

# *Building Trust*

Consumer Protection in Native Communities

Native Assets Research Center // Research Report 2011-5 // January 2011





## ACKNOWLEDGEMENTS

This research was funded by the Annie E. Casey Foundation. We thank them for their support but acknowledge that the findings and conclusions presented in this paper are those of the authors alone, and do not necessarily reflect the opinions of the Foundation. This paper was written by Raymond Foxworth, Research and Program Officer, First Nations Development Institute, and Sarah Dewees, Senior Director of Research, Policy and Asset Building Programs, First Nations Development Institute. We thank the advisory committee established at the start of this project for sharing their time and valued expertise in providing feedback on earlier drafts of this paper. In particular, we thank Tanya Fiddler, Executive Director, Four Bands Community Fund; Levon Henry, Executive Director, DNA People's Legal Services; and Leslie Parrish, Senior Researcher, Center for Responsible Lending. We also thank Christina Barsky, Program Director, Northern Plains Initiative and Rural Dynamics Incorporated, for her input on this paper.

## DISCLAIMER

This report contains information regarding tribal jurisdictional issues. Jurisdictional issues are still the subject of contentious litigation and naturally involve the sovereign rights of Indian nations. Thus, Indian nations should consult legal counsel when making decisions that pertain to their legal and sovereign status. Moreover, it is important to note that the analysis contained in this document may not be applicable to all tribal nations in North America. For example, Public Law 280 states may have differing state legal contexts that need to be considered in relation to the contents of this report.

This report was created for the exclusive use of First Nations Development Institute. All material is copyrighted and is not intended for reprint unless permission is specifically granted by First Nations Development Institute. Such permission is also needed for quotes of 50 words or more, or more than 400 words of material quoted from this report.

Suggested citation: First Nations Development Institute (2011). "Building Trust: Consumer Protection in Native Communities." Longmont, CO: First Nations Development Institute.

© 2011 First Nations Development Institute.

For more information, or to order additional copies of this report, please call 303-774-7836 or email [info@firstnations.org](mailto:info@firstnations.org).



# Building Trust

Consumer Protection in Native Communities

## EXECUTIVE SUMMARY

The predatory lending industry has emerged in the past thirty years to offer such high cost products as payday loans, refund anticipation loans (RALs), refund anticipation checks (RACs), car title loans, and pawnshop loans. Although an exact legal definition of predatory lending remains elusive, predatory lending encompasses a number of abusive practices including charging unreasonably high interest rates and hidden or excessive fees, offering a loan knowing that a borrower lacks the ability to repay, and fraudulent or deceptive sales tactics in loan transactions.

Research suggests that predatory lending is stripping money from low-income tribal citizens, especially those who are unbanked or underbanked. Some tribes have passed legislation to provide consumer protection for their citizens. Such legislation is increasingly important as more and more states are passing legislation to limit predatory lending which may lead to these lenders flocking to do business on tribal lands to avoid the limits imposed by state legislation.

This report is the first attempt to explore the complex legal dynamics related to tribal consumer protection legislation and to discuss what tribal nations are doing to combat predatory lending through the use of tribal legislation. Examining existing consumer protection and anti-predatory lending policies, this report looks at what tribal governments are already doing to actively protect tribal citizens and highlights issues that tribal leaders should consider in developing such legal and regulatory tools.

This report highlights potential jurisdictional issues that could emerge with the passage of tribal consumer protection laws. Tribes should anticipate challenges to their jurisdiction from states and other interests. The Navajo Nation provides an example of tribal legislation that anticipates such challenges to tribal jurisdiction.

This report also documents the need to implement regulatory and consumer education systems in addition to passing tribal consumer protection legislation. Such systems are needed to educate, monitor, and regulate businesses serving tribal citizens. Such systems also facilitate the enforcement of any new tribal legislation. Consumer education helps reduce demand for predatory lending products.

Recently, some tribes have used tribal corporations to offer “fringe” financial products in partnership with large payday lending corporations. Partnering with these kinds of alternative financial service companies may be an attractive business opportunity for some tribal nations as it may generate a few jobs and stimulate some capital flow within reservations. Certainly the sovereignty of Native nations makes it clear that every Native nation is entitled to its own choice, especially in the face of the failed trust responsibility of the federal government. However any such decision should be considered in relation to not only the negative cost of predatory lending for tribal citizens, but also in relation to potential court challenges and the potential impact on tribal sovereignty. Though state courts have thus far rightfully upheld the doctrine of sovereign immunity in relation to tribal and state laws, a zealous state Attorney General taking up this issue in federal court might obtain rulings that create challenges to tribal sovereignty and eventually impact tribal nations across the board.

Every year, predatory lending strips resources and assets from Native communities. Tribal leaders have a range of options available to them to limit predatory lending practices and stem the flow of money out of reservation economies. We applaud the tribal leaders that have already taken steps to pass legislation, implement a regulatory system, and educate consumers in their communities.

## I. Introduction

The most recent economic crisis ushered in new debates about predatory lending and its impact on communities and individuals across North America. Much of the current debate surrounding predatory lending is related to the surge in sub-prime lending in the last decade and the subsequent housing collapse and credit crisis. However, the roots of predatory lending and the “fringe financial sector” are much deeper and the industry has a longer history.<sup>1</sup> Over the past 30 years, there has been significant growth in the alternative financial services industry,<sup>2</sup> including businesses that offer high cost credit in the form of payday loans, car title loans, and tax-related refund anticipation loans and refund anticipation checks. Many of these businesses target low-income and minority populations. These businesses have been successful in influencing policy agendas nationally and in many states, and as a result have flourished with little regulation over the past three decades. Although the increasingly large lobbying power of the alternative financial sector has obstructed efforts to develop an effective national policy to combat predatory lending, an increasing number of states are looking to combat predatory lending through a variety of means, including developing usury caps on loan products and developing and strengthening consumer protection laws that protect citizens and provide some form of regulation for many businesses.

Debates about consumer protection occurring at the federal and state levels of governance have not gone unnoticed by leaders of Native nations. To contribute to the ongoing discussion, First Nations Development Institute released two reports in 2008 that outline the broad strategies available to Native nations to combat predatory lending in their communities. Both of these reports highlight the importance of providing low cost alternative loan products, financial education, and consumer education as strategies to reduce the high use of predatory lending products among American Indians.<sup>3</sup>

Building on these two previous studies, this report takes a different look at what Native nations can do to combat predatory lending in their communities. Specifically, this report highlights the regulatory functions that tribal governments can and have developed in combating predatory lending and promoting consumer protection within their communities. As sovereign nations, Indian nations can and have developed consumer protection laws that not only regulate business transactions within their reservation boundaries but also protect tribal consumers from harmful financial products. Until recently, the federal government has been unable to pass effective legislation to combat abusive lending practices,<sup>4</sup> and an increasing number of states are acknowledging that predatory lending practices harm their constituents and are looking at ways to combat these abuses. Similarly, an increasing number of Indian nations and nonprofit organizations are taking notice of the problems related to predatory lending and developing strategies to combat the use of high-cost financial products within Native communities.<sup>5</sup>

This report is the first attempt to explore the complex legal dynamics related to tribal consumer protection legislation and to discuss what tribal nations are doing to combat predatory lending through the use of tribal legislation. Examining existing consumer protection and anti-predatory lending policies, this report looks at what tribal governments are already doing to actively protect tribal citizens and highlights issues that tribal leaders should consider in developing such legal and regulatory means. Specifically, this report identifies potential jurisdictional issues and also touches upon tribal infrastructure and capacity issues that may hinder the development of tribal regulatory functions.

---

1 For a good overview of the rise of the fringe financial sector see Gary Rivlin's 2010 book *Broke, USA: From Pawnshops to Poverty, Inc.: How the Working Poor Became Big Business*.

2 There are many different terms that can be used to describe the businesses that provide predatory credit products. We use the terms “alternative financial services industry,” “fringe financial sector,” and “predatory lenders” interchangeably in this report to describe businesses that provide unsuitable loan products to vulnerable borrowers.

3 First Nations Development Institute (2008); First Nations Development Institute (2009).

4 Although the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law on July 21<sup>st</sup> 2010 its impact, including the effectiveness of the Consumer Financial Protection Bureau, is still unknown.

5 The terms Native, Native American and American Indian are used interchangeably throughout this report to refer to the first peoples of this continent.

In the sections that follow, this report provides an overview of existing tribal laws in relation to predatory lending. A review of the efforts of two tribal nations to establish effective tribal consumer protection laws is provided. Next, a collaborative campaign to combat predatory lending in Montana is discussed. From these case profiles and other research, we draw together some lessons learned in the development of consumer protection codes within Native nations. Finally, we conclude with policy recommendations, highlighting the need for a model tribal consumer protection code so that more tribal leaders can consider the use of such a tool to limit predatory lending.

## II. Recognizing and Defining Predatory Lending: Causes and Costs

Although an exact legal definition of predatory lending remains elusive, predatory lending encompasses a number of abusive practices. These practices include lenders charging unreasonably high interest rates and hidden or excessive fees, offering a loan knowing that a borrower lacks the ability to repay, refinancing a loan without benefit to the borrower, and using high-pressure tactics, fraud or deception in loan transactions. Moreover, countless legal cases have noted other abusive and predatory practices, including flipping loans to collect additional fees, inducing borrowers to take optional and costly insurance, and complicated and misleading advertising.<sup>6</sup> For the purposes of this paper, predatory lending is generally defined as an unsuitable loan designed to exploit vulnerable borrowers, and includes such products as payday loans, refund anticipation loans and checks, car title loans, and pawnshop loans.

Several authors have analyzed the rise of the fringe financial sector. The fringe financial sector includes check-cashers, payday lenders, buy-here-pay-here auto sales, tax preparers offering refund anticipation loans and checks, rent-to-own furniture and appliance stores, auto title loan providers, and pawnshops. Some groups have attempted to rationalize the existence of these businesses, arguing that they provide access to needed financial services for the poor and working class, and that the high rates and fees are needed to offset loan risks. Others have also noted that changes in the mainstream banking industry, including the introduction of high fees and penalties in the 1980s, drove many low-income consumers to the fringe financial sector to obtain basic financial services.<sup>7</sup> Still others argue that the fringe financial sector charges unnecessarily high fees and uses deception to trick unsophisticated borrowers into buying usurious financial products.<sup>8</sup>

Several groups have started documenting the deleterious impacts of the fringe financial sector, including the cost of high interest rates and the extreme cycles of debt that typically accompany these financial products. For example, research shows that payday lenders trap borrowers into cycles of debt by providing expensive loan products that borrowers have trouble paying back, and that such products often charge annualized interest rates that surge near or above 400 percent.<sup>9</sup> A recent study documented the emergence of a new “interest-only” payday loan that exploits borrowers in need of quick cash and keeps them mired in debt.<sup>10</sup> Industries such as buy-here-pay-here auto sales and rent-to-own furniture stores charge extraordinary interest rates and fees, above and beyond the overall value of products and what mainstream creditors would charge. Research by First Nations Development Institute suggests that high-priced refund anticipation loans cost low to moderate income tax filers in Native communities over \$22 million in 2007, and our research corroborated recent findings that these products are used more often in minority communities.<sup>11</sup> There is growing evidence of the negative effects of these alternative financial products on low-income people.

Many studies documenting the overall impact of predatory loan products have noted correlations between race, class and the use of products offered by the fringe financial sector.<sup>12</sup> This is not surprising given that research indicates that certain racial and ethnic minority groups, including African Americans, Hispanics and Latinos, are more likely to be

6 Martin et al. (2008). See also GAO (2004).

7 See Rivlin (2010).

8 Rivlin (2010).

9 Parrish & King (2009).

10 Martin (2010).

11 First Nations Development Institute (2009); Keely & Griffith (2007); Theodos et al. (2010).

12 First Nations Development Institute (2009); Keely & Griffith (2007); Theodos et al. (2010).

unbanked or underbanked, which increases their need to rely on alternative financial services.<sup>13</sup> Although various government and nonprofit organizations have attempted to uncover the overall impact of predatory lending in relation to ethnic and racial minorities, we still know relatively little about the use of predatory loan products by American Indians.

In 2009, the Federal Deposit Insurance Corporation (FDIC) issued results from their national survey on unbanked and underbanked households in the U.S. Their findings indicate that 28.9 percent of American Indian and Alaska Natives are underbanked, and 15.6 percent of American Indian and Alaska Natives are unbanked.<sup>14</sup> These figures may actually underestimate the numbers of unbanked because many American Indians have bank accounts set up for them by the federal government but do not use these accounts for everyday financial transactions. Given the high number of unbanked and underbanked American Indians in the U.S., there is great reason to expect that they also use alternative lending products at extremely high rates. A survey released by First Nations Development Institute in 2007 indicated predatory lending was a significant concern across Indian Country with 71 percent of respondents indicating that predatory lending was either a “big problem” or “somewhat of a problem” in their communities.<sup>15</sup> As stated above, research by First Nations Development Institute revealed that high cost refund anticipation loans siphoned a significant amount of money from Native communities, and First Nations’ report *Borrowed Time* suggests that Native communities use these products at a higher rate than non-Native communities.<sup>16</sup> Thus, issues related to predatory lending are of significant concern to many Native nations. Their populations may be especially vulnerable to such products because geographic isolation and historical redlining of many Native communities may limit access to mainstream loan products. The populations residing on many reservations are both low income and underbanked, and therefore may be targeted by the predatory lending industry.

### III. Exploring Tribal Laws and Consumer Protection

Tribal leaders and tribal organizations are increasingly concerned with the development of tribal legislation and systems that codify, govern and structure law and order within Indian nations. Most of these concerns center on the recognized need for tribal governments to develop tribal capacity in relation to criminal, civil and business law and regulation. Within the context of tribal business law and code development, over the past ten years many tribal governments have developed uniform commercial codes to structure the sale of goods and regulate other commercial transactions within their reservation jurisdictions. Similarly, over the past five years, Indian nations have paid increasing attention to the development of secured transaction codes which clarify and establish procedures for secured and unsecured credit transactions. Many of these legal developments stem from recognizing the need to develop and enact laws to provide structures to promote economic development on Indian lands. These legal developments are key mechanisms to reduce legal uncertainties related to business transactions for all parties and to protect tribal businesses from unscrupulous business dealings. In addition, the passage of these laws asserts tribal sovereignty by defining tribal-specific laws and procedures for dispute resolution. Though many of these newly developed laws go a long way in protecting tribal businesses and organizations within reservation boundaries, and may also touch on aspects of consumer protection, many Indian nations have not yet fully developed consumer protection laws that specifically provide tribal consumers with broad protections.<sup>17</sup>

#### ***What are consumer protection laws and why are they needed?***

Consumer protection laws are intended to maintain adequate protection and ethical conduct in transactions related to business and financial services. Consumer protection laws are statutes that govern sales and credit practices involving

<sup>13</sup> Federal Deposit Insurance Corporation (2009).

<sup>14</sup> The FDIC defined households as unbanked if they answered “no” to the following question: “Do you or does anyone in your household currently have a checking or savings account?” Underbanked households included respondents who had a checking or savings account but rely on alternative financial services, specifically, non-bank check-cashing services, payday loans, rent-to-own agreements, or pawn shops at least once or twice a year or refund anticipation loans at least once in the past five years. See Federal Deposit Insurance Corporation (2009).

<sup>15</sup> First Nations Development Institute (2009).

<sup>16</sup> First Nations Development Institute (2009). See also Keeley et al. (2007)

<sup>17</sup> It is important to note that many tribal Uniform Commercial Codes and Secure Transactions Codes do have some provisions relating to individual consumer protection though they may not fully capture all aspects of law and regulation related to consumer protection codes.

consumer goods. This can include statutes that prohibit and/or regulate “deceptive or unconscionable advertising and sales practices, product quality, credit financing and reporting, debt collection, leases and other aspects of consumer transactions.”<sup>18</sup> Thus, consumer protection laws may encompass a broad range of regulatory functions including usury caps on interest rates and truthful disclosure requirements in business. Overall, consumer protection laws would promote the highest ethical standards of behavior for businesses operating on Indian lands. Consumer protection laws are not intended to replace normal market mechanisms of competition, rather they are legal means for correcting market imperfections or market failures that may produce inefficient market outcomes and distort information in regard to consumer choice. Though intended to curb abusive business practices and offer remedies for redress, consumer protection laws are not intended to be blanket responses that protect consumers from all liability in business transactions.

A search of all Indian nations’ codes possessed by the National Indian Law Library at the Native American Rights Fund in Boulder, Colorado found that only seven American Indian nations have developed and adopted some form of consumer protection laws. As Table 1 below notes, these consumer protection codes vary to a great degree. Some mandate usury caps and specifically outline abusive and unconscionable practices, while others merely set out terms and procedures for redress.<sup>19</sup>

Table 1: Tribal Consumer Protection Codes	
Indian Nation	Elements of Tribal Code
Oglala Sioux Tribe	Adopted in 2007, this code outlines procedural and jurisdictional considerations for such actions as repossession and sale of items.
Navajo Nation	This law defines acceptable consumer business practices, regulates pawn transactions, automobile sales and sets usury interest caps for loans.
Rosebud Sioux Tribe	Chapter two of the Tribal Business Laws deals specifically with consumer protection, mainly dealing with business transactions done in homes of tribal members (for example, door-to-door solicitations).
Blackfeet Nation	Enacted in 1999, this consumer protection code establishes a Truth in Lending policy and establishes an APR not to exceed 21% per year, and regulates unconscionable business practices, lending and debt collection. It also outlines creditor and consumer remedies.
Grand Traverse Band of Ottawa and Chippewa Indians	Chapter nine of the Housing and Property statute titled “Homeownership Protection From Predatory Lending Ordinance” establishes standards by which creditors, lenders, appraisers, home inspectors, builders, manufactured housing dealers, contractors, and real estate agents must conduct business when tribal members, tribal lands, and/or tribal dollars are involved in housing and mortgage lending transactions.
San Ildefonso Pueblo	Consumer civil rights and welfare protection statutes note that tribal citizens are protected by the Consumer Protection Statutes of the State of New Mexico in commercial transactions with dealers licensed by the State of New Mexico, and should avail themselves of those statutes’ benefits and remedies. Moreover, the code outlines regulations for pawn transactions and repossessions.
Eastern Band of Cherokee Indians	This code established usury caps on business transactions and check cashing services. It outlaws unfair, deceptive, or fraudulent lending and offers remedies for the aggrieved.

**Source:** National Indian Law Library, Native American Rights Fund

<sup>18</sup> Nolan et al. (1991).

<sup>19</sup> This sample is limited in that we are only looking at tribal governments that have consumer protection codes in the database at the National Indian Law Library. It is possible that other tribal governments have enacted such laws and they have not provided information to the National Indian Law Library.



As Table 1 above shows, only a few Native nations have laws that fully protect tribal citizens from potential abuses by unscrupulous businesses. Although many Native nations are looking for ways to stimulate economic growth and development, consumer protection is a significant area of underdevelopment not yet addressed by many tribal governments. There are many possible explanations for the lack of high quality consumer protection laws on Native lands. Critical issues related to poverty, housing, and health care may eclipse attention paid to consumer protection. As we will see, ongoing jurisdictional confusion about consumer protection may have limited the willingness of tribal governments to develop their own legal frameworks.

Some tribal nations like the San Ildefonso Pueblo, have decided to simply use state laws for protecting tribal citizens rather than developing their own legal framework. Most tribal governments cannot simply rely on state and/or federal consumer protection laws to shield their citizens, however. This is largely because there is no comprehensive federal legislation and only a limited number of states offer sufficient mechanisms to protect consumers from unscrupulous financial service providers. Thus, deferring to state law may not be an effective tribal consumer protection strategy under conditions of weak and unspecified state law. Furthermore, sovereign Indian nations are free to create their own customized laws to protect tribal consumers, and by doing so may better address the unique needs of their citizens.

### ***Why create tribal consumer protection laws?***

There are a number of reasons Indian nations may want to consider the development of tribal consumer protection laws. First, as stated above, looking to state or federal laws as the sole remedy for protecting tribal citizens from potentially abusive practices has significant limitations. Most states don't have such laws, and we now know that existing federal regulation in relation to the mortgage industry, for example, was woefully inadequate. Even when such laws exist to assist consumers, many tribal citizens may have limited knowledge of state and federal law or may be discouraged by the costs associated with filing a claim.

Second, tribal governments should consider using their inherent ability to develop their own systems to protect tribal consumers. When it comes to exercising tribal sovereignty, a "use it or lose it" framework is often applicable. In other words, the development of consumer protection laws is one more way for Native nations to exercise their sovereign powers to protect tribal citizens. As essential and vital members of tribal economies, tribal consumers should not be forgotten when tribal nations develop mechanisms for economic growth and development.

Third, tribal governments have the opportunity to design a legal framework that is more progressive and customized than the consumer protections offered at the federal, state and local levels. This provides a chance to offer effective protection of their citizens, while at the same time stemming the flow of financial resources out of the reservation economy and into surrounding towns where many predatory lenders are located.

Indian nations that do not have consumer protection laws in place provide a unique opportunity for predatory lenders. Recent events on the Cheyenne River Sioux Indian Reservation in Eagle Butte, South Dakota demonstrate what can happen when clear consumer protection laws are not established. An internet payday lender recently emerged claiming to be located "within the exterior boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America." This lender has a significant marketing campaign that includes national television commercials and a website. The ads and the website advertise fast cash through high interest rate loan products. The national television commercials feature a young Native-looking man as the spokesperson for the company's promises of fast cash, and the commercial describes the company as Native owned and protected by tribal sovereignty. We do not have specific information about this company but the claim of tribal sovereignty protection raises significant questions about the use of tribal law to protect this company. There is little precedent regarding the regulation of tribal members' businesses on tribal land. The organization's claims of protection may result in litigation, and such litigation

may ultimately result in rulings not favorable to Indian nations. Thus, while tribal authorities may not have authorized this organization to operate within their reservation boundaries, its presence could potentially have significant blowback for the Cheyenne River Sioux Tribe as well as Indian Country more broadly. If the tribe had regulatory mechanisms in place, the company would not be able to claim the protection of tribal sovereignty and tribal consumer protection laws would cap interest rates charged on loan products. Ongoing consumer education efforts at Cheyenne River are working to reduce demand for such products locally,<sup>20</sup> but more work is needed to ensure that such businesses do not thrive on Indian reservations.

Another topic related to predatory lending and Native nations recently received attention from the national news cycle. The Wall Street Journal, National Public Radio, and the Center for Public Integrity all presented in-depth articles about a phenomenon dubbed “rent-a-tribe” whereby a payday lending corporation partners with a tribe to incorporate under tribal law and therefore avoid state or federal regulation of lending activities.<sup>21</sup> Several tribal nations have partnered with such alternative financial services providers and have been offering short term loans mostly over the internet. Many analysts believe that this pattern will expand to other Indian nations as payday lenders look for creative ways to skirt increasing state and federal regulation. Unfortunately, in addition to exploiting vulnerable borrowers, these payday lenders also have brought about a new round of litigation facing Native nations. “Rent-a-tribe” activities have led to lawsuits in several state courts and cease-and-desist orders from State Attorneys General across the United States. Current lawsuits have the potential to eventually challenge tribal jurisdiction on such issues if litigation is moved to federal courts. This trend toward exploiting the unique qualities related to tribal sovereignty for offering alternative financial services is another reason that the Native nations may wish to consider adoption of tribal consumer protection laws.

There is precedent in Indian law for tribal governments to develop not only their own laws but also their own regulatory structure in relation to business transactions. There is also precedent among other governing bodies. For example, New York City implemented one of the most progressive consumer protection agencies; this organization regulates many business transactions, including financial service transactions. In 1968, New York City consolidated its Department of Markets and its Weights and Measures division with the Department of Licensing, creating the NYC Department of Consumer Affairs. In 1969, the city passed a landmark Consumer Protection Law, increasing the department’s power and making the Department of Consumer Affairs the first municipal agency of its kind in the country. The Department of Consumer Affairs is responsible for mediating and resolving consumer complaints and has broad licensing and enforcement powers. The NYC Consumer Protection Law requires all financial services industries (and other businesses) to register with the Department of Consumer Affairs and to pledge to follow their guidelines for conducting business in the city. Businesses must agree to the jurisdiction of the City’s courts, even if incorporated in other states and/or cities. The Department enforces the city’s Consumer Protection Law and collects fines and conducts litigation if necessary. In addition to enforcement work, the Department of Consumer Affairs educates New Yorkers about consumer rights and business responsibilities. This model of regulating businesses, even those incorporated under the laws of other jurisdictions, is one that could be useful to tribal governments as they design their consumer protection strategy.

The lack of consumer protection in Native communities along with the recent developments on the Cheyenne River Indian Reservation and the rise of “rent-a-tribe” businesses demonstrate the adaptability and creativity of predatory lenders and their ability to target locations where consumer protections are lacking. Moreover, tribal leaders should take note of the ability of predatory lenders operating on tribal lands to claim certain legal protections under the guise of tribal sovereignty. This situation has the potential to affect tribal jurisdiction negatively if litigation were to arise. Establishing regulatory mechanisms to thwart predatory lending and provide a means to punish would-be predators is only one important mechanism that tribal nations can develop to protect tribal consumers. Without such mechanisms in place, reservation communities may be perceived as locations favorable to predatory lending operations.

---

<sup>20</sup> See Fiddler (2011).

<sup>21</sup> See Hudson & Heath (2011); NPR (2011); Silver (2011).

#### IV. Consumer Protection Codes of Native Nations and Jurisdictional Considerations

Tribal sovereignty has continuously been challenged and diminished by the federal government, the Supreme Court, state governments, members of mainstream society, and businesses. Because of this, Indian nations should be cognizant of jurisdictional issues that may arise when enacting consumer protection codes. Moreover, jurisdictional issues are still subject to ongoing, and, currently, contradictory rulings. This makes the jurisdictional considerations of Indian nations' consumer protection laws all the more salient. Jurisdictional issues can be complicated by sovereign immunity waivers granted during certain tribal business dealings and dispute resolution forum agreements that may be incorporated into tribal business agreements. These issues can also be complicated by contradictory legal definitions that arise in relation to tribal jurisdiction within reservation boundaries, and on other parcels of trust lands, where jurisdictional lines may be unclear and subject to dispute.<sup>22</sup> Finally, as scholars of Indian law know, the legal jurisdiction of a tribe in relation to non-tribal members on Indian or reservation land, and tribal members off Indian land, is still subject to discussion, debate, and litigation, and can vary among tribes, states and regions of the country.

Despite this confusion related to legal jurisdiction, there are established legal doctrines that protect tribal sovereignty and citizens in relation to consumer protection and business regulation on tribal lands. Specifically, exceptions under *Montana v. United States (1981)* provide legal justification for the extension of tribal jurisdiction over non-Indian business activities. Specifically, this case lays out two applications of tribal jurisdiction over non-Indians on reservation lands. These two conditions are specified as follows:

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. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands 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* [emphasis added].<sup>23</sup>

Although the *Montana (1981)* case justifies the extension of tribal jurisdiction over non-Indians on Indian lands, it has not gone unchallenged.<sup>24</sup> Moreover, exceptions to the *Montana (1981)* case have been upheld and disregarded by different courts.<sup>25</sup> Furthermore, in 2001, the Supreme Court left open the question of whether tribal courts have any jurisdiction over non-Indians when it comes to business transactions that occur on Indian lands.<sup>26</sup>

Another obstacle in the matter of tribal jurisdiction is the Supreme Court's ruling in the *Plains Commerce Bank v. Long Family Land and Cattle* case in 2008. The Court ruled in this case, overturning the Cheyenne River tribal court and other lower court rulings, that tribal courts did not have jurisdiction in regulating non-Indian fee lands located within a reservation. Unresolved in this case is the question of tribal authority over non-tribal members. However, this case, as well as an earlier *Nevada v. Hicks (2001)* case, strongly suggests that the Supreme Court was signaling a future desire to rule on this issue. All indications suggest that the Court is moving to restrict the scope of tribal authority over non-Indians who conduct business on Indian lands. Thus, this should be a cautionary tale about potential further obstructions to the sovereignty of tribal nations.

22 For example, in *United States v Stands*, 105 F3d 1565, 1572, 1572 n 3 (CA 8, 1997), the court held that "tribal trust land beyond the boundaries of a reservation ordinarily is not Indian Country."

23 *Plains Commerce Bank v Long Family Land and Cattle Co*, US; 128 S Ct 2709, 2720; 171 L Ed 2d 457 (2008) (quoting *United States v Montana*, 450 US 544 (1981)).

24 For example see, *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997).

25 Petitioner's Writ of Certiorari at 4-5, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.* (Docket No. 07-411). They note that the Supreme Court has never upheld the *Montana* exceptions. However, in contrast see *Smith v. Salish Kootenai College* 378 F. 3d 1048 - Court of Appeals, 9th Circuit (2004), in which the court upheld the consensual relationship exception for tribal jurisdiction over non-Indians.

26 *Nevada v. Hicks*, 121 S. Ct. at 353 (2001).

Nonetheless, one matter that remains clear is that tribal nations do have jurisdiction over reservation businesses owned and operated by tribal citizens.<sup>27</sup> Thus, consumer protection is definitely subject to remedy in tribal courts when consumer violations are committed by such businesses.

The above discussion makes clear that the dynamics of tribal jurisdiction are still fluid. Legal precedent is often contradictory when it comes to regulating business transactions between tribal citizens and non-Indians. Naturally, this raises questions about how tribal governments can develop effective mechanisms to protect tribal consumers. In the sections that follow, this report details consumer protection strategies of two different tribal nations. These efforts not only include the enactment of tribal consumer protection legislation, but also the ability of tribal governments to draw upon broader state coalitions to promote statewide change in consumer protection policy.

## V. The Navajo Nation and Consumer Protection

In 1999, the Navajo Nation recognized the absence of tribal laws protecting Navajo consumers and acknowledged the possibility of Navajo citizens falling prey to unscrupulous, dishonest and predatory business practices. Thus, in 1999, the Navajo Nation Tribal Council unanimously passed a series of consumer protection laws to protect Navajo consumers. Over fifty-five pages in length, the Navajo Nation Consumer Protection Laws are some of the most comprehensive tribal codes in North America. The laws codify unconscionable, unfair and deceptive trade business practices and set forth regulatory and remediation systems for motor vehicle transactions, pyramid schemes, door-to-door sales, rental-purchase agreements, repossession requirements, advertisement disclosures and pawn transactions. Moreover, within the original consumer protection code, the Navajo Nation Finance Charge Limitation Act prohibits charging more than one and one-half percent interest per month over the term of a loan and imposes stiff penalties for such usury violations.<sup>28</sup>

The enactment of the law immediately unleashed waves of criticism from various organized interest groups claiming that the interest rate cap prevented some Navajo consumers from accessing credit.<sup>29</sup> The original Code remained intact until 2006, when the Navajo Nation Council amended the Finance Charge Rate Limitation Act. The amended law was expanded to allow a finance charge not to exceed “an annualized rate equal to the prime interest rate, as indicated in the latest print edition of the *Wall Street Journal*, at the time the contract is executed, plus fifteen (15) percentage points above the prime rate.”<sup>30</sup> The consumer protection code developed by the Navajo Nation remains one of the most proactive and comprehensive pieces of legislation created to protect tribal citizens.

### **Consumer Protection and the Navajo Court System**

Legislation aimed at protecting Navajo consumers is not the only proactive step initiated by the Navajo Nation. The Navajo Nation court system has also demonstrated a proactive approach to protecting Navajo citizens from unscrupulous business practices. They have carefully established case law that creates precedent for future rulings and clearly outlines protections for tribal citizens. In addition, they have practiced judicial activism in proactively interpreting Navajo Nation law in a way that protects consumers.

In 2000, the Crownpoint District Court of the Navajo Nation ruled on the case of *Capital Loan Corporation v. Platero, Henry and Largo*. In 1999, the three named defendants in this case, Platero, Henry and Largo, had all received loans from Capital Loan Corporation, a business in Gallup, New Mexico. The amount of money borrowed varied by defendant, ranging from \$100-\$500, as did the annual percentage rate charges, which ranged from 89% to 233%. Given that Platero,

27 For example see, *Oliphant v Suquamish Indian Tribe*, 435 US 191; 98 S Ct 1011; 55 L Ed 2d 209 (1978).

28 Navajo Nation Consumer Protection Laws, CJY-71-99, available at [www.navajocourts.org/Resolutions/CJY-71-99.pdf](http://www.navajocourts.org/Resolutions/CJY-71-99.pdf), accessed 29 October 2010. Specifically, subchapter six of the Navajo Nation Consumer Protection Law noted that lenders who charge more than the permissible rate commit usury, and they can be subjected to a penalty in the sum of three times the finance charge, but not less than \$1,000.

29 For example see Maniaci (2009).

30 Amending the Navajo Nation Finance Charge Rate Limitation Act, CJA-08-06, available at [www.navajocourts.org/Resolutions/CJA-08-06Rate.pdf](http://www.navajocourts.org/Resolutions/CJA-08-06Rate.pdf), accessed 29 October 2010. To get a sense of the rate cap, if the *WSJ* prime rate was 3.25%, this would cap interest rates at 18.25%.

Henry and Largo had taken out their loans prior to the enactment of the Navajo Nation Consumer Protection Laws, the Court could not retroactively apply the law to these cases. However, the Navajo Consumer Protection Laws anticipated such cases and provided the Court the ability to refuse or limit enforcement of contracts with excessive terms. Thus, the Court noted they could not enforce such an unconscionable agreement, and relying on previously established case law, required each of the defendants to repay their loan products at a more reasonable 21% interest rate.

### **Long Arm Jurisdiction**

In 2001, the Navajo Nation took radical action to protect their citizen and tribal interests in business transactions occurring within and off the Navajo Nation. Largely in response to negative court rulings in the U.S. and Arizona Supreme Courts and jurisdictional confusion under the Navajo Nation Consumer Protection Laws, the Nation passed the Navajo Nation Long-Arm Jurisdiction and Service of Process Act. The two provisions of this Act include the following:

1. "A court of the Navajo Nation may exercise personal jurisdiction over any member of the Navajo Nation....for activities outside this jurisdiction which affect any other member of the Navajo Nation."
2. The Navajo Nation court can "exercise personal and subject matter jurisdiction over any non-member who consents to jurisdiction by commercial dealings, residence, employment, written or implied consent, or any action or inaction which caused injury which affects the health, welfare, or safety of the Navajo Nation or any of its members."<sup>31</sup>

In effect this law, with the support of subsequent case law of the Navajo Nation, provided a legal mechanism for Navajo Nation tribal law to have presumptive civil jurisdiction over (1) non-Indians on Navajo lands and, perhaps more importantly, (2) Navajo citizens conducting business off the Navajo Nation reservation.

The full legal implications of the Navajo Nation Long-Arm Jurisdiction and Service of Process Act have not been fully tested in federal court.<sup>32</sup> Although there are some legal precedents for extending tribal jurisdiction beyond the boundaries of reservations, these instances have limited scope, for example in Indian child welfare cases. Since the *Oliphant v. Suquamish Indian Tribe* (1978) case and prior, the Supreme Court and increasingly states have attempted to usurp tribal powers and erode the jurisdictional authority of Indian nations.<sup>33</sup> Given these ongoing legal battles, the full implications of the Navajo Nation Long-Arm Jurisdiction Act and others of the sort will surely be the subject of legal dispute in the future.

The Navajo Nation's codes exemplify proactive steps that a Native nation can take to protect tribal consumers. Its efforts were not only forward-looking, but also provided a means for its Court to remedy past violations. Of course, the Long Arm statute developed by the Nation may be the subject of future debate and litigation. Nonetheless, much recognition should be given to the Navajo Nation for its desire to exert and utilize inherent sovereign rights as a nation and protect tribal consumers. Unfortunately, however, the Long Arm statute, if challenged, may have significant negative implications for all of Indian Country.

## **VI. The Challenges of Consumer Protection: The Blackfeet Nation**

The Blackfeet Nation offers another example of a tribe working to provide consumer protection for its citizens. In 1999, the Blackfeet Nation took steps to protect its consumers by enacting a consumer protection code of four parts: consumer credit, consumer sales practices, equal credit opportunity, and truth in lending. One of the most notable aspects

31 Navajo Code § 253a, The Navajo Nation Long-Arm Civil Jurisdiction and Service of Process Act of 2000. Available at [www.navajocourts.org/Resolutions/CJA-02-01%20Long%20Arm.pdf](http://www.navajocourts.org/Resolutions/CJA-02-01%20Long%20Arm.pdf), accessed 29 October 2010.

32 Other tribal governments have established similar ARM laws, including the Ho-Chunk Nation (2009) and the Nez Perce Nation (2006). See Ho-Chunk Nation Code 2009 Title 2 § 15, available at [www.ho-chunknation.com/UserFiles/2HCC15\\_Long\\_Arm.pdf](http://www.ho-chunknation.com/UserFiles/2HCC15_Long_Arm.pdf). Nez Perce Tribal Code 2006 § 1-1-12, available at [www.nezperce.org/~code/AdminOfTribalCourtPreliminaryProvisions.htm#§ 1-1-12 Personal Jurisdiction](http://www.nezperce.org/~code/AdminOfTribalCourtPreliminaryProvisions.htm#§%201-1-12%20Personal%20Jurisdiction), accessed 29 October 2010.

33 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Also see Wilkins & Lomawiana (2001) and Thompson (2010).

of this legislation is a 21% annual percentage rate (APR) cap (Chapter 1, Section 4) and an “unconscionability statute” (Chapter 1, Section 9). The latter reads, “The Court may refuse to enforce any agreement or part of any agreement which it finds to be unconscionable.”<sup>34</sup>

The leaders of the Blackfeet Nation should be commended for passing a progressive consumer protection act and providing the legal framework for protecting tribal citizens from excessive or unconscionable credit products. However, the enforcement mechanisms for this legislation have proven to be a challenge within the Blackfeet Nation. Challenges of enforcement include difficulty in developing a regulatory focal point to monitor and penalize violators of the Blackfeet Consumer Protection Code. Moreover, the lack of vertical communication between tribal leadership and the various tribal departments may also pose challenges to enforcement. One issue that has emerged since the passage of this legislation is that some loan products being offered by the tribe itself can charge interest rates higher than the 21% cap. This contradiction - limiting interest rates, while at the same time offering tribal loan products that exceed the legal limits - highlights the need for internal communication and alignment of policy initiatives. The Blackfeet Nation is continuing to review its systems to identify the best way to implement the consumer protections outlined in their legislation yet still provide needed credit products to their citizens.

The issue of consumer protection systems on the Blackfeet Nation highlights some very important considerations for tribal leaders across Indian Country. Although tribal legislators can develop effective legislation, enforcement and educational mechanisms and systems must also accompany such legislation. While the Blackfeet Consumer Protection Code points to the court as one point of enforcement, this level of enforcement is limited to reacting to cases brought before the court. Thus, tribal nations may choose to explicitly outline other mechanisms of enforcement applicable to those that seek to take advantage of tribal consumers. Indian nations may wish to establish an office of consumer affairs similar to the New York City Department of Consumer Affairs, to provide a mechanism for registering and mediating consumer complaints, licensing organizations doing business on the reservation, enforcing the consumer protection law, educating consumers, and leading litigation in the tribal court system if necessary.

The Blackfeet Nation has been a leader in writing consumer protection legislation to help its citizens. The issues related to implementation and enforcement of this legislation are not unique to this community, but represent a lesson learned while implementing progressive consumer protection legislation. Partners in the local community such as the Native American Community Development Corporation continue to offer innovative and effective financial and consumer education as well as access to affordable credit products, all of which help reduce the use of predatory financial products among tribal citizens.

## **VII. Other Strategies to Limit Predatory Lending: Partnering with State Coalitions**

In addition to passing tribal codes and establishing systems for regulation and enforcement, Native nations and their citizens may see value in partnering with statewide coalitions to pass legislation limiting predatory lending. This is especially true in states where the majority of predatory lenders are located off of reservations and therefore state laws could have a large positive impact in reducing the supply of unethical financial products sold to tribal members. One example of a successful statewide campaign to limit predatory lending occurred in 2010 in Montana.

In early 2010 a statewide coalition emerged to support a ballot initiative that would cap interest rates for products such as payday loans at 36% per year, similar to federal regulations capping loan products to military personnel and their families.<sup>35</sup> The I-164 “Cap the Rate” ballot initiative was supported by a broad range of organizations interested in

<sup>34</sup> The Blackfeet Tribe of Indians Consumer Protection Code is available at [www.narf.org/nill/Codes/blackfeetcode/blftcodetoc.htm](http://www.narf.org/nill/Codes/blackfeetcode/blftcodetoc.htm), accessed 9 November 2010.

<sup>35</sup> See Public Law 109-364, the John Warner National Defense Authorization Act for Fiscal Year 2007, section 670, “Limitations on Terms of Consumer Credit Extended to Service Members and Dependents” (October 17, 2006). Several other states have passed similar legislation limiting the interest rates that payday lenders can charge.

strengthening consumer protection in Montana. Supporters included regional and national organizations: AARP Montana, the Center for Responsible Lending, Montana Human Rights Network, Montana Catholic Conference, Montana AFL-CLO, the Service Employees International Union, Montana Women's Lobby, Rural Dynamics Incorporated and others. These diverse groups were able to coalesce around common goals, arguing that predatory lending produced poor economic outcomes for a broad range of citizens in Montana. Although I-164 was polling favorably among voters during the weeks leading up to election day, supporters of the ballot initiative noted a huge increase in activity by the opposition. Despite concerns, the I-164 ballot initiative was passed by an astonishing 78% of voters, largely due to successful public education and outreach activities on the part of the coalition.

Outreach activities included talking to Native voters in Native communities using a targeted public education and awareness campaign. Not only were outreach activities within Native communities aimed at educating Native voters but I-164 supporters recognized the need to educate tribal government leaders as well. One concern was that if the ballot initiative did pass, predatory lenders would flock to reservation communities in the state if Indian nations did not have robust consumer protection laws.<sup>36</sup> Rural Dynamics Incorporated, which serves a large tribal constituency and includes Native representation on its board of directors, was very active in galvanizing support for I-164 in Native communities and talking with tribal leaders about the need to develop effective laws and infrastructure to combat predatory lending within their own nations.

The full scope of the work by the "Cap the Rate" movement and interaction with Indian nations in the state is still unfolding. In the short term, state restrictions on payday lenders should limit the number of predatory lenders that prey on tribal citizens. Organizations like Rural Dynamics Incorporated have expressed the desire to assist tribal entities in developing a consumer protection code, though these plans are still in the beginning stages. However, the events that unfolded in South Dakota raised a red flag that suggests that without consumer protections in place, predatory lenders may see Indian reservations in the state of Montana as favorable locations for operations.

### **VIII. Developing Dynamics of Predatory Lending in Indian Country: "Rent a Tribe"**

The success of the "Cap the Rate" initiative, while positive, may actually create new questions, opportunities, and challenges related to predatory lending in the state of Montana. The ongoing litigation related to the "rent-a-tribe" phenomenon highlights some increasingly important dynamics related to predatory lending in Indian Country. Recent cases in state courts in Colorado and California challenging tribal corporations offering payday lending services rightfully recognized that tribal sovereignty cannot be usurped by state law.<sup>37</sup> These cases dealt with tribal nations as partial owners of payday lending business and upheld their immunity from the imposition of state laws. These cases both involved tribal partnerships with large national payday lenders who offer services over the internet.

The passage of state legislation in Montana may encourage payday lending corporations to partner with Native nations in the region to continue to offer their services to residents of Montana. Thus far, litigation has protected Native nations who choose to offer alternative financial services using a tribal corporation. Partnering with an alternative financial services company may look like an attractive business opportunity: a means to generate jobs and stimulate capital flow within the reservation. Certainly every Native nation must consider all of its options during difficult economic times and in the face of the failed trust responsibility of the federal government. However any such decision should be considered

<sup>36</sup> Private conversation with Christina Barsky of the Northern Plains Initiative at Rural Dynamics Incorporated, October 29<sup>th</sup> 2010.

<sup>37</sup> *Ex rel. Suthers v. Cash Advance*, 205 P.3d 389, 399 (Colo. App. 2008) and *Cash Advance v. Colorado* (2010). These cases involved the extent to which named tribes could avoid being investigated for unfair consumer practices in relation to a payday lending operation that was partly owned by Indian tribal governments. More specifically, this case involved the extent to which companies that do business over the internet can avail themselves of tribal sovereign immunity by incorporating as part of a tribe's business operations. The court rightfully upheld tribal sovereignty and the overall doctrine of sovereign immunity in relation to state law. There are sure to be more cases like this. If one emerges in federal court new dynamics could result making it more difficult to defend tribal sovereignty. Also see similar developments in California: *Ameriloan v. Superior Court (People)* Sev2 008 SOS 6711 (CA 2008).

in relation to the negative cost of predatory lending for tribal citizens and also to potential court challenges and the potential impact on tribal sovereignty. Although state courts have rightfully upheld the doctrine of sovereign immunity in relation to tribal and state laws, a zealous state Attorney General taking up the issue in federal court might obtain rulings that create challenges to tribal sovereignty and eventually impact tribal nations across the board. Tribal leaders must continually weigh difficult and multi-faceted decisions in managing the daily operations of their nations. Therefore the long term legal questions and concerns related to the decision to partner with a predatory lender should be addressed by tribal leaders, their attorneys, and their tribal constituents when considering such a business opportunity. Overall, the participation of tribal nations in the predatory lending industry is still a developing phenomenon, but it is sure to be the subject of future litigation and debate, especially as more and more states and the federal government, move to tighten anti-predatory lending policy.

## **IX. Lessons Learned**

The above discussion demonstrates the significant variations in tribal efforts to protect tribal consumers and some potential negative implications for Indian nations that do not have consumer protection laws and enforcement capacity. From the above discussion we have drawn several lessons learned:

### **1. *Very few Indian Nations have developed and implemented consumer protection laws.***

Our research indicates that only seven Indian nations have codified explicit consumer protection laws. The paucity of tribal consumer protection laws indicates it is not a high priority for most Indian nations. Consumer protection is less developed than other areas of tribal regulatory functions. Though the majority of Indian nations have started considering ways to develop an enabling environment for business development, consumer protection has not yet figured into most equations.

### **2. *Indian Nations must consider jurisdictional issues when developing consumer protection codes.***

Jurisdictional conflict has been a significant contributor to many of the legal tensions between tribal nations and state governments. As Indian nations increase attention to the legal infrastructure related to business development, history suggests that jurisdictional conflicts will intensify. Thus, this suggests that tribal nations should weigh legal considerations of consumer protection in relation to broader federal law. The Navajo Nation provides a classic example of a tribal nation taking proactive consumer protection steps with the initiation of the Navajo Consumer Protection Laws in 1999. The comprehensive and strong language within the code demonstrates commitment to consumer protection integrated into broader tribal goals for economic development. The 2001 Navajo Long-Arm Law is also an excellent example of proactive legal action. It is important to keep in mind, however, that such legislation may result in future legal challenges and federal court intervention.

### **3. *Regulation and enforcement measures should be in place when considering consumer protection legislation.***

In addition to passing legislation, tribes should consider establishing regulatory offices that educate businesses and consumers, monitor and regulate business activity, and enforce all relevant laws. Such an office can apply due scrutiny to industries that interact with consumers such as pawn shops and firms that provide loan products. For example, the Navajo Nation requires that pawnshops keep accurate records and obtain yearly licenses from the Nation, and requires them to disclose pawn policies as part of the licensing process. Tribal courts must have the capacity to enforce consumer protection laws when cases are brought before them. By their nature courts are reactive, limited to hearing cases after an abuse has occurred. Therefore they should not be the only enforcement method.

### **4. *Countervailing forces can obstruct consumer protection efforts.***

Indian nations considering the development of consumer protection laws should be aware that there may be forces at play designed to obstruct their efforts. For example, it is hard to gauge the amount of resistance initiated by the passage of the Navajo Nation consumer protection laws, but evidence suggests organized attempts to obstruct these

efforts.<sup>38</sup> Similarly, lobbying groups' reaction to the "Cap the Rate" efforts in Montana demonstrates that countervailing interests will attempt to obstruct consumer protection measures. Many opponents of consumer protection laws claim such laws actually hurt consumers by restricting consumer access to credit and limiting consumer choice, but these claims have not been supported empirically, and public education efforts have been shown to expand consumer choice and access to credit.

**5. Indian nations and their partners can offer access to alternative loan products for consumers.**

In previous reports, First Nations has documented the effectiveness of low-cost alternative loan products.<sup>39</sup> These loan products can be offered by tribal governments or community development financial institutions, or a combination of both. The work of Four Bands Loan Fund ([www.fourbands.org](http://www.fourbands.org)) on the Cheyenne River Indian Reservation is an example of a community development financial institution successfully offering alternatives to high cost predatory lending products. These alternative loan products provide tribal consumers with affordable small loans and offset the demand for payday loans, refund anticipation loans, or other high cost credit products. In all, alternative loan products can provide access to cash for tribal members in times of financial need at affordable prices.

**6. Tribal nations can collaborate with statewide initiatives that champion consumer protection.**

The Montana case makes clear the power of numbers in pushing for broader consumer protection. Such state-focused efforts can have spillover effects for tribal citizens and consumers. Partnering with broader statewide movements can have a significant impact on altering state policy and has the potential to educate a broader audience about consumer protection issues in Native communities. Evidence largely suggests that the federal government is not likely to intervene and initiate broad federal policy for national consumer protection in the near future.<sup>40</sup> Thus, statewide efforts, as well as tribal efforts, may continue to be the most effective way to bring about needed change to benefit consumers.

**7. Public, consumer and financial education is needed.**

The cases profiled in this report demonstrate that legal and regulatory functions may not be the sole mechanisms for consumer protection. The Cheyenne River experience demonstrates the importance of broad consumer and financial education that not only provides tribal citizens with financial and consumer skills, but offers greater opportunities to educate tribal consumers about broader trends in predatory lending and consumer protection. In all, legislation and regulation is just one piece of an overall strategy to protect tribal consumers. Educating citizens is essential to protect citizens and reduce demand.

## **X. Moving Forward: Policy Recommendations for Indian Nations**

Drawing upon the lessons noted above, the following are policy recommendations designed to advance tribal consumer protection in Native communities:

- 1. Tribal nations can develop tribal codes for consumer protection.** Few Indian nations have developed consumer protection codes. This suggests that tribal governments could benefit from a model tribal code, one that could be adapted and modified by tribal leaders. We have included a model tribal code in this document for potential use by Native nations (see Appendix I).

38 For example see Maniaci (2000).

39 First Nations Development Institute (2008).

40 In the summer of 2010, the federal government took steps to promote consumer protection. However, the overall impact of this legislation is not yet known and will undoubtedly be the focus of future research.

- 2. Tribal nations should develop broad strategies for consumer protection.** As discussed above, legislation alone is not an effective strategy to protect consumers. Robust regulatory functions that clearly specify effective methods of enforcement are needed as well. Regulatory functions work best when combined with educational efforts. Such efforts include financial and consumer education for tribal citizens.
- 3. Indian nations can partner with community organizations.** Connected to the recommendation above is the benefit of partnering with existing community organizations, such as community development financial institutions (CDFIs). These organizations typically offer educational programs that dovetail with the tribe's regulatory activities. Moreover, Indian nations can work with CDFIs and similar organizations to provide alternative loan products for tribal consumers.
- 4. Indian nations and Native community organizations can partner with statewide organizations.** Statewide movements can be effective advocates for state policy change. When tribal nations and Native organizations partner with statewide movements, the opportunities to change state policy and to educate larger audiences about consumer protection dynamics in Native communities expand. Collaborations at the state level should be accompanied by tribal development of internal policies so that if the desired result is achieved and state law is altered, predatory lenders cannot flee to tribal lands.

## **XI. Conclusion**

As Indian nations continue work on their legal, political and economic development issues, consumer protection should be an important part of the equation. Consumers are the backbone of an economy, and are integral to any effective economic development strategy. Consumer protection does not obstruct broader efforts of community economic and political development but instead provides adequate legal mechanisms to promote them.

Though the issues related to consumer protection have been debated nationally and within some states, this is the first attempt to investigate the dynamics of consumer protection for citizens of Indian nations. As this report has noted, few tribal governments have developed consumer protection laws. Moreover, there is great variation in implementation. We recommend a variety of issues to consider, especially in relation to enforcement and regulation, when implementing consumer protection laws.

This report has documented the importance of considering tribal legal jurisdiction when drafting and implementing consumer protection codes. Legal jurisdiction in relation to Indian lands remains a fundamental area of conflict and contradiction. Though there is ample legal justification to support tribal consumer protection laws on tribal lands, it is apparent that the federal courts are signaling a desire to limit the scope of tribal jurisdiction. Thus, these factors must be considered by tribal nations when looking at code development.

Every year, predatory lending strips resources and assets from Native communities. Tribal leaders have a range of options to limit predatory lending practices and stem the flow of money out of reservation economies. We applaud the tribal leaders who have already taken steps to pass legislation, implement a regulatory system, and educate consumers in their communities. And we encourage those who are considering this important issue to take the next step.

## WORKS CITED

- Agarwal, S., Marta S. P. & Tobacman, J. (2009). *Payday Loans and Credit Cards: New Liquidity and Credit Scoring Puzzles?* Chicago, IL: Federal Reserve Bank of Chicago, Vanderbilt University Law School, & University of Pennsylvania.
- Ameriloan v. Superior Court (People)* Sev 2008 SOS 6711 (CA 2008).
- Bertrand, M. & Morse, A. (2009). *Information Disclosure, Cognitive Biases, and Payday Borrowing*. Chicago IL: University of Chicago School of Business.
- Biegelsen, A. (2011, March 21). *Maryland Challenges Online Payday Lender Owned by Tribal Member*. Washington DC: The Center for Public Integrity
- Campbell, D., Martinez J. A. & Tufano, P. (2008). *Bouncing out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*. Boston, MA: Harvard Business School.
- Caldwell, A. (2011, February 13). Hiding behind a Tribe: Payday Lenders are Able to Get Around State Regulations by Claiming Sovereign Immunity. *The Denver Post*.
- Federal Deposit Insurance Corporation. (2009). *FDIC National Survey of Unbanked and Underbanked Households*. Washington, DC: FDIC.
- Fiddler, T. (April 22 2011). Applying Traditional Values In Today's Economy. *Indian Country Today*. [http://indiancountrytodaymedianetwork.com/ict\\_sbc/applying-traditional-values-in-today%E2%80%99s-economy/](http://indiancountrytodaymedianetwork.com/ict_sbc/applying-traditional-values-in-today%E2%80%99s-economy/) accessed 29 April 2011.
- First Nations Development Institute. (2008). *Borrowing Trouble: Predatory lending in Native American Communities*. Longmont, CO: First Nations Development Institute.
- First Nations Development Institute. (2009). *Borrowed Time: Use of Refund Anticipation Loans Among EITC Filers in Native American Communities*. Longmont, CO: First Nations Development Institute.
- General Accounting Office. (2004). *Federal and State Agencies Face Challenges in Combating Predatory Lending*. Washington DC: General Accounting Office.
- Hudson, M., & Heath, D. (February 7. 2011). *Debt Deception: Fights over Tribal Payday Lenders Show Challenges of Financial Reform*. Washington DC: The Center for Public Integrity.
- Keeley, C., Ludwig, S. & Griffith, M.W. (2007). *Predatory Tax-Time Loans Strip \$324 million From New York City's Poorest Communities: An Analysis of Tax Refund Anticipation Lending in NYC 2002-2005*. New York, NY: Neighborhood Economic Development Advocacy Project.
- King, U. & Parrish, L. (2011). *Payday Loans, Inc.: Short Credit, Long on Debt*. Washington DC: Center For Responsible Lending.
- Maniaci, J. (2000, February 17). Panel Asks Higher Interest-Rate Cap. *The Gallup Independent*. Available at [www.gallupindependent.com/1999-2001/2-17-00.html#anchor3](http://www.gallupindependent.com/1999-2001/2-17-00.html#anchor3), accessed 29 October 2010.
- Marta, P. & Tobacman, J. (2008). *Do Payday Loans Cause Bankruptcy?* Nashville, TN & Pennsylvania, PA: Vanderbilt University Law School and University of Pennsylvania.
- Martin, D. N., Planchich S. & Sabry, F. (2008). *The Use of Economic Analysis in Predatory Lending Cases: Application to Subprime Loans*. Washington DC: National Economic Research Associates, Inc.
- Martin, N. (2010). 1,000% Interest—Good while supplies last: A study of payday loan practices and solutions. *Arizona Law Review*. Vol. 52:3, 1-59.
- Melzer, B.T. (2009). *The Real Costs of Credit Access: Evidence from the Payday Lending Market*. Evanston, IL: Kellogg School of Management, Northwestern University.
- National Public Radio. (2011, February 7). "Tribal Land Helps Payday Lenders Skirt State Laws." Washington, DC: NPR. Available at: [www.npr.org/2011/02/07/133557321/Tribal-Land-Helps-Payday-Lenders-Skirt-State-Laws](http://www.npr.org/2011/02/07/133557321/Tribal-Land-Helps-Payday-Lenders-Skirt-State-Laws), accessed 5 April 2010.
- Nevada v. Hicks*, 121 S. Ct. at 353 (2001).
- Nolan, J. R. & Nolan-Haley, J. M. (1991). *Black's Law Dictionary*. St. Paul, MN: West Publishing Co.
- Oliphant v Suquamish Indian Tribe*, 435 US 191; 98 S Ct 1011; 55 L Ed 2d 209 (1978).
- Parrish, L., & U. King. (2009). *Phantom Demand*. Washington, DC: Center for Responsible Lending.
- Plains Commerce Bank v Long Family Land and Cattle Co*, US; 128 S Ct 2709, 2720; 171 L Ed 2d 457 (2008).
- Rivlin, G. (2010). *Broke, USA: From Pawnshops to Poverty, Inc.: How the Working Poor Became Big Business*. New York, NY: Harper Business.
- Silver, J. (2011, February 10). "Tribes Profit on Payday-Loan Rules." *Wall Street Journal*. *Smith v. Salish Kootenai College* 378 F. 3d 1048 - Court of Appeals, 9th Circuit (2004).
- State ex rel. Suthers v. Cash Advance & Preferred Cash Loans* . 205 P.3d 389 (Colo. Ct. App. 2008).
- The Timber Lake Topic. (2011, March 30). "Colorado AG Suing Local Lender." *The Timber Lake Topic*.
- Thompson, S. C. (2010). Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know. *Washburn Law Journal*, 49.3: 661-715.
- Trimble, C. (2011, March 14). Sovereignty for Rent with Payday Loan Business. *Indianz.com*.
- Theodos, B., Brash, R., Compton, J., Masken, K., Pindus, N., & Steuerle, C. (2010). *Who Needs Credit at Tax Time and Why: A Look At Refund Anticipation Loans and Refund Anticipation Checks*. Washington DC: Urban Institute.
- United States v Stands*, 105 F3d 1565, 1572, 1572 n 3 (CA 8, 1997).
- Wilkins, D. E. & Lomawaima, K. T. (2001). *Uneven Ground: American Indian Sovereignty and Federal Indian Law*. Norman, OK: University of Oklahoma Press.





FIRST NATIONS  
DEVELOPMENT INSTITUTE

EDUCATING • ADVOCATING • CAPITALIZING

351 Coffman, Suite 200 • Longmont, Colorado 80501  
Tel: (303) 774-7836 • (Fax): 303 774-7841  
[www.firstnations.org](http://www.firstnations.org)

