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Jane Daugherty: New York's illegal attack on tribal sovereignty

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Attacking the sovereign immunity of Indian tribes, the state of New York has ordered Internet loan companies owned by the tribes to stop doing business with New York residents. The tribes' loan companies generate millions of dollars for Indian education, medical care and other essential services.

Benjamin Lawsky, the new superintendent of New York's Department of Financial Services, moved against the tribal loan businesses on Aug. 6, issuing a cease and desist order to 35 online and tribal lenders to stop offering what he called "illegal payday loans in New York."

His action comes on the heels of catastrophic cuts of \$552.7 million in federal funding to date for Indian health clinics, schools, housing and child care prompted by the budget sequester. Funding for the tribes was supposed to be exempt from the sequester, the game of political chicken played by Congress in its budget standoff with President Obama, but the exclusionary language was left out.

New York's action is "an insult to tribal nations," who were not consulted prior to the order, and "ignores over two centuries of federal Indian law," said Barry Brandon, executive director of Native American Financial Services Association, a group of 16 tribes that offer short-term loans over the Internet, in a letter to Lawsky.

Indeed, New York's action ignores the sovereign immunity of recognized Indian tribes, which has repeatedly been upheld in the Supreme Court and in numerous states. Put simply, sovereign immunity of Indian tribes treats the tribes as independent nations within the U.S.; it has been recognized since the founding of the United States.

Article I, section 8, of the United States Constitution includes a provision protecting Indian sovereignty and stipulating that only Congress has the authority to regulate commerce with the Indian tribes. From 1778 to 1871, Congress ratified 371 treaties with the tribes, in most of the Indian nations gave up their rights to land in exchange for the federal government's promises of recognition of tribal rights and reservation areas. A 1905 Supreme Court decision clearly reinforced the concept that the tribes retain their status as sovereign entities.

In one of the most recent sovereign immunity cases filed in 2005, *State of Colorado v. Cash Advance and Preferred Cash Loans*, the litigation dragged on for seven years with the District Court ultimately finding that the tribally-owned loan company had sovereign immunity and could not be regulated by the state of Colorado -- in an effort very similar to New York's Aug. 6 attempt.

In his 2011 order in the Colorado case, Denver District Court Judge Morris B. Hoffman found:

"Indian tribes were of course governing themselves in the New World long before the territorial claims of European colonial powers. Their sovereignty was recognized, if inconsistently and seldom with any fidelity, not just by those European powers but also by the nascent United States. The United States Supreme Court held as early as 1831

that congressionally-recognized Indian nations retained their sovereignty even as those nations' ancestral lands became absorbed into the United States. Congressionally-recognized Indian nations are immune from suit, meaning that they can be sued in courts of the United States or in any state courts only if Congress expressly permits such a suit. or the Indian nation waives immunity and consents to the suit."

Hoffman also issued several corollaries highly relevant to New York's recent actions that stem from the principles of tribal immunity, including:

"Tribal immunity knows no territorial bounds... Indian nations are immune from suit period, whether the subject of the suit is activity on or off Indian lands.

...enforcement actions, unlike criminal prosecutions, are "suits," to which federally recognized Indian nations are immune.... tribal immunity applies to a tribe's governmental and commercial activities alike. There is a rich history of federal Indian law whose central premise is that, until and unless Congress decides otherwise, Indian tribes must be free to engage in economic activities... these critical tribal economic activities must often be conducted through business entities recognized by state law – corporations, limited liability companies, etc. Tribes must therefore be permitted to engage in business through these kinds of legal entities without risking their immunity...

"A tribal entity engaged in business does not lose its immunity simply by contracting with non-Indian operators of the business. Here again, the idea is that Indian nations must be encouraged to generate revenues to fund their governments and activities, and must therefore be free to enter into commercial areas where they have no expertise, but can acquire the necessary expertise through non-Indian operators..."

It is true that many of the online loans carry high interest rates, which are advertised. Most of the online borrowers have bad credit, low incomes and face emergencies that require cash. If they do not repay the short-term loans promptly, the penalties and additional interest rates soar. There have been cases of consumers paying exorbitant interest rates, sometimes more than 300 percent, because they defaulted on their short-term payments.

How is that any different from the lenders, several operated by the U.S. government, who issued ill-advised loans to home owners without sufficient income to repay them and wound up losing their homes or stuck with mortgages for more than the homes were worth? Did the state of New York step in and stop all foreclosures of such loans by Countrywide, Fannie Mae or Bank of America or any the thousands of holders of these "toxic loans"? No, the borrowers are the ones who lost, not the lenders. The powerful lenders escaped harm for their reckless practices and even amassed huge profits, but New York did not move against them.

But, as always, smaller, Indian-owned entities are easy targets for state officials looking for heroic headlines.

New York Governor Andrew Cuomo said, "Illegal payday lenders swoop in and prey on struggling families when they're at their most vulnerable - hitting them with sky-high interests rates and hidden fees. We'll continue to do everything we can to stamp out these pernicious loans that hurt New York consumers."

What Cuomo did not address is how Indian tribes, whose land was stolen in New York and numerous other states, whose treaties with the U.S. have repeatedly been broken and who have been pushed into operating casinos and selling untaxed tobacco products to generate income, often on the barren and contaminated lands onto which they were forced, are supposed to operate businesses if at every turn the rules are changed.

Cuomo's new financial services superintendent, Lawsky, accompanied his cease and desist order with letters to 117 banks that do business with online lenders, including

tribally owned companies, telling them to stop participating in the Automated Clearing House Network, which allows borrowers to make online payments. If New York can succeed in shutting down automated access to consumer bank accounts in the state, online lenders would be unable to receive repayment as they do now.

On Aug. 14, the Native American Financial Services Association sent a letter to Bank of America, J.P. Morgan Chase, Capital One Financial, Wells Fargo and other banks involved in the Automated Clearing House for internet loans contending that Lawsky's action is an illegal infringement on their rights:

"Tribal Nations, with the support and encouragement of the federal government, have engaged in significant economic development efforts, including operating online lending entities now targeted by (the Department of Financial Services). We want you to be aware that we view these actions as a direct threat to tribal sovereignty and our efforts to develop economic self-sufficiency."

New York's attempted crackdown on online loans offered by tribal companies and the massive sequester cuts in federal funds promised to the tribes are another example of U.S. and state governments' cynicism and selective observance of legal obligations to Indian nations. New York's taxpayers should avoid a costly and losing legal battle similar to Colorado's and, if they are serious about aiding consumers by limiting interest charges on loans to high-risk borrowers, they should establish state- or bank-offered alternatives to online loans and assume the high risks of those loans.

Jane Daugherty, former associate professor of journalism at Florida International University, is a doctoral candidate at the University of Miami School of Communication. An investigative reporter and editor for 25 years, she is a four-time winner of the Robert F. Kennedy Journalism Award for coverage of the disadvantaged and was named a Pulitzer Prize finalist in commentary in 1994. Her great-great-grandmother was a member of the Creek nation who fled Indian removal.