Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

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| In the Matter of: | ) | |
| | ) | DIA Nos. 12IDB002, 13IDB001 |
| CASHCALL, INC. | ) | IDOB Nos. 2012-NRR 2003-0154 |
| 1600 South Douglass Road | ) | 2012-NRR-2012-0099 |
| Anaheim, CA 92806 | ) | |
| | ) | **RULING ON WHETHER** |
| Respondent. | ) | **LOANS AT ISSUE ARE** |
| | ) | **SUBJECT TO IOWA LAW** |

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Pursuant to a joint motion of the parties, hearing on the Statement of Charges filed against Respondent CashCall, Inc. by the Iowa Division of Banking (the Division) was consolidated with the hearing requested by Respondent on the denial of its applications for Nonresident Regulated Loan Company licenses. The State later filed an unresisted Motion to Sever Proceedings, resulting in the division of this proceeding into two parts: 1) a hearing regarding the threshold question of whether loans made and/or serviced by Respondent are subject to Iowa law; and 2) a hearing regarding application of Iowa laws (if the loans at issue are found to be subject to Iowa law), any remaining issues regarding grounds for discipline and/or license denial, and the appropriate level of discipline and amount of restitution owed by Respondent, if any.

The parties later agreed to submit the first issue – whether the loans made and/or serviced by Respondent are subject to Iowa law – without evidentiary hearing pursuant to 187 Iowa Administrative Code 11.30. At a status conference on May 30, 2013, the parties agreed upon the documents to be included in the record.

Each party submitted an initial brief and a reply brief.[1] After submission of the briefs, oral argument was held on July 26, 2013. The parties included exhibits with their briefs, some of which had not been included at the time of the May 30 status conference when the parties agreed upon the documents to be admitted into the record. The parties agreed at oral argument that the record would consist of: 1) the parties' joint Stipulation and Exhibits A through M; 2) State's Exhibits 1 through 9; and 3) Respondent's Exhibits 1 through 4.[2] Several of the exhibits submitted are affidavits. The parties represented

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1 Respondent captioned its initial brief as a Motion to Dismiss. Both parties previously agreed, however, that the issue of whether the loans at issue are subject to Iowa law is not necessarily dispositive for purposes of these actions. Additionally, the parties agreed to submit the threshold issue of the applicability of Iowa law on stipulated facts after briefing and oral argument. Consequently, CashCall's document entitled Motion to Dismiss is not being treated as such. As the State correctly notes, the Motion to Dismiss here goes beyond the pleadings. Finally, one of the actions here – the appeal of the license denial – was actually initiated by CashCall. CashCall presumably does not wish to have that action dismissed.

2 Respondent's exhibits were numbered differently when they were submitted for purposes of the May 30 status conference. For convenience, the numbering used for purposes of this

that the facts in any affidavits submitted are not uncontested. The parties agreed that the affidavits would be considered in the context of the stipulation and other documents in the record in order to make a determination regarding the accuracy or veracity of the facts asserted therein, if necessary.

## FINDINGS OF FACT

*Relationship between CashCall, Inc., Western Sky Financial, LLC, and WS Funding, LLC*

Western Sky Financial, LLC ("Western Sky") is a limited liability company organized under the laws of the State of South Dakota. Western Sky is wholly owned by Martin Webb, an enrolled member of the Cheyenne River Sioux Tribe ("Tribe"). The Tribe is a federally recognized Indian tribe. Western Sky maintains a Cheyenne River Sioux business license.[3] The Tribe does not have a corporate organizational statute. Western Sky is not owned or operated by the Tribe or any of its political subdivisions. (Stip. ¶ 8).

Western Sky does not maintain a physical presence in Iowa. Western Sky's facilities are located entirely within the external boundaries of the Tribe's reservation. (Stip. ¶¶ 10, 11). All of Western Sky's employees, facilities, and operations are located on the Tribe's reservation. (Stip. ¶ 11; Resp. Exh. 3 ¶¶ 6-9, 14). Western Sky has approximately 53 employees, many of whom are enrolled tribal members. (Resp. Exh. 3 ¶ 9).

WS Funding, LLC ("WS Funding") is a wholly-owned subsidiary of CashCall. Pursuant to Western Sky's agreements with CashCall and WS Funding, WS Funding purchases all of the loans made by Western Sky and CashCall provides certain services to Western Sky. CashCall services the loans made by Western Sky and owned by WS Funding. Under the agreements between these entities, Western Sky sells all of its Iowa loans to WS Funding. WS Funding receives the notes in "like-new" condition – the agreement stipulates that no payments will have been received on the notes and that the balances due are equal to face value. The sales generally occur within three days of the loan date, but can take up to seven days. (Stip. ¶¶ 5, 7; Exh. A ¶ 7(c)).

The agreements between these entities require WS Funding to maintain a reserve account at a balance sufficient to fund two days' worth of purchased notes (as determined by the last month's daily average), and to fund the account with an initial $100,000 deposit. Western Sky debits the account daily "for payment of purchased notes assigned to [WS Funding] and to fund any unpurchased or unfunded Notes which were executed by makers prior to [the end of the Agreement]." (Exh. A ¶ 8).

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decision will reflect the numbering Respondent used when attaching the exhibits to its briefs.
3 The Cheyenne River Sioux Tribe Business License which was submitted by the parties provides on its face that, "[h]aving made proper application[,] [t]his business license is hereby issued to the person named. This Business License enables this person to transact whatever business or activity is specified on application until this Business License expires or is cancelled." (Stip. Exh. I).

Under the agreements, WS Funding also provides Western Sky with money ($10,000/month minimum) to cover operating expenses. Additionally, WS Funding is obligated to reimburse Western Sky for "any and all fees associated with such assignment and purchase, including but not limited to any additional office or personnel costs to Western Sky Financial, ACH, wiring or other bank fees, if any, upon presentation of invoice." WS Funding also covers costs associated with Western Sky's server and indemnifies Western Sky. (Exh. A ¶¶ 5, 6, 8, 11).

*Iowa Loans Issued by Western Sky*

The Iowa Division of Banking issued Iowa Nonresident Regulated Loan Company license No. NRR 2003-0154 to CashCall, Inc. on October 23, 2003. The license is active through December 31, 2013. (Stip. ¶ 1).

Division examiner Randy Johnson conducted an examination of CashCall's business pursuant to Iowa Code section 536.10. Johnson reviewed loans made from January 1, 2009 through July 5, 2012. There were 1,231 loans to Iowa consumers in CashCall's portfolio for that time period; Johnson reviewed 52 of the loans. All of the loans reviewed were originated by Western Sky Financial and became part of CashCall's portfolio as a result of the agreements between Western Sky, CashCall, and WS Funding described above. (Stip. ¶¶ 2-4).

In a typical loan transaction, a potential Iowa borrower contacts Western Sky over the telephone or via the internet to apply for a loan. Western Sky communicates its approval or denial of a borrower's loan application – based on its own underwriting system – by phone or internet. If a borrower decides to accept the loan terms proposed by Western Sky, the borrower signs the loan agreement with Western Sky electronically. When the loan is approved, Western Sky deposits money into the borrower's bank. All communications between Iowa borrowers and Western Sky, CashCall, and WS Funding occur via mail, over the telephone, or through the internet. (Stip. ¶¶ 20-24).

A standard Western Sky loan agreement, of the type found in the portfolio serviced by CashCall, provides as follows regarding choice of law and jurisdiction:

> **This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By executing this Loan Agreement you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.
>
> . . .
>
> **Governing Law.** This Agreement is governed by the Indian Commerce Clause of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other

> states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America.

(Stip. ¶ 25; Exh. C, pp. 1, 3).

*Complaint*

A customer, Customer A, filed a complaint with the Division regarding the terms of his loan with CashCall. Using a computer in Iowa to submit the loan application, Customer A borrowed $2,525 from Western Sky on March 9, 2011. The loan carried an interested rate of 135% which, when combined with additional costs of the loan, came to an annual percentage rate of 139.32%. On March 12, 2011, Customer A was notified that his loan had been transferred to WS Funding and would be serviced by CashCall. (Stip. ¶ 31; Exh. J, K, L, M).

## CONCLUSIONS OF LAW

These consolidated actions both arise from the Superintendent of Banking's role in licensing and regulating lending in Iowa. CashCall was issued an Iowa nonresident regulated loan company license by the Superintendent of Banking on October 23, 2003. The Statement of Charges that forms the basis for the first action alleges that Respondent CashCall as licensee violated or aided and abetted violation of provisions of Iowa Code Chapter 536, the Iowa Regulated Loan Act, and Iowa Code Chapter 537, the Iowa Consumer Credit Code (ICCC). The second action arises from the Superintendent of Banking's denial of nonresident regulated loan company licenses to CashCall's branches in Anaheim, California and Las Vegas, Nevada. The denial is premised largely upon the alleged conduct that forms the basis for the Statement of Charges in the first action.

The threshold issue that the parties have requested ruling on prior to proceeding is whether the loans at issue – that is, the loans made by Western Sky, sold to WS Funding, and serviced by CashCall – are subject to Iowa law.

A. *The Iowa Consumer Credit Code*

The Iowa Consumer Credit Code ("ICCC") was enacted for a number of reasons, including to protect consumers against unfair practices by suppliers or collectors of consumer credit and to permit and encourage the development of fair and economically sound consumer credit practices.[4] The legislature directed that the ICCC be liberally construed and applied to promote these underlying purposes.[5]

The ICCC applies to any transaction that is entered into or modified in the State of Iowa. A transaction is entered into or modified in Iowa if, among other things, the debtor is a resident of Iowa at the time the person extending credit solicits the transaction or the

4 Iowa Code § 537.1102(2) (2013).
5 Iowa Code § 537.1102(1) (2013).

debtor is a resident of Iowa at the time the person extending credit receives a signed writing evidencing the transaction or a written offer to enter into the transaction.[6]

One of Respondent's arguments against application of Iowa law to the loans at issue is that the parties expressly agreed to be bound in the loan agreement to the laws and jurisdiction of the Tribe, to the exclusion of any other state or federal law or regulation. Under the ICCC, however, consumers are not permitted to waive or agree to forego rights or benefits conferred by the ICCC.[7]

In *Aldens, Inc. v. Miller*, the Eighth Circuit upheld the ICCC against challenge on grounds that it constituted an undue burden on interstate commerce in violation of the commerce clause of the United States Constitution.[8] The Court examined application of the ICCC to an Illinois corporation that conducted a mail order business in all 50 states, using a credit agreement stating that the contract was governed by Illinois law. In *Aldens*, the credit charges under the agreement were in compliance with Illinois law, but out of compliance with rates applicable to open-end credit financing in Iowa.[9] In upholding application of the ICCC, the Court found,

> In contrast to the insubstantial burdens the operation of Chapter 537 imposes on interstate commerce, the interest of the State of Iowa in protecting its citizens from usurious interest rates in consumer credit transactions is considerable. And, it extends to credit sales solicited of and by Iowa residents in Iowa, notwithstanding that the contract terms declare the contract to be governed by the laws of the state in which the seller is located. It suffices to note that it is necessary for the states to enact reasonable consumer credit legislation to protect this public interest, for 'in the power of the lender to relieve the wants of the borrower lies the germ of oppression.' 45 Am.Jur.2d Interest and Usury s 4 (1969).[10]

The loans examined by the Superintendent for purposes of these actions were loans made to individuals who gave Iowa addresses in telephone and internet loan applications. Under the express terms of the ICCC, these loans are subject to Iowa law.

B. *Tribal Sovereign Immunity*

Respondent argues that, notwithstanding the ICCC, Iowa lacks authority to regulate the transactions between Western Sky and Iowa consumers because of Western Sky's status as a business owned by a Tribe member and licensed by the Tribe to conduct business inside the reservation. Respondent asserts that, based on "the general derivative immunity of the Tribe's members from being forced to live by non-tribal state law while present on the Reservation," the Tribe has sole regulatory authority over Western Sky's on-reservation business activities and any disputes related to those activities.

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6 Iowa Code § 537.1201(1), (2) (2013).
7 Iowa Code § 537.1107(1) (2013).
8 610 F.2d 538 (8th Cir. 1979).
9 *Id.* at 538-39.
10 *Id.* at 539-40 (*quoting Aldens, Inc. v. Miller*, 466 F.Supp. 379, 383-86 (S.D. Iowa 1979)).

1. The *Montana* Rule and Its Exceptions

In *Montana v. United States*, the United States Supreme Court set out the general rule regarding an Indian tribe's authority over nonmembers: the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[11] The Court articulated two exceptions to the rule, however, both of which relate to a tribe's regulation of activities occurring on its reservation.[12] First, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Second, a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on non-Indian fee lands[13] within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[14]

In *Plains Commerce Bank v. Long Island Family Land and Cattle Co.*, the Supreme Court had the opportunity to elaborate on the exceptions developed in the *Montana* case.[15] The case concerned a non-Indian bank that sold fee land on a tribal reservation to non-Indian individuals. The land had previously been owned by two enrolled members of the Cheyenne River Sioux Indian Tribe, Ronnie and Lila Long, and the company in which they held majority ownership. The Longs mortgaged a portion of the land to the bank in exchange for a cancellation of some of the company's debt and additional operating loans. The Longs defaulted on their loans and the bank initiated eviction proceedings on the land. The Longs and their company brought suit against the bank in tribal court alleging, among other things, that the bank discriminated against them by offering the land to non-members on terms more favorable than the bank had offered to them.[16]

After the tribal court found in favor of the Longs on the discrimination claim, the bank filed an action in federal district court challenging the tribal court's jurisdiction over the matter. Based on the bank's entry into a consensual business relationship with the Longs and their company, the district court found that, under the first *Montana* exception, the tribal court had jurisdiction. The Eighth Circuit affirmed, finding that when the bank chose to deal with the Longs, it effectively consented to substantive regulation by the tribe.[17]

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11 450 U.S. 544, 565 (1981).
12 "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands." *Id.* at 565 (emphasis added).
13 Non-Indian fee lands on the reservation are parcels of land on the reservation that the tribe was granted the authority to sell and has sold to non-Indian owners. *Id.* at 547-48.
14 *Id.* at 565-66 (1981).
15 554 U.S. 316 (2008).
16 *Id.* at 320-22.
17 *Id.* at 323-24.

The Supreme Court reaffirmed the position laid out in *Montana*, that tribes do not, as a general matter, possess authority over non-Indians, even when those non-Indians come within the borders of the reservation.[18] The Court found that efforts by a tribe to regulate nonmembers are presumptively invalid and that the burden rests on the tribe to establish one of the *Montana* exceptions.[19] In finding that the first *Montana* exception did not apply, the Court held,

> [N]onmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.[20]

Regarding the second *Montana* exception, the Court held that it also did not apply.

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S., at 566, 101 S.Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid*. One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n.220.[21]

Prior to its decision in *Plains Commerce Bank*, the Supreme Court addressed the second Montana exception in *Strate v. A-1 Contractors*.[22] In *Strate*, the Court addressed the jurisdiction of tribal courts over personal injury actions against defendants who are not tribal members. Two non-members got into an automobile accident on a North Dakota state highway running through the Fort Berthold Indian Reservation. North Dakota maintains the road under a right-of-way granted by the United States. The right-of-way lies on land held by the United States in trust for three affiliated tribes and their members.[23]

One of the parties to the accident was the widow of a deceased member of the tribe who had five adult children who were tribe members. She filed suit in tribal court against the other party to the accident and his employer. The respondents later initiated an action

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18 *Id.* at 327-28.
19 *Id.* at 330.
20 *Id.* at 337 (*citing Montana*, 450 U.S. at 564).
21 *Id.* at 341.
22 520 U.S. 438 (1997).
23 *Id.* at 442-43.

in federal district court for a declaratory judgment that the tribal court had no jurisdiction to adjudicate the claims arising out of the accident.[24]

In rejection the application of *Montana*'s second exception to the facts of the case, the Court noted that,

> [r]ead in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." 450 U.S., at 564, 101 S.Ct., at 1257-58. Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S., at 220, 79 S.Ct., at 271.[25]

2. Analysis

a. The First Exception: Consensual Commercial Relationships with a Tribe or its Members

As an initial matter, the Iowa consumers who entered into loan agreements with Western Sky did not enter into a business relationship either with the Tribe or a member of the Tribe. While Martin Webb, a Tribe member, owns Western Sky, the business itself is an LLC organized under the laws of South Dakota. The business license issued by the Tribe simply allows Western Sky to transact business on the reservation; it does not change Western Sky's status vis-à-vis the Tribe itself. The first *Montana* exception applies only to consensual commercial relationships with the Tribe or its members. Western Sky is neither.

Second, even if Western Sky were a political subdivision of the Tribe or a Tribe member, which it is not, it is well-settled that individual tribe members remain amenable to the process of state courts in connection with activities occurring off the reservation.[26] The doctrine of sovereign immunity does not immunize individual members of a tribe for off-reservation activities.[27] The *Montana* decision and its progeny focus heavily on whether the conduct sought to be regulated takes place on the reservation or off the reservation. "A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention."[28]

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24 *Id.* at 443-44.
25 *Id.* at 459.
26 *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 171 (1977).
27 *Id.* at 171-72.
28 *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

There is no significant disagreement between the parties here regarding the steps involved with the formation of the loan agreements at issue and disbursement of funds: the prospective debtor makes application from off the reservation; Western Sky applies its underwriting guidelines and makes the decision about whether to extend credit on the reservation; Western Sky sends a loan agreement to the consumer electronically from the reservation which contains the terms of the loan; the consumer electronically signs the loan agreement off the reservation and the signed agreement is transmitted back to Western Sky; and Western Sky disburses funds to the consumer's off-reservation bank account.

Where the parties do disagree is with regard to where the contract is actually accepted, or where the meeting of the minds occurs. Respondent argues that the meeting of the minds occurs at the point at which Western Sky receives the signed agreement and decides to disburse funds. Under Respondent's formulation, there is no contract until Western Sky receives the signed loan agreement in which the consumer has agreed to all terms and decides that everything looks fine with the contract. The State argues that the loan contract is formed when the debtor signs the loan agreement with specific terms and conditions that has been provided by Western Sky. In Respondent's formulation, the contract is formed on the reservation; in the State's formulation, the contract is formed off the reservation.

The State's position on this point is the more persuasive. Both parties have cited the Iowa Supreme Court's decision in *Heartland Express, Inc. v. Terry* in support of their respective positions.[29] In that case, Terry submitted an employment application to Heartland Express, Inc.; the application contained no definite terms and specifically stated that it did not obligate the employer to hire the applicant. The Court found that the employment application was not sufficiently definite to constitute an offer of employment by Terry that he work for Heartland. At most, the Court held, it was nothing more than a solicitation or invitation to Heartland to offer Terry work. The Court held that the contract was actually formed during a phone conversation when Heartland offered Terry a job and Terry accepted.[30] Terry was in Georgia when he accepted the offer of employment, therefore the Court held that the contract was formed in Georgia. The Court articulated the general rule that a contract is created at the place where the acceptor speaks or otherwise completes his manifestation of assent. This is the case whether assent is made by mail, telegram, or by voice.[31]

With regard to the loans at issue here, the Iowa consumer completes an loan application that does not contain specific terms and conditions of the loan. Western Sky receives the loan application and applies its underwriting criteria. After evaluating the application, if Western Sky decides to extend credit to the consumer, Western Sky sends the consumer a loan agreement document that contains the terms and conditions of the loan, including the interest rate, any fees, and repayment terms. The consumer reviews the loan agreement, which under the *Terry* case constitutes the offer. The consumer is provided with instructions regarding how to electronically sign the loan agreement.

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29 631 N.W.2d 260 (Iowa 2001).
30 *Id.* at 268-69.
31 *Id.* at 270.

Under *Terry*, the consumer's signature constitutes acceptance. The consumers at issue here were Iowa residents, therefore it is a reasonable assumption that the vast majority of them electronically signed the loan agreement in Iowa. Acceptance takes place where the assent is made, which in this case is Iowa.

While I find that the loan contracts at issue here appear to have been formed in Iowa, it is not clear that an opposite conclusion would compel the result that Respondent seeks. There is nothing in the *Montana* line of cases that mandates that formation of a contract on the reservation compels application of tribal sovereign immunity with regard to any attempted regulation of the contract. The location where a business contract is formed is but one of the factors to consider in analyzing on-reservation and off-reservation activity. The off-reservation activity is significant enough to preclude application of the first exception here, even if it otherwise applied. Western Sky reached out to consumers via the Internet, which extends the reach of the Tribe and its members beyond the boundaries of the reservation, to solicit Iowa consumers to enter into loan agreements. Having taken such steps, Western Sky cannot now attempt to hide behind the concept of tribal sovereign immunity to shield its off-reservation commercial relationships.

Finally, the Supreme Court's decisions since *Montana* have repeatedly emphasized that the exceptions articulated in that case only apply when the tribe's sovereignty is implicated by the attempted state or federal regulation. That is simply not the case here. The only argument that Respondent has put forth in that regard is that the economic activity generated by Western Sky's presence on the reservation is significant and that the business promotes the tribe's sovereignty. There is no persuasive evidence in the record that demonstrates any link between Western Sky's loans to Iowa consumers and the Cheyenne River Sioux Tribe's sovereignty. Notably, the Tribe itself is not a party here and has not itself asserted any threat to its sovereignty resulting from Iowa's regulation of Western Sky's loans. This is simply too attenuated a connection to allow application of the first *Montana* exception.

b. The Second Exception: The Tribe's Inherent Power to Regulate the Conduct of Non-Indians on Land Within the Reservation

For many of the reasons articulated above, *Montana*'s second exception also does not preclude Iowa from regulating loans made by Western Sky, sold to WS Funding, and serviced by CashCall. Western Sky is neither the Tribe itself, nor a member of the Tribe, plus a great deal of the conduct involved in the formation of the loans takes place off the reservation.

Above all, however, there is no evidence that allowing Iowa to regulate the loans at issue threatens the political integrity, economic security, or health or welfare of the Cheyenne River Sioux Tribe.[32] There is no evidence that catastrophic consequences to the Tribe would result if Iowa is allowed to regulate these loans.[33] The ability to exclusively impose tribal law on loans made to Iowa consumers by an LLC organized under the laws of South Dakota has no relationship to the Tribe's inherent power to determine

32 *See Montana*, 450 U.S. at 566.
33 *See Plains Commerce Bank*, 554 U.S. at 341.

membership, punish tribal offenders, regulate domestic relations among members, or prescribe rules of inheritance for members. It has no relationship to tribal self-government or internal relations.[34] For all of these reasons, *Montana*'s second exception does not apply.

C. *Federal Preemption*

Respondent CashCall further argues that Iowa is preempted from regulating Western Sky's consumer lending to Iowa residents because of Congress' establishment of the Indian Business Development Program to establish and expand profit-making Indian-owned economic enterprises.[35]

In support of this argument, Respondent cites the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In that case, California was attempting to apply a portion of the California penal code prohibiting bingo games except under certain circumstances to two Indian tribes conducting bingo games open to the public on their reservations.[36] Congress had granted to California and several other states broad criminal jurisdiction over offenses committed by or against Indians within Indian country and more limited civil jurisdiction over private civil litigation involving reservation Indians in state court. The Supreme Court determined that California's attempt to regulate bingo on the reservations through the penal code was not authorized under the scope of the jurisdictional grant.[37]

The Supreme Court declined to endorse, however, a per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent. California was attempting to regulate conduct on the tribal reservations; the Court found that "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."[38] In the *Cabazon Band* case, however, non-tribe members were implicated only because of activity they physically engaged in on the reservation.

The Southern District of Iowa tackled the same issue of federal preemption, but in the context of an Indian tribe in the state of Nebraska operating a cigarette manufacturing company that was allegedly selling cigarettes in the state of Iowa. Against the backdrop of national tobacco litigation and settlement, Iowa had enacted a statute requiring cigarette manufacturers not participating in the tobacco settlement to place funds in an

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34 *See Strate*, 520 U.S. at 459.
35 25 U.S.C. § 1521 ("There is established within the Department of the Interior the Indian Business Development Program whose purpose is to stimulate and increase Indian entrepreneurship and employment by providing equity capital through nonreimbursable grants made by the Secretary of the Interior to Indians and Indian tribes to establish and expand profit-making Indian-owned economic enterprises on or near reservations.").
36 480 U.S. at 205.
37 *Id.* at 210-11.
38 *Id.* at 214-15 (*quoting New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)).

escrow account representing a percentage of their sales in Iowa. The tribe filed a complaint asserting that the Iowa attorney general exceeded his authority in imposing Iowa's tobacco escrow statute on the tribe.[39]

The Court found that federal law did not preempt Iowa's imposition of the escrow statute on the tribe, noting that the Indian Commerce Clause does not in and of itself provide an automatic exemption for Indian tribes.[40] The Court quoted the Supreme Court's decision in *Mescalero Apache Tribe* for the proposition that state jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.[41] The Court noted that federal interest in encouraging Indian tribal economic self-sufficiency and tribal self-determination alone are insufficient to preempt state jurisdiction to regulate off-reservation tribal commerce.[42] In upholding the escrow statute, the Court noted that the statute treats all cigarette manufacturers, whether in-state, out-of-state, or tribal, equally. The Court held that the off-reservation activities of Indians are generally subject to the prescriptions of a nondiscriminatory state law in the absence of express federal law to the contrary.[43]

Both the *Cabazon Band* and the *Omaha Tribe of Nebraska* cases dealt with the state's regulation of a tribe or businesses owned directly by a tribe, not businesses owned by a tribal member, as is the case with Western Sky. In both cases, a per se rule disallowing state regulation of any tribal enterprise was considered and rejected. In the case of Western Sky, the general federal interest in establishing and expanding Indian-owned profit-making enterprises expressed by Congress' establishment of the Indian Business Development Program (IBDP) is insufficient to preempt the application of the ICCC to Western Sky's consumer loans made off the reservation. The statute to which the Respondent points establishing the IBDP makes no mention of specific types of enterprises, does not address consumer lending in any fashion, and does not in any way indicate that the many ways in which states can regulate other non-tribal enterprises are wholly inapplicable to Indian-owned enterprises, especially when those enterprises transact business outside of a reservation's boundaries.

D. *CashCall as "De Facto Lender"*

The State also argued that, despite Western Sky's status as an Indian-owned business, the issue of tribal sovereignty is not implicated because CashCall is the de facto lender in the transactions with Iowa consumers. The state relies upon the financial and organizational interrelation between Western Sky and CashCall prior to WS Funding's official purchase of the loans in question in making this argument. For the reasons articulated above, the loans are subject to Iowa law even if Western Sky is considered to

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39 *Omaha Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 818-20 (S.D. Iowa 2004).
40 *Id.* at 822.
41 *Id.* (*quoting Mescalero Apache Tribe*, 462 U.S. at 334).
42 *Id.* at 824.
43 *Id.* at 825 (citations omitted).

be the true lender. Consequently, I need not decide whether CashCall is the de facto lender.

*E. Applying Tribal Law*

The State made additional arguments regarding the legality of the loans at issue under tribal law if Iowa law were found not to apply to the loans. Given the conclusion that Iowa law applies to the loans, I need not address these arguments.

**ORDER**

Iowa law applies to the loans at issue in these matters. Pursuant to the agreement of the parties, a status conference will be held to set a timeline for further proceedings. The telephone status conference will take place on **October 22, 2013 at 3:00 PM**. The parties shall follow the instructions at the end of this order to participate in the status conference.

Dated this 26th day of September, 2013.

Laura E. Lockard
Administrative Law Judge

cc: Shauna Russell Shields – AG (by electronic mail)
Jessica Whitney – AG (by electronic mail)
Claudia Callaway – Attorney (by electronic mail)
John Black – Attorney (by electronic mail)
Matthew Whitaker – Attorney (by electronic mail)
Rodney Reed – IDOB (by electronic mail)

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**INSTRUCTIONS TO PARTICIPATE IN THE STATUS CONFERENCE:**

We use a telephone conference calling system for hearings. You can participate from any location where you have a telephone.

**At the date and time scheduled for status conference, you must do the following:**

- Call 1-866-685-1580
- When prompted, enter the following Conference Code Number: **0009991673** (press # after entering the number)
- The system will ask if you are the leader. YOU ARE NOT -- DO NOT PRESS THE * KEY
- The system will ask you to state your first and last name

- You will be put on hold until the judge enters the conference call; stay on the line until the judge enters the call.

**Important information about participating in the status conference:**

- You may call in as early as five minutes before your status conference is scheduled to begin (example: if your hearing is scheduled to begin at 9:00 AM, you may call as early as 8:55 AM).
- The judge will wait five minutes after the time the status conference is scheduled to start to allow all parties to call in. If you have not called in by five minutes after the hearing is scheduled to start, the judge may enter a default judgment against you.
- **It is your responsibility to call in for the status conference. The judge will not call you. If you do not call using the above instructions, you will not be able to participate in the status conference. If you have technical difficulties connecting at the time of the status conference, please call (515) 281-6468.**