another criticism of the appellate court’s decision is that in the appellate court’s public policy analysis, the court completely separated the act of failure to register from the predatory crime that precipitated the registration requirement. *Jones*, 700 N.W.2d at 560. In doing so, the appellate court made no effort to reconcile its determination with the Minnesota Supreme Court’s statement in *Busse* that “looking at

The *Jones* case is now headed to the Minnesota Supreme Court, and while the decision is consistent with current federal policy favoring tribal sovereignty, the appellate court's failure to distinguish *Busse* makes it difficult to predict what the Minnesota Supreme Court will decide.

Limiting Public Law 280's reach with respect to sex offender registration comports with the federal government's shift from a policy supporting Indian assimilation to one that respects tribal sovereignty. Furthermore, although *Jones* was necessary to bring the tribes and the State to the table to discuss predatory offender registration on reservations, as will be discussed, the solutions coming out of these meetings effectively balance tribal sovereignty and tribal needs with the importance of a comprehensive predatory offender registry. Despite the compelling reasons for affirming *Jones*, when the appellate court's decision is scrutinized under the legal microscope, aspects of the court's analysis are certainly open to criticism. Thus, while compelling arguments exist that Minnesota's predatory offender registration law, under a strict application of the *Cabazon* test, is criminal/prohibitory, in other contexts, the Minnesota Supreme Court has refused to label the law as "criminal," so as to avoid Constitutional concerns.<sup>87</sup> The combination of this tension with the inconsistent results characterizing the *Cabazon* test makes it difficult to predict whether the Minnesota Supreme Court will affirm or reverse the appellate court's decision in *Jones*. Furthermore, with courts' interpretation of Public Law 280 jurisdiction varying so much from state to state, there is no reason to think that courts in other Public Law 280 states will mirror whatever decision is set forth by the Minnesota Supreme Court.

Since applying *Cabazon* has proved to be an ineffective tool for determining the scope of Public Law 280 jurisdiction with any consistency, po-

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the underlying basis for a license revocation, or in this case, cancellation, is not prohibited when determining whether the offense involves heightened public policy concerns." *Busse*, 644 N.W.2d at 84. Applying this language to the *Jones* case, it appears that the court did not have to consider Jones's failure to register by itself, and instead could have considered the prior predatory kidnapping offense that led to his being subjected to the registration requirement.

A final point of criticism is that the appellate court in *Jones* defended the district court's reliance upon *Boutin* and *Kaiser* in determining that the registration statute was civil/regulatory. The court of appeals' opinion stated that although *Boutin* and *Kaiser* did not address Indian jurisdictional issues, "it would seem wholly contradictory for any court to classify the statute as regulatory/civil for some purposes and prohibitory/criminal for other purposes." *Jones*, 700 N.W.2d at 560-61. However, under this contention, the Wisconsin Supreme Court came to a "wholly contradictory" conclusion in *In re Burgess*, where it held that the state had jurisdiction under Public Law 280 to hold civil commitment hearings for a sexually violent Native-American offender who had committed his offense on the reservation he resided on. *In re Burgess*, 665 N.W.2d 124 (Wis. 2003).

<sup>87</sup> See *Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999) (holding, based on the U.S. Supreme Court's test in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), that Minn. Stat. § 243.266 is a civil, regulatory statute, and, therefore, the Constitutional "presumption of innocence" does not attach); see also *Smith v. Doe*, 538 U.S. 84 (2003); *Kaiser*, 641 N.W.2d 900. The United States Supreme Court held that Alaska's sex offender registration law established a civil regulatory scheme and therefore its retroactive application did not violate the Constitution's Ex Post Facto Clause. *Id.*

litical agreements between Public Law 280 states and tribes remain the optimal solution for closing the jurisdictional gap with regard to sex offender registration. The actions taken by the State and tribes in Minnesota underscore the effectiveness of political dialog in creating an effective and workable balance between state and tribal interests. As a result, other States and tribes subject to Public Law 280 would benefit by taking stock of the Minnesota experience and should resolve state–Indian jurisdictional issues through the political process rather than leave them to the court’s discretion.

### III. THE LESSONS TO BE LEARNED FROM THE TRIBAL AND STATE RESPONSE TO *JONES*

In light of the unpredictability surrounding the scope of Public Law 280 jurisdiction when decided by the courts, states and tribes can benefit by resolving these jurisdictional question through the political process. This Part will discuss the lessons other Public Law 280 tribes and states can take away from the Minnesota experience surrounding *Jones*. First, this Part will study the fallout in Minnesota from the appellate court’s decision in *Jones*. Next, this Part will show that the successful adoption of tribal–state agreements in Minnesota stemmed from the parties’ recognition of their common objectives, and the acknowledgement that there was not a one-size-fits-all solution to filling the jurisdictional hole created by *Jones*. Finally, this Part will conclude by describing the strengths and weaknesses of three different tribal solutions to monitoring sex offenders on reservations.

#### *A. The Value in Proactive Agreements: Minimizing Political Tension and the Media Spotlight*

The initial public and political reaction to the *Jones* decision in Minnesota should serve as a strong incentive for Public Law 280 states and tribes to proactively resolve the issue of how to address sex offender registration before courts resolve the issue. While *Jones* was the necessary catalyst to bring the tribes and State to the discussion table in Minnesota, initial tensions between the two sides were exacerbated due to their mutual surprise at the *Jones* decision and the media spotlight shown on the issue.

The reaction to the jurisdictional hole created by *Jones*—which had previously not been on the tribes’ or the State’s radar<sup>88</sup>—was swift following the Minnesota Court of Appeals’ ruling on July 26, 2005. The Minnesota Governor, Tim Pawlenty, reacted quickly to *Jones*, writing a letter to Minnesota Attorney General Mike Hatch on July 28, expressing “concern and alarm” over the court’s decision.<sup>89</sup> The Governor urged the Attorney General “to make available whatever resources are necessary” to appeal the

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<sup>88</sup> Benjamin, *supra* note 78, at 7B.

<sup>89</sup> Letter from Tim Pawlenty, *supra* note 10.

decision to the Minnesota Supreme Court.<sup>90</sup> The press echoed the concern expressed by the Governor as newspaper articles reported on how the *Jones* decision would impact the monitoring of the 665 registered American Indians in the state.<sup>91</sup> Articles in the *Star Tribune* and the *Duluth News Tribune* quoted a Minnesota Bureau of Criminal Apprehension (“BCA”) agent as saying that the court’s decision was “a little disconcerting” and “flies in the face of the movement to get a better handle on where these people are.”<sup>92</sup> The same *Star Tribune* article also quoted the Cass County Attorney’s response that the decision was “disappointing from a public safety standpoint,” since “registration not only helps law enforcement identify possible suspects; often it warns the public about where a predatory offender resides.”<sup>93</sup>

These news articles, while emphasizing the State’s concern that reservations would become safe havens for sex offenders, largely ignored the tribal perspective on the case. Some early newspaper articles did quote a statement by the solicitor general for the Mille Lacs Band of Ojibwe saying that the tribe “understand[s] that registration serves a beneficial purpose,” and that “[i]t’s something we want to preserve, but we’re glad for the opportunity to create our own system.”<sup>94</sup> The media’s initial reaction, however, ignored or minimized tribal reaction to the case and instead focused on the State government’s concern that “what we don’t want to have happen is [tribal members] fleeing to the reservation to avoid registration.”<sup>95</sup> In response to this one-sided reporting, tribal officials began issuing press releases and writing letters to the editor to express their view of *Jones* to the public.

On July 30, Kevin Leecy, Chairman of the Minnesota Indian Affairs Council, issued a press release in response to an unbalanced article in the

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<sup>90</sup> *Id.*

<sup>91</sup> The exact calculation of registered Native-Americans in the State varied, but the response was somewhere around the 665 reported by the *Star Tribune*. Pat Doyle, *Indians: No ‘Safe Haven’ for Predators*, STAR TRIB., Aug. 2, 2005, at 1B [hereinafter Doyle, *Indians*]. For articles immediately following the *Jones* decision, see Larry Oakes, *Hole Remains in Offender Registry: The Appeals Court Ruling Says the State Cannot Force American Indians Living on Reservations to List Addresses*, STAR TRIB., July 27, 2005, at 1B [hereinafter Oakes, *Hole Remains*]. See also *Court Ruling Deals Blow to Offender Registry*, DULUTH NEWS TRIB., July 28, 2005, at Local [hereinafter *Court Ruling Deals Blow*]; Larry Oakes, *Offender Registration Examined Loophole Lets Criminals on Reservations Avoid Registering Addresses*, STAR TRIB., July 28, 2005, at 1B [hereinafter Oakes, *Offender Registration Examined Loophole*].

<sup>92</sup> See Oakes, *Hole Remains*, *supra* note 91, at 1B; see also *Court Ruling Deals Blow*, *supra* note 91.

<sup>93</sup> Oakes, *Hole Remains*, *supra* note 91, at 1B.

<sup>94</sup> See Oakes, *Offender Registration Examined Loophole*, *supra* note 91, at 1B; see also Associated Press, *Offender Law Doesn’t Extend to Reservations: Tribes Want to Create Own Tracking System*, ST. PAUL PIONEER PRESS, July 29, 2005, at 4B [hereinafter *Offender Law Doesn’t Extend to Reservations*].

<sup>95</sup> See Oakes, *Offender Registration Examined Loophole*, *supra* note 91, at 1B (quoting Eric Knutson, BCA special agent); *Offender Law Doesn’t Extend to Reservations*, *supra* note 94, at 4B.

*Star Tribune* reporting on the State's response to the *Jones* decision.<sup>96</sup> Leecy criticized the *Star Tribune* reporter for failing to research tribal rules already in place to protect the community from predatory offenders. Leecy's letter also criticized the media's failure to report on tribal efforts to work cooperatively with the State in creating a workable sexual registration program.<sup>97</sup> The press release stressed the principle of tribal sovereignty, but underscored that the challenge to the law came from Jones himself and not from a tribal government.<sup>98</sup> The article also emphasized that the tribes would not hesitate to pass tribal laws to deal with predatory offenders and that some Minnesota tribes already banished sex offenders from the tribal community for life.<sup>99</sup> Leecy's statement concluded by expressing optimism for the future discussions between the Minnesota tribes and the Attorney General's Office, and frustration at the Governor for failing to advocate a political solution to the jurisdictional gap.<sup>100</sup>

In addition to pursuing the Governor's orders to appeal the *Jones* decision, the Attorney General simultaneously entered into discussions with the ten tribes subject to Minnesota's Public Law 280 jurisdiction. The goal of these discussions was to develop agreements that would effectively bridge the jurisdictional chasm created by *Jones*, while preserving tribal sovereignty.<sup>101</sup> Many tribal officials published letters expressing appreciation of Hatch's efforts to collaborate with the tribes on this matter, but criticized the Governor's decision to "call[] his attorney" to appeal the case before "call[ing] tribal leaders" to work out a mutually agreeable solution.<sup>102</sup>

Although the discussions between the tribes and the Attorney General were ultimately successful, the hard-line stance of the Governor and the initial lopsided reporting by the press threatened to derail the negotiation process before it even began. Other States could avoid much of this political tension by proactively addressing the jurisdictional issue presented in *Jones*. When the tribes and the states are forced to deal with the issue of sex offender registration in a climate of judicial intervention—or worse, in reaction to a crime committed by an unregistered prior offender—the parties can expect considerably more scrutiny from the media and public. This

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<sup>96</sup> Leecy Press Release, *supra* note 11. Leecy, who is also the Chairman of the Bois Forte Band of Chippewa in Northern Minnesota, was responding to the article *State Fights Legal Shield for Indian Criminals*. See Larry Oakes, *State Fights Legal Shield for Indian Criminals*, STAR TRIB., July 29, 2005, at 2B.

<sup>97</sup> Leecy Press Release, *supra* note 11.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Doyle, *Indians*, *supra* note 91, at 1B. The Red Lake tribe did not agree to discussions with the Attorney General in response to *Jones*. This is not altogether surprising since Congress expressly exempted the Red Lake Reservation from Public Law 280 jurisdiction.

<sup>102</sup> Benjamin, *supra* note 78, at 11B.

attention and public pressure will make it difficult for States and tribes to reach a reasonable compromise.

*B. The Key to Successful Agreements: A Recognition of Common Objectives and the Avoidance of a One-Size-Fits-All Solution*

While many scholars and commentators have touted the value of tribal–state compacts over rigid divisions between tribal and State sovereignty,<sup>103</sup> there are many obstacles to effective compacting. These obstacles can range from inharmonious objectives between the two sides to the often-bitter history between a state and a tribe, as well as insensitivity to the existence of cultural, economic, and political differences between the parties.

1. *The Common Goals of the State and the Tribes.*—Unlike other areas of tribal–state compacting, in the case of sex offender registration, the states and the tribes share a common objective: keeping communities safe from sexual predators. In Minnesota, this tribal–state unity facilitated early and successful meetings between the Attorney General and the tribes, in contrast to some prior interactions between the two parties on other issues.<sup>104</sup> With this common objective in mind, tribes then focused on implementing sex offender registries through the exercise of tribal sovereignty,<sup>105</sup> while the State focused on developing agreements that monitored sex offenders as effectively as when the issue was completely under the State’s jurisdiction.<sup>106</sup>

2. *Not a One-Size-Fits-All Solution.*—As discussed below, tribes vary significantly with respect to their size, location, wealth, interaction with local enforcement agencies, and philosophy. The success of the sex offender registration agreements in Minnesota is largely due to an early recognition that these variables would undermine the effectiveness of a one-size-fits-all solution to the jurisdictional gap created by *Jones*. Prior to the second meeting between the parties, a draft memorandum of understanding between the State and the tribes was circulated, along with a Draft Tribal Ordinance. The Attorney General’s office understood, however, that the parties intended to use this document only as a template, and that the unique

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<sup>103</sup> See Garrison, *supra* note 30.

<sup>104</sup> See Benjamin, *supra* note 78, at 7B. This same sentiment was also expressed in my interviews with tribal representatives. Telephone Interview with Mark Anderson, Attorney, Jacobson, Buffalo, Schoessler & Magnuson, Ltd., in St. Paul, Minn. (Oct. 2005) (attorney for the Bois Forte Band of the Minnesota Chippewa Tribe).

<sup>105</sup> See generally Benjamin, *supra* note 78, at 7B; see also Doreen Hagen, *State Should Work Together with Tribal Governments*, ST. PAUL PIONEER PRESS, Aug. 7, 2005, at 11B; Leecy Press Release, *supra* note 11; *Tribes Must Work Together*, ST. PAUL PIONEER PRESS, Aug. 1, 2005, at 6B.

<sup>106</sup> See generally Letter from Tim Pawlenty, *supra* note 10.

situations of each tribe would require modifications to the proposed documents and, in some cases, a different course of action altogether.<sup>107</sup>

As other tribes and states attempt to resolve the question of sex offender registration in Indian country, it is important that they show the same flexibility exhibited in Minnesota. Although this flexibility requires the State to exert more effort, these cooperative solutions allow the State to push for certain baseline requirements in the tribal registration schemes, while allowing tribes to tailor their registration requirements based on the unique needs of their community.

An examination of some of the tribes in Minnesota reveals how the varied demographic, economic, and cultural characteristics of each tribe can impact the response to the sex offender registration issue. For example, the three largest reservations in Minnesota each have American Indian populations in the thousands, with Red Lake's population at 5071, Leech Lake at 4561, and White Earth at 3378.<sup>108</sup> In contrast, the Upper Sioux, located in southwestern Minnesota, has an Indian population of only 47.<sup>109</sup> These population disparities can impact the amount of registration procedures required by a tribe. The smaller the tribe, the more likely tribal law enforcement already knows the reservation's residents, thereby lessening the necessity for stringent registration procedures.

The tribe's geographic location has an impact on its economic welfare, which in turn affects the amount of financial resources the tribe can dedicate to implementing its own sex offender registration policy. For example, although most reservations are located in the northern half of the state, the Shakopee-Mdewakanton tribe is located just outside the Twin Cities metro area.<sup>110</sup> Due to the reservation's close proximity to the Twin Cities, the Shakopee-Mdewakanton, which only has 214 members living on its reservation, operates the state's largest casino and the second most financially successful Indian casino in the country.<sup>111</sup> As a result, the Shakopee-Mdewakanton tribe has the financial resources to consider a wider range of solutions to confronting registering sexual offenders than other tribes.

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<sup>107</sup> See Facsimile from Ken B. Peterson, Deputy Attorney General, Minnesota Office of the Attorney General, to Tribal Leaders and Attorneys (Aug. 5, 2005) [hereinafter Facsimile from Ken B. Peterson] (on file with author).

<sup>108</sup> Minnesota Indian Affairs Council, 2002 Annual Report, <http://archive.leg.state.mn.us/docs/2003/mandated/030246.pdf> (last visited Nov. 19, 2006). The Indian populations of the other tribes in Minnesota are: Bois Forte = 464; Fond du Lac = 1353; Grand Portage = 322; Lower Sioux = 294; Mille Lacs = 1034; Prairie Island = 166; Shakopee-Mdewakanton = 175; and Upper Sioux = 47.

<sup>109</sup> *Id.*

<sup>110</sup> Minnesota Indian Affairs Council, Overview of Indian Tribes in Minnesota 25, [http://www.cribsu.org/IA\\_web/htdocs/tribes/index.html](http://www.cribsu.org/IA_web/htdocs/tribes/index.html) (last visited Nov. 19, 2006). This document provides a map of Minnesota showing the location of the various tribal reservations.

<sup>111</sup> Minnesota Indian Affairs Council, Shakopee Mdewakanton Community 28, [http://www.cribsu.org/IA\\_web/htdocs/tribes/shakopee.html](http://www.cribsu.org/IA_web/htdocs/tribes/shakopee.html) (last visited Nov. 19, 2006).

The size and location of the reservations also has a large impact on the coordination between the tribe's law enforcement department and other local police and governments. For example, the Leech Lake and White Earth reservations are among the largest in Minnesota, and each borders four different counties.<sup>112</sup> Due to the amount of interaction between the tribe and non-Indians on the reservation, the tribal law enforcement officials of both tribes exercise concurrent jurisdiction with local police.<sup>113</sup> A tribe's interaction with the surrounding non-Indian law enforcement community also serves an important role in tribal sentencing. Since tribes in Public Law 280 states do not have criminal jurisdiction, many tribes do not have jail facilities on their reservations. However, many tribal governments, such as the White Earth, contract with local county jails to house tribal members sentenced to jail.<sup>114</sup> In other cases, tribes benefit from their interaction with only one county. As will be discussed, the Shakopee and Grand Portage tribes' proposal to coordinate with state judges regarding conditions of parole for predatory offenders is aided by the fact that both tribes only have to coordinate these efforts with the judges of one county.<sup>115</sup>

While all the tribes agreed that some form of registration of sex offenders was necessary, philosophical differences among the tribal representatives led to differing conclusions about the proper course of action. The tribe's historical response to sex offenders played a factor, as some reservations already banished sex offenders from the community.<sup>116</sup> But many other tribes did not have any predatory offender registration law in place prior to the *Jones* decision.<sup>117</sup> In addition, tribal leaders also differed as to how broadly they would exercise their sovereign powers in light of the possible penalties for registration violations. Some tribal representatives placed a high priority on the prosecution of registration violations in tribal court,<sup>118</sup> while others were concerned that the misdemeanor penalty that tribal courts would issue for a registration violation was an inadequate sub-

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<sup>112</sup> See Minnesota Indian Affairs Council, *supra* note 110, at 25.

<sup>113</sup> See Minn. Stat. § 626.90 (2004). See Lexis annotations for recent litigation concerning the Leech Lake and White Earth tribes' concurrent jurisdiction with the state.

<sup>114</sup> Telephone Interview with Joe Plummer, White Earth Tribal Court (Aug. 18, 2006).

<sup>115</sup> See *infra* Part III.D.3.

<sup>116</sup> See Leecy Press Release, *supra* note 11. For other information on sex crimes in Indian country, see Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121 (2004); see also Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83 (2001).

<sup>117</sup> See, e.g., Mille Lacs Band of Ojibwe Indians Legislative Branch of Tribal Government, J. Res. 11-04-111-05 (2005) (on file with author) (stating that the joint resolution was being passed because the Band did not currently have a registration law in place).

<sup>118</sup> See Registration of Predatory Offenders Code, 20 White Earth Nation Stat. § 2 (2005) (on file with author) (stating that "the White Earth Tribal Council hereby finds and determines that it is in the best interests of the White Earth Nation to adjudicate all cases in the White Earth Tribal Court").

stitute for the felony offense handed down by the state courts.<sup>119</sup> The combination of all these variables led to the development and implementation of a number of unique solutions designed to bridge the jurisdictional chasm created by *Jones*.

The recognition in Minnesota of the inadequacy of a one-size-fits-all approach to plugging the jurisdictional hole left by *Jones* allowed the tribes and the State to develop agreements tailored to the unique interests of each tribe, while at the same time meeting the State's concern over maintaining a comprehensive predatory offender registry. As other Public Law 280 States and tribes attempt to resolve the issue of sex offender registration in Indian country, the flexibility exhibited by the State and tribes of Minnesota allows the tribal registration programs to be uniquely structured in order to best serve the needs of the particular reservation community.

*C. A Starting Point for Tribal–State Discussions: Draft Tribal Ordinances and Memoranda of Understanding*

As mentioned above, implementing a successful sex offender registration program in Indian country requires that tribal–state agreements be custom tailored to reflect the unique needs and values of each tribe. While such flexibility is crucial, it is also necessary for tribes and states to have a starting point for their discussions. Prior to the second meeting between the tribes and Minnesota's Attorney General on August 10, the Attorney General's office circulated a Draft Tribal Ordinance for the Registration of Predatory Offenders and a Draft Proposal Memorandum of Understanding between the tribes and the State to serve as a starting point for discussion.<sup>120</sup> The Draft Memorandum of Understanding outlined the obligations assumed by the State and the tribe in pooling their registration information on predatory offenders. The response to the State's draft was generally favorable, with both sides recognizing the importance of such an agreement. However, the time required for the respective sovereigns to negotiate their final obligations under the Memorandum of Understanding made its adoption an impractical quick-fix solution. The Draft Tribal Ordinance met with a more varied reaction by the tribes. While the draft tribal ordinance provided a good starting point for discussions, varying tribal philosophies and limited tribal resources made the adoption of the Draft Tribal Ordinance unrealistic for many tribes.

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<sup>119</sup> Leech Lake Reservation Tribal Council Proposed Resolution (2005) (on file with author) (stating that "it is the belief of the Leech Lake Tribal Council that the Leech Lake Reservation communities would be better served by having criminal prohibitory consequences for violation of the predatory offender registration statutes as opposed to civil regulatory consequences").

<sup>120</sup> The Draft Proposal Memorandum of Understanding was faxed to the tribes on Aug. 5, 2005. See Facsimile from Ken B. Peterson, *supra* note 107. The Draft Tribal Ordinance is dated August 9, 2005.

1. *A Basic Tribal Ordinance Template: The State's Proposed Draft Tribal Ordinance.*—All states can use their own predatory offender registration laws as a basic template to assist tribes in drafting tribal predatory offender registration ordinances.

The Draft Tribal Ordinance circulated by the Minnesota Attorney General's office,<sup>121</sup> with a few notable exceptions, duplicated the language in Minnesota's predatory offender registration law. The primary difference between the registration systems was that under the tribal ordinance, "enrolled member[s] of the [tribe] present on the reservation" required to register,<sup>122</sup> would do so with the "tribal police or other designated tribal law enforcement authority,"<sup>123</sup> rather than with the Minnesota Bureau of Criminal Apprehension.<sup>124</sup> Violators of the tribal ordinance's registration requirements, furthermore, would be subject to tribal penalties, rather than state felony prosecution.<sup>125</sup>

The registration procedures the predatory offenders were to follow, and the information provided to the appropriate authorities was largely identical, whether mandated by Minnesota law or the Draft Tribal Ordinance. The tribal ordinance, however, included registration procedures for tribal members within the reservation who lacked a primary address—something not included in Minnesota's law.<sup>126</sup> Additionally, the Draft Tribal Ordinance required certain in-person reporting for Level II<sup>127</sup> and Level III offenders<sup>128</sup> not found in Minnesota law, as well as notification requirements regarding health-care facilities.<sup>129</sup>

2. *The Draft Proposal Memorandum of Understanding Between the Tribes and the Bureau of Criminal Apprehension.*<sup>130</sup>—Tribal ordi-

<sup>121</sup> Registration of Predatory Offenders: Draft Tribal Ordinance, Aug. 9, 2005 [hereinafter Draft Tribal Ordinance] (on file with author).

<sup>122</sup> See Draft Tribal Ordinance, *supra* note 121, at subdiv. 1a(g).

<sup>123</sup> See *id.* subdiv. 1a(f).

<sup>124</sup> Compare *id.* with Minn. Stat. § 243.166.

<sup>125</sup> Compare Draft Tribal Ordinance, *supra* note 121, at subdiv. 5, with Minn. Stat. § 243.166, at subdiv. 5. Another key difference was that the draft tribal ordinance's registration requirements extended to individuals who had violated a similar law of another state, the United States, or a tribe, while Minnesota's registration requirement did not recognize the violation of tribal law. Compare Draft Tribal Ordinance, *supra* note 121, at subdiv. 1b(d)(1), with Minn. Stat. § 243.166, at subdiv. 1(d)(1).

<sup>126</sup> The tribal ordinance required that if a person left his primary address without having acquired a new one, the person had to register with tribal law enforcement authorities within 24 hours, providing a detailed description of the location at which they were staying. Draft Tribal Ordinance, *supra* note 121, at subdivs. 3a(a), 3a(d). Until these individuals found a new primary address, they would have to report in person on a weekly basis to tribal law enforcement authorities. *Id.* subdiv. 3a(d). If the tribal authorities found the weekly reporting to be impractical in a given circumstance, the requirement could be lessened to only reporting in person once per month. *Id.* subdiv. 3a(e)(3).

<sup>127</sup> *Id.* subdiv. 4(c)(3).

<sup>128</sup> *Id.* subdiv. 4(b).

<sup>129</sup> *Id.*

<sup>130</sup> Draft Proposal, Memorandum of Understanding Between (Tribe) and The Minnesota Department of Public Safety Bureau of Criminal Apprehension [hereinafter MOU] (on file with author).

nances address the issue of sex offender registration requirements and enforcement, but do not necessarily address how tribal and state agencies will pool information and resources regarding their sex offender registries. Memoranda of understanding between tribes and states, therefore, are necessary in order for tribes and the State agencies to share information on predatory offenders.<sup>131</sup>

The Draft Memorandum of Understanding (“MOU”) circulated by the Minnesota Attorney General’s office set forth specific obligations of the BCA and the tribe, as well as mutual obligations of both parties. Under the MOU, the BCA would agree to notify tribal police and provide information on any tribal members who were predatory offenders and resided, or intended to reside, on the tribal reservation.<sup>132</sup> Additionally, at the request of the tribe, the BCA would inform the tribe if any particular enrolled member of the tribe was “classified as a predatory offender under State law.”<sup>133</sup> In turn, the tribe would agree to adopt an ordinance requiring tribal members residing on the reservation who are predatory offenders to register with the tribe.<sup>134</sup>

Furthermore, the ordinance, at a minimum, would include the same requirements as Minnesota’s registration law.<sup>135</sup> The tribe would then provide the BCA with information on those offenders registered with the tribe and notify the BCA when an offender failed to comply with registration laws or moved off the reservation.<sup>136</sup> Both the tribe and the BCA would agree to use the information for law enforcement purposes only,<sup>137</sup> and upon request, to inform the other party of any enforcement action taken against the offender for violating the registration requirements.<sup>138</sup> In addition, the MOU explicitly stated that it in no way created shared liability between the parties,<sup>139</sup> impacted jurisdiction,<sup>140</sup> or served as a waiver of sovereign immunity for the tribe or the State.<sup>141</sup>

3. *Tribal Response to the State’s Draft Proposals.*—While the draft proposals were generally welcomed as a good starting point, not surprisingly, they also received some mixed reviews. Most tribes expressed interest in entering into some sort of memorandum of understanding with the State, but each tribe wanted it tailored to reflect the tribe’s own governmen-

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<sup>131</sup> *See id.* at I(A).

<sup>132</sup> *Id.* at II(A)(1), II(A)(2).

<sup>133</sup> *Id.* at II(A)(5).

<sup>134</sup> *Id.* at II(B)(1).

<sup>135</sup> *Id.*

<sup>136</sup> MOU, *supra* note 130, at II(B)(2), II(B)(3).

<sup>137</sup> *Id.* at I(A)(3), II(B)(7).

<sup>138</sup> *Id.* at I(A)(4), II(B)(4).

<sup>139</sup> *Id.* at VI.

<sup>140</sup> *Id.* at VII.

<sup>141</sup> *Id.* at VIII.

tal structure and social concerns. Due to the degree of tribal–state negotiations involved in brokering an individualized government-to-government agreement, the MOU was impractical as an immediate response to *Jones*.<sup>142</sup> However, the basic obligations and provisions included in the draft MOU were agreeable to most tribes.<sup>143</sup>

Response to the Draft Tribal Ordinance was more varied than the generally positive reaction to the notion of a memorandum of understanding between the tribes and the State. Due to the public reaction to the *Jones* decision and the community safety issues involved, most tribes wanted to pass some sort of measure quickly. However, factors such as lengthy notice and comment periods for some tribes made quick implementation of a comprehensive registration law difficult.<sup>144</sup> As a result, some tribes wanted to pass simple, stopgap registration resolutions until they could develop a more detailed statutory scheme.

Tribes such as the Mille Lacs Band of Ojibwe, for example, passed a simple resolution, whereby the tribe adopted the State of Minnesota's predatory offender registration statute for 90 days, until November 22, 2005, unless the Band adopted its own predatory offender registration law before that date.<sup>145</sup> Similarly, the Bois Forte Band of the Minnesota Chipewewa Tribe passed a stripped down version of Minnesota's registration law, stating that anyone required to register under Minnesota's registration statute, or a similar law of another State or tribe, had to register with the tribal police department five days before living or working within the Band's territory.<sup>146</sup> The resolution required the offender to provide tribal police with the same information required under Minnesota's law, and failure to comply with the tribe's registration requirements was a class one misde-

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<sup>142</sup> Telephone Interview with John Swimmer, Solicitor General, Mille Lacs Band of Ojibwe, Minn. (Oct. 2005).

<sup>143</sup> *Id.* There was indication by some of the tribes who signed agreements with the State that details in the agreements still needed be ironed out. One tribe alluded to the fact that the Attorney General pushed for the public announcement in order to generate positive publicity as a part of his campaign for Minnesota governor in the upcoming election. However, the Attorney General felt the public announcement was needed to respond to increasing public pressure regarding this issue, an example of which is found in a legislative bill introduced by Representative Scott Newman, H.F. 2614, Feb. 16, 2006, available at <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H2614.0.html&session=ls84>. This bill, which was first posted on the Minnesota House of Representative's website on February 16, 2006, would place additional burdens on Native American offenders to prove to the State their tribal membership and residence on the reservation. Furthermore, the bill would require any Native American offender residing on a reservation to sign a waiver of the right to avoid predatory offender registration in the State before entering the State of Minnesota.

<sup>144</sup> This was pointed out to me during an off-the-record telephone interview conducted with a source in October 2005.

<sup>145</sup> Mille Lacs Band of Ojibwe Indians Legislative Branch of Tribal Government, J. Res. 11-04-111-05, *supra* note 117.

<sup>146</sup> Draft of Bois Forte Resolution Regarding Predatory Offender Registration (Aug. 25, 2005) (on file with author); Telephone Interview with Mark Anderson, *supra* note 104 (discussing the resolution the Bois Forte Band had passed).

meanor.<sup>147</sup> The Prairie Island Reservation also mirrored State law as a temporary solution to the sex offender registration issue. With a temporary solution in place, the new Prairie Island tribal council, which was elected in December 2005, made a conscious decision to reevaluate the tribe's sex offender registration policy, which had previously included banishing high-level offenders from the reservation.<sup>148</sup>

*D. Three Model Solutions to Sex Offender Registration in Indian Country*

The Draft Tribal Ordinance and MOU served as useful starting points for discussion between the Minnesota Attorney General and the tribes, but many of the final tribal ordinances deviated substantially from the draft proposal. Looking at these final tribal predatory offender registration ordinances, it is clear that two factors played a dominant role in the ordinances' development: the extent to which the tribe wanted to exercise its sovereignty and the capabilities of tribal police and tribal courts in implementing and enforcing registration requirements. Three Minnesota tribes weighed these factors differently, leading to very different solutions to the sex offender registration issue on their reservations. Each approach has its own strengths and weaknesses, and can serve as an important model for tribes in other Public Law 280 states.

*1. Powerfully Expressing Tribal Sovereignty Through Tribal Enforcement: The White Earth Nation's Predatory Offender Registration Code.*—The most powerful expression of tribal sovereignty

in the area of sex offender registration is for a tribe to regulate and enforce its tribal registration code through the use of its own tribal police and courts. This was the approach adopted by the White Earth Nation, which signed its Registration of Predatory Offenders Code into law on September 9, 2005.<sup>149</sup> The tribe viewed its predatory offender registration law as a powerful expression of the White Earth Nation's "inherent sovereignty," and felt the statute would "preserve the peace, harmony, and safety" of the White Earth community, and effectively "register and prosecute predatory offenders."<sup>150</sup>

The text of White Earth's law contained many of the components present in the Draft Tribal Ordinance. For example, the White Earth registration law contained the same registration procedure for people lacking a

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<sup>147</sup> Telephone Interview with Mark Anderson, *supra* note 104 (discussing the resolution the Bois Forte Band had passed).

<sup>148</sup> Telephone Interview with Jake Reint, Prairie Island Tribal Spokesperson, in Prairie Island, Minn. (Mar. 7, 2006).

<sup>149</sup> See *White Earth Reservation: Tribe Signs Predatory Offender's Code*, GRAND FORKS HERALD, Sept. 8, 2005, at B2.

<sup>150</sup> See Registration of Predatory Offenders Code, *supra* note 118, ch. 1, § 3 (stating the purposes of the registration law); *White Earth Reservation: Tribe Signs Predatory Offender's Code*, *supra* note 149.

primary address as found in the Draft Tribal Ordinance,<sup>151</sup> and also required annual, in-person reporting from high-risk offenders no longer under correctional supervision.<sup>152</sup> The White Earth registration law, however, also contained some notable exceptions to the Draft Tribal Ordinance and Minnesota's registration law. For example, White Earth's law did not include the health care notification component found in the Draft Tribal Ordinance,<sup>153</sup> and unlike the Draft Tribal Ordinance and Minnesota's law, the tribe's statute required offenders to register any "secondary residence."<sup>154</sup>

The key area where White Earth's law expanded upon the Draft Tribal Ordinance was with regard to tribal prosecution of registration violations. Unlike the Draft Tribal Ordinance, which only made a vague reference to the fact that violators would be prosecuted under tribal law,<sup>155</sup> White Earth's registration law explained the criminal penalties for violating the statute in great detail, making a strong statement on tribal sovereignty in the process.<sup>156</sup> All cases would be adjudicated in the White Earth Tribal Court,<sup>157</sup> with violations of the registration code constituting a misdemeanor offense. The maximum penalty is one-year imprisonment under the custody of the White Earth Department of Public Safety, payment of a fine of \$5000, or both.<sup>158</sup> While federal law prevented the tribe from increasing its sentences to the felony level prosecution a violator would receive under State law, the tribe was able to stiffen the sentence for multiple violations of the registration statute. Unlike Minnesota's registration law, the White Earth Nation stiffened its penalty by treating each thirty-day period an offender was in violation of the registration requirement as a separate offense, with the corresponding sentences running concurrently.<sup>159</sup>

The White Earth Nation's predatory offender registration code is a powerful expression of tribal sovereignty. This declaration of tribal sovereignty is strengthened by the tribe's ability to self-regulate and self-enforce its registration scheme. As a result, the White Earth experience can serve as an important model to other tribes looking to strongly assert their sovereignty. In particular, White Earth's punishment of each thirty-day period that an offender is unregistered as a separate offense has legitimized its en-

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<sup>151</sup> Compare *White Earth Reservation: Tribe Signs Predatory Offender's Code*, *supra* note 149, ch. 5, with Draft Tribal Ordinance, *supra* note 121, subdiv. 3a.

<sup>152</sup> Compare Registration of Predatory Offenders Code, *supra* note 118, ch. 6, § 7, with Draft Tribal Ordinance, *supra* note 121, subdiv. 4(c)(3).

<sup>153</sup> See Draft Tribal Ordinance, *supra* note 121, subdiv. 4b.

<sup>154</sup> Registration of Predatory Offenders Code, *supra* note 118, ch. 1, § 5(j). "Secondary Residence" was specifically defined as including a student's parent's home or the home of someone with whom the offender shared joint custody of a child. *Id.*

<sup>155</sup> Draft Tribal Ordinance, *supra* note 121, subdiv. 5.

<sup>156</sup> Registration of Predatory Offenders Code, *supra* note 118, ch. 8.

<sup>157</sup> *Id.* ch. 1, § 2(c).

<sup>158</sup> *Id.* ch. 8, §§ 1–2.

<sup>159</sup> *Id.* ch. 8, § 3.

forcement abilities. White Earth's law deflects criticism that the tribe's inability to prosecute registration violations as felony offenses limits the effectiveness of the tribe's registration requirements.<sup>160</sup> However, some tribes lack the law enforcement capabilities and judicial infrastructure to effectively implement and enforce their own registration scheme. This tends to be particularly true for tribes subject to Public Law 280, since criminal jurisdiction lies with the State. Many tribes, therefore, will need to develop sex offender registration laws that utilize the state's assistance in areas where tribal resources are lacking. For example, while the White Earth Nation has chosen to enforce its registration code itself, the reservation does not have its own jail facilities. However the tribe has resolved this issue by contracting with local county jails.<sup>161</sup> In contrast, as discussed below, other tribes lacking such facilities have chosen to leave enforcement responsibilities with the State.

2. *Insufficient Judicial and Enforcement Capabilities Leading to a Minimal Assertion of Tribal Sovereignty: The Leech Lake Resolution.*—The Leech Lake reservation was at the center of *Jones*, and the Leech Lake Tribal Council's proposed registration resolution, when compared to the resolutions of other tribes following *Jones*, is an exceptional outcome. The solution itself is relatively straightforward—it requires all tribal members who would be subject to Minnesota's registration law if they lived off the reservation to comply completely with Minnesota's law while residing within the reservation.<sup>162</sup> The tribal resolution, furthermore, stipulates that failure to comply with Minnesota's registration law “will result in criminal felony prosecution in state court under the State of Minnesota's Public Law 280 criminal/prohibitory jurisdiction.”<sup>163</sup>

The Leech Lake resolution reflects a position that the Minnesota predatory offender registration law is criminal/prohibitory and should be under the State's jurisdiction. This sets Leech Lake apart from the other tribes, which heralded the predatory offender registration law's civil/regulatory classification as an opportunity to exercise tribal sovereignty, while at the same time protecting the tribal community. In the Leech Lake Tribal Council's long list of findings, it states that Minnesota's registration law “serves a strong public policy interest,” and that “it is vital to the safety of tribal members . . . to have a uniform mandatory predatory offender regis-

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<sup>160</sup> See Leech Lake Reservation Tribal Council Proposed Resolution, at 2 (2005) (on file with author) (stating that “it is the belief of the Leech Lake Tribal Council that the Leech Lake Reservation communities would be better served by having criminal prohibitory consequences for violation of the predatory offender registration statutes as opposed to civil regulatory consequences”).

<sup>161</sup> Telephone Interview with Joe Plummer, White Earth Tribal Attorney, White Earth Tribal Court (Aug. 18, 2006).

<sup>162</sup> Leech Lake Reservation Tribal Council Proposed Resolution, *supra* note 160.

<sup>163</sup> *Id.*

tration statute.”<sup>164</sup> The Leech Lake resolution, furthermore, acknowledges that the tribal court is “without the current capability of handing down jail sentences.”<sup>165</sup> Finally, the Leech Lake’s findings state that the Tribal Council believes the Reservation community “would be better served by having criminal prohibitory felony consequences” for violation of the registration laws “as opposed to civil regulatory consequences.”<sup>166</sup> Contrast this language with that found in the White Earth Nation’s predatory offender registration code, which states that the tribe is able to create “a forum which is fair, accessible and culturally appropriate” for dealing with predatory offender registration issues, and “that it is in the best interests of the White Earth Nation to adjudicate all cases in the White Earth Tribal Court.”<sup>167</sup>

Although the Leech Lake Tribal Council exercised its tribal sovereignty in declaring that it viewed the predatory offender registration code as a criminal matter, the tribe effectively returned its jurisdiction back to the State. This decision was motivated by the strong public safety threat posed by predatory offenders, the tribe’s view that under Public Law 280, this matter should be under the State’s jurisdiction, and the tribe’s lack of resources to effectively implement its own registration code.<sup>168</sup> While the tribe does not endorse Public Law 280’s applicability to Minnesota tribes as a general policy matter, the Leech Lake Tribal Council felt that the public safety concerns implicated by the *Jones* case did not make this the proper issue on which to push for expanded tribal jurisdiction.<sup>169</sup> Instead, the Tribal Council felt that the larger struggle for tribal sovereignty would face a serious setback if an unregistered offender slipped through any remaining cracks in the jurisdictional chasm left by *Jones*.<sup>170</sup> As a result, particularly since members of the tribal government believed that the State had done an excellent job in implementing its registration laws and did not want to water down the law’s effectiveness by reducing the criminal penalties from a felony to a misdemeanor, the tribe chose to turn enforcement back to the State.<sup>171</sup>

The Leech Lake resolution provides a powerful example of the value in resolving the issue of sex offender registration in Indian country before the public’s attention is drawn to the subject. Although it is unclear how much of the Leech Lake Tribal Council’s response to *Jones* was driven by the fact that its reservation was at the center of the case, it was the only Minnesota

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Registration of Predatory Offenders Code, *supra* note 118, ch. 1, sec. § 2(c).

<sup>168</sup> Telephone Interview with Mike Garbow, Leech Lake Legal Counsel, in Cass Lake, Minn. (Aug. 14, 2006).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Telephone Interview with Mike Garbow, Leech Lake Legal Counsel, in Cass Lake, Minn. (Oct. 17, 2005).

tribe to take the position that the State should maintain jurisdiction over Native American predatory offender registration. As a result, the Leech Lake resolution appears to reflect Governor Pawlenty's view of *Jones* and comes across as a strong endorsement of Public Law 280 jurisdiction. While it is inevitable that the limited law enforcement resources and public safety concerns of some tribes will force them to defer to the State's registration program, the Leech Lake resolution failed to make any advances towards retrocession, and instead reads as an endorsement for Public Law 280.

3. *Exercising Tribal Sovereignty While Recognizing State Expertise: The Balanced Approach of the Shakopee and Grand Portage Tribes.*—The White Earth and Leech Lake proposals are at opposite ends of the spectrum in terms of their expression of tribal sovereignty and utilization of tribal police and courts. The Shakopee and Grand Portage tribes have proposed a more balanced solution, which would allow the State to prosecute registration violations, while allowing the tribe to affirm its tribal sovereignty.<sup>172</sup> Under this proposal, the Shakopee and Grand Portage tribes would pass a law similar to other tribes, requiring tribal members residing on the reservation who are released predatory offenders, to register with tribal and State officials.<sup>173</sup> The key to this proposal is that the State would add, as a condition of parole for these predatory offenders, a requirement that they comply with tribal law.<sup>174</sup> Then, if a sex offender failed to follow the tribe's registration requirements, the parole officers of the State, rather than the small tribes, would deal with the prosecution and the penalties.<sup>175</sup>

This proposal succeeds in balancing the State's expertise in handling predatory offender registration with the tribe's desire to exercise its sovereignty. This increased coordination between the State and the tribes, however, creates unique concerns regarding the implementation of this proposal. First, the proposal appears to be strictly prospective, with no retroactive applicability, since the requirement is tied to a parole condition rather than a statute. Second, there may be instances where an offender's registration requirements outlast his time on parole. Third, the proposal is problematic in that it is only applicable to predatory offenders convicted in Minnesota state court; it is not applicable to individuals convicted of similar crimes under another state's law. While it is likely the tribes will be able to get State judges within their county to cooperate in including the parole condition, it is unlikely the condition will be implemented on a statewide basis.

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<sup>172</sup> Telephone Interview with Andrew Small, Attorney for Shakopee and Grand Portage Tribes (Oct. 2005).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

This proposal strikes a good balance between State and tribal interests, and serves as a unique model for tribes that wish to exercise their tribal sovereignty, while also drawing upon State resources and expertise in the area of sex offender registration. However, there are a number of red flags in this proposal that could inhibit its effectiveness as a comprehensive plan. While the solution properly strives to balance the exercise of tribal sovereignty with the reality of limited tribal resources, States and tribes need to be aware of the jurisdictional gaps that remain under this particular proposal.

#### CONCLUSION

The *Jones* decision revealed a new area of concern in sex offender monitoring: the enforcement of registration laws on Indian reservations. The political response from the tribes and the Minnesota Attorney General following the appellate court's ruling, like the passage of much sex offender legislation, has been swift and done under the public's watchful eye. Despite some political tension between the Minnesota Governor and the tribes, the tribes and the Minnesota Attorney General have successfully drafted a number of different solutions to fill the jurisdictional hole created by the *Jones* decision.

The collaborative relationship the tribes and the Attorney General have entered into, and the solutions as a result of these collaborative negotiations, serve as an important model for other States and tribes that have not yet confronted this issue. The common objective of making communities safe from predatory offenders, and the early recognition that there is not a perfect "one-size-fits-all" answer to the issue of sex offender registration in Indian country, allowed the State and the tribes of Minnesota to enter into an effective compromise, where so long as the solutions resulted in a comprehensive, state-wide registry, the tribes had broad latitude to develop a registration system that catered to the needs, concerns, and values of their local community.

Both Public Law 280 States and tribes would benefit from proactively addressing the jurisdictional issue raised in *Jones* through similar tribal-state agreements. This would remove a class of cases from the courts, which, through the application of the *Cabazon* test, have proven unable to determine the jurisdictional reach of Public Law 280 with any consistency. The adoption of tribal-state agreements, furthermore, comports with the federal government's policy recognizing the importance of tribal sovereignty, as opposed to the outdated advocacy of tribal assimilation which motivated Public Law 280's passage.

The structure of future tribal predatory offender registration ordinances and the degree of tribal reliance upon State resources will vary depending on the extent to which a tribe wishes to assert its tribal sovereignty and the extent of the tribe's law enforcement capabilities. At one end of the spec-

trum, tribes looking to assert their sovereignty and enforce their own registration law can use the White Earth Nation's code as a model for increasing tribal penalties so that they approach state felony sanctions. At the other end of the spectrum, tribes with limited law enforcement capabilities can allow the State to monitor offenders on the reservation and prosecute those who violate the registration requirements. However, unlike the Leech Lake Reservation's resolution, it may be possible for a tribe to utilize the State's resources without minimizing the importance of tribal sovereignty. The Shakopee and Grand Portage tribes' proposal successfully achieved such a balance, but the proposal also raised questions about whether it could effectively close all the jurisdictional gaps present in the state's sex offender registry.

In conclusion, other Public Law 280 states and tribes should proactively address the issue of sex offender registration in Indian country, using the solutions developed by the Minnesota tribes and the State as a model. Acting before the jurisdictional issue is litigated will allow the tribes to develop resolutions and agreements that affirm tribal sovereignty, protect the community, and respond to local needs, without the added pressure of the media spotlight.

