IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

NO. 25648

July 13, 2010

NATIVE AMERICAN BANK, NATIONAL ASSOCIATION,

Plaintiff/Appellant,

v.

CANGLESKA, INC.,

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT
SHANNON COUNTY, SOUTH DAKOTA

THE HONORABLE THOMAS L. TRIMBLE
CIRCUIT COURT JUDGE, PRESIDING

APPELLANT'S BRIEF

NOTICE OF APPEAL FILED ON JUNE 1, 2010

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STATEMENT OF COMPLIANCE

I certify that this brief complies with the type volume limitation set forth in SDCL 15-26A-66 of the South Dakota Rules of Civil Appellate Procedure because it contains 9,157 words - less than 10,000 words enumerated in SDCL 15-26A-66, not including parts of the brief exempted by statute. This brief also complies with the typeface requirements of SDCL 15-26A-66 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12 point Times New Roman.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument.

PRELIMINARY STATEMENT

Appellant, a Native-American owned banking institution, made a loan to Appellee for the construction of a shelter for victims of domestic abuse. As a portion of the collateral securing the loan, Native American Bank had sought a leasehold mortgage on the parcel of trust property on which the shelter was to be constructed. Pursuant to 25 U.S.C. § 81, no contract, including a leasehold mortgage, with any Indian tribe that encumbers, for a period of 7 or more years, lands held by the United States in trust for the tribe, or lands held by the tribe subject to a federal restriction against alienation, is valid unless the contract bears the approval of the Secretary of the Interior or his designee. Here, no such approval from the Bureau of Indian Affairs (hereinafter the "BIA") was ever received to validate the leasehold mortgage. Additionally, at the lower level, Cangleska insinuated that the loan was backed by a guaranty from the United States Department of Agriculture (hereinafter the "USDA"). Unfortunately, Cangleska never completed the USDA's requirements to effectuate the guaranty, and based thereon, the

USDA is not involved in the parties' transactions. Accordingly, despite the lower court's assumptions, the federal government has no interest in this case that would warrant removal to federal court. Based thereon, Native American Bank filed suit in state court pursuant to SDCL15-7-2 which establishes jurisdiction as follows:

> Acts within the state subjecting persons to jurisdiction of the courts. Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, through an agent or through a subsidiary, of any of the following acts: (1) The transaction of any business within the state … (3) The ownership, use, or 15-5-7 possession of any property, or of any interest therein, situated within this state … (6) Acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state …

Now, despite the presence of the collateral within the State of South Dakota, the Circuit Court has taken the position, without providing any legal analysis or any justification for his holding, that he does not "think" he has subject matter jurisdiction over this case. App. X, Tr. ¶ 34, lns. 21-24. In fact, the Circuit Court never clearly addressed the issue as to how the facts of this case which involve the entry of an agreement, negotiated and executed off-reservation lands, by a non-member of a Tribe with a non-member corporation duly organized and existing under the laws of the State of South Dakota could strip the State of its concurrent jurisdiction over the ensuing action. Indeed, the Circuit Court's decision has unilaterally stripped the Attorney General of his authority over 501(c)(3) corporations individually organized by members of a Tribe. The Circuit Court clearly erred in limiting the subject matter jurisdiction of the state in this manner.

In this brief, the Appellant, Native American Bank will be referred to as "NAB". The Appellee, Cangleska, Inc., will be referred to as "Cangleska". References to the

Appendix will be identified by the abbreviation "App" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The jurisdictional basis for this Appeal is provided by SDCL § 15-26A-3. NAB filed this suit on or about January 5, 2010, wherein NAB sought an order holding Cangleska liable for repayment of the One Million Dollar ($1,000,000.00) loan made by NAB for construction of the women's shelter. This is an appeal from a judgment dated April 27, 2010, issued by the Honorable Thomas L. Trimble, Circuit Court Judge for the Seventh Judicial District, Shannon County, South Dakota, which granted Cangleska's motion to dismiss for lack of subject matter jurisdiction. App. A. Notice of Entry of Judgment was served on NAB on May 18, 2010. App. B. NAB timely filed its Notice of Appeal on June 1, 2010. This appeal is from a final order of the Circuit Court disposing of all the parties' claims.

STATEMENT OF LEGAL ISSUE

WHETHER THE CIRCUIT COURT HAS SUBJECT MATTER JURISDICTION TO ADJUDICATE CLAIMS MADE BY NATIVE AMERICAN BANK?

The circuit court determined that it did not have subject matter jurisdiction. *See* App. A.

Most relevant cases and statutory provisions.

United States v. Montana, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

Sage v. Sicangu Oyate Ho, Inc., 473 N.W.2d 480 (SD 1991).

STATEMENT OF THE CASE

This suit was brought by NAB in the Seventh Judicial Circuit, Shannon County, in the State of South Dakota on or about January 5, 2010, wherein they

sought repayment of a One Million Dollar ($1,000,000.00) loan that was made by NAB to Cangleska in 2006. On or about February 9, 2010, NAB filed a Motion for Default Judgment based upon the failure of Cangleska to file any response to NAB's complaint. Within mere days of the hearing on the Motion for Default Judgment, Cangleska filed a Motion to Dismiss the complaint on March 9, 2010 pursuant to SDCL § 15-6-12(b) for lack of subject matter jurisdiction. A Hearing was held on or about April 27, 2010 and the Circuit Court issued its final order on April 27, 2010, thereby granting Cangleska's motion to dismiss for lack of subject matter jurisdiction. On June 1, 2010, NAB filed a timely Notice of Appeal challenging the Circuit Court's ruling.

STATEMENT OF FACTS (App. C)

In or about 2006, Cangleska made application for a One Million Dollar ($1,000,000.00) loan from NAB, a federally chartered banking institution. Cangeska's Board of Directors formally authorized George Twiss and Karen Artichoker via resolution to "sign any documents associated with the shelter/administration construction bank loan documents and other account documents with Native American Bank." App. D. ¶ 13. During loan negotiations, Cangleska's representatives stated that the Tribal Council of the Oglala Sioux Tribe did not need to give its approval for execution of the loan documents. App. E. ¶ 16. Because Cangleska's Articles of Incorporation made no reference at all to the Oglala Sioux Tribe nor did Cangleska ever state or imply that it was an entity of the Oglala Sioux Tribe, the issue of sovereign immunity was not raised. *See* App. E. ¶ 16. During these same negotiations, NAB considered itself to be dealing exclusively with a 501(c)(3) corporation duly authorized to conduct business by the State

of South Dakota,[1] because Cangleska was listed as a Non-Profit Corporation (Organizational ID#: NS010520) with the South Dakota Secretary of State.[2] In fact, Cangleska provided Corporate Authorization Resolution to NAB clearly demonstrating a non-profit corporation designation with attached South Dakota Secretary of State Certificate of Incorporation Non Profit Corporation.[3] App. G.

Based upon documents provided during negotiations and assurances provided by Cangleska's representatives, NAB advanced One Million Dollars ($1,000,000.00) from November 22, 2006 thru August 31, 2007 for construction of a women's shelter on the following parcel of property:

> The shelter was constructed on a tract of land located at 8 ACRES WITHIN EAST HALF OF SOUTHWEST QUARTER SOUTHWEST QUARTER SOUTHWEST QUARTER EAST HALF NORTHWEST QUARTER SOUTHWEST QUARTER SOUTHWEST QUARTER SECTION 21 TOWNSHIP 40 NORTH RANGE 41 WEST. THIS PROPERTY IS LOCATED

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[1] Cangleska's Articles of Incorporation were submitted to the South Dakota Secretary of State by incorporators Karen Artichoker, Sharon Mousseau and Marlin Mousseau on March 1, 1996 and amended on June 10, 1996. App. F

[2] Cangleska's Certificate of Good Standing dated May 18, 2006 states in part: "said corporation has complied with the laws of this State relative to the formation of corporations of its kind and is now a regularly and properly organized and existing corporation under the laws of this State and is in good standing, as shown by the record of this office."

[3] Oglala Sioux Tribe Resolution 96-78 was not enacted until October 8, 1996 granting a charter to "Medicine Wheel a/k/a Cangleska, Inc." App H. No annual reports submitted to the South Dakota Secretary of State by Cangleska reference "Medicine Wheel a/k/a Cangleska, Inc." App. E ¶ ¶ 51-54. NAB lent Cangleska money as a South Dakota Non-Profit 501 (c)(3) corporation. Memorandum dated July 21, 2006 from NAB to Cangleska, Inc. refers twice to the Borrower as "Cangleska, Inc. a South Dakota Corporation." App. E ¶ ¶ 31,33. Memorandum dated January 6, 2006 from NAB to Cangleska refers twice to Cangleska as "Cangleska, Inc. a South Dakota Corporation." App. E ¶ ¶ 18, 20. Memorandum dated March 7, 2006 from NAB to Cangleska refers twice to the Borrower as "Cangleska, Inc. a South Dakota Corporation." Cangleska "accepted and agreed to these terms." App. E ¶ ¶ 24, 26. Memorandum dated August 3, 2006 from NAB to Cangleska refers twice to the Borrower as "Cangleska, Inc. a South Dakota Corporation." Cangleska "accepted and agreed to these terms." Appendix E ¶ ¶ 38, 40.

WITHIN THE STATE OF SOUTH DAKOTA 6TH PM COUNTY OF SHANNON.

App. Q.

In consideration for the loan, Cangleska executed a Commercial Loan Agreement (hereinafter the "Loan Agreement") on October 10, 2006 for a principal balance of $1,000,000.00 that was executed by Cangleska's duly authorized representatives. App. R. The Loan Agreement refers to "Cangleska, Inc. Nonprofit Corporation formed under the laws of the State of South Dakota" in the first paragraph. *See* App. S ¶ 89. There are no references in any of the loan documents to "Medicine Wheel a/k/a Cangleska, Inc." *See* App. S. Additionally, the Loan Agreement mandated that Cangleska submit annual reports to the South Dakota Secretary of State as a condition of the loan. When that requirement was not satisfied, NAB sent an email to Cangleska on March 15, 2006, that provides in part: "In completing this package, I discovered that Cangleska still hasn't updated their annual reports with the Secretary of State so they are out of compliance and not registered as a valid Corporation in the state …I won't be able to send this off until Cangleska is in good standing …." App. JJ. In response to NAB's concerns, Cangleska submitted delinquent annual reports to the South Dakota Secretary of State. App. E ¶ ¶ 51-54.

In addition to the Commercial Loan Agreement, the parties executed a Construction Loan Agreement and a Commercial Promissory Note on October 10, 2006 which was executed by Karen Artichoker and George Twiss who had the authority to enter into the loan agreements pursuant to the Corporate Authorization Resolution. App. S and T. A Commercial Security Agreement was also executed. App. U. A Commercial

Debt Modification Agreement was subsequently executed by the parties on October 10, 2006. App. V.

As time proceeded, it became evident that Cangleska did not intend or could not repay the loan, and so, on November 5, 2009, after numerous notices of delinquency were sent to Cangleska, NAB issued a final demand letter that provided:

> This letter is to formally inform you of a default under the Commercial Promissory Note dated 10/10/2006 and the Commercial Debt Modification Agreement dated 1/31/08. Per the terms of the agreements, payments consisting of principal and interest are due monthly on the 1st day of each month through the maturity date of December 31, 2027. However, payment has not been received since January 16, 2009, resulting in a delinquency of 278 days as of the date of this letter. Native American Bank now demands payment in full under this promissory note. The following represents the payoff amount: Principal Balance $974,992.00 Interest through 11/4/2009 $65,625.44 Late Charges: $5,587.77 Total $1,046,205.21 .... App. W.

STANDARD OF REVIEW

The Court "review[s] issues regarding a court's jurisdiction as questions of law under the de novo standard of review." Daktronics, Inc. v. LBW Tech Co. Inc., 2007 SD 80, ¶ 2, 737 N.W.2d 413, 416 (*quoting* Grajczyk v. Tasca, 2006 SD 55, ¶ 8, 717 N.W.2d 624, 627). In Guthmiller v. Deloitte & Touche, LLP, the Court discussed the proper standard of review for a motion to dismiss under SDCL 15-6-12(b):

> A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. "Our standard of review of a trial court's grant or denial of a motion to dismiss is the same as our review of a motion for summary judgment-is the pleader entitled to judgment as a matter of law?" Thus, all reasonable inferences of fact must be drawn in favor of the non-moving party and we give no deference to the trial court's conclusions of law. 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496 (*quoting* Vitek v. Bon Homme County Bd. of Com'rs, 2002 SD 100, ¶ 7, 650 N.W.2d 513, 516).

SUMMARY ARGUMENT

The Circuit Court erred in holding that it did not have jurisdiction over Cangleska, a non-member of the Oglala Sioux Tribe and a 501(c)(3) corporation duly organized under the laws of the State of South Dakota, in a civil action brought by a non-member federally chartered banking institution. It appears from the scant record and vague order issued by the Circuit Court that it misunderstood the consensual commercial relationship test set out in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) and erroneously believed that if federal diversity jurisdiction exists, the state court is foreclosed from exercising concurrent jurisdiction over the same matter. Based upon the Circuit Court's erroneous beliefs, NAB respectfully requests that this Court reverse the lower court's holding that the State of South Dakota does not have subject matter jurisdiction over a 501(c)(3) corporation and a non-tribal entity conducting business off-reservation with a non-member of the Tribe.

ARGUMENT

ISSUE

WHETHER THE CIRCUIT COURT HAS SUBJECT MATTER JURISDICTION TO ADJUDICATE CLAIMS MADE BY NATIVE AMERICAN BANK?

I. THE EXISTENCE OF FEDERAL DIVERSITY JURISDICTION DOES NOT FORECLOSE STATE COURT JURISDICTION OVER THE SAME MATTER.

The Circuit Court, without providing any justification therefore, held that it did not have subject matter jurisdiction over NAB's claims, because the proper forum lies with the federal courts. *See* App. X, ¶ 34-35, lns 25, 1-3. Without the benefit of any concrete guidance provided by the Court, it appears that the Honorable Judge Trimble was assuming that the existence of diversity jurisdiction in a federal court deprives a state

court of general jurisdiction of its authority. The Circuit Court is clearly misguided. Indeed, federal diversity jurisdiction permits state and federal courts to exercise concurrent jurisdiction. *See* Colorado River Conservation Dist. v. United States, 424 U.S. 800, 809, 96 S.Ct. 1236, 1242, 47 L.Ed.2d 483 (1976) ("There is no irreconcilability in the existence of concurrent state and federal jurisdiction. Such concurrency has ... long existed under federal diversity jurisdiction.").

Further, Judge Trimble was misled into believing that the USDA and the BIA were involved in the transaction making state court jurisdiction more tenable. To this date, neither the BIA nor USDA has become a party to the loan transaction nor do they exercise any authority over this matter. Because both federal and state court have jurisdiction over NAB's claims, they sought relief in state court for two primary reasons. First, the State of South Dakota has helped fund Cangleska's operations. For example, in fiscal year 2007, $35,894 of federal funds passed through the State of South Dakota to Cangleska, Inc. App. HH ¶ 302. Finally, NAB filed its complaint in state court in case the need arose to seek the Attorney General's assistance pursuant to SDCL 47-26-16 that provides:

> Involuntary dissolution by court decree--Action by attorney general--Grounds of action. The provisions of § 47-24-13.1 notwithstanding, a corporation may be dissolved involuntarily by a decree of the circuit court in an action filed by the attorney general if it is established that: (1) The corporation procured its articles of incorporation through fraud; or (2) The corporation has continued to exceed or abuse the authority conferred upon it by law.

and SDCL 47-26-25 that provides the following:

> Power of court in liquidation proceedings--Action by attorney general. Courts of equity shall have full power to liquidate the assets and affairs of a corporation when an action has been filed by the attorney general to dissolve a corporation and it is established that liquidation of its affairs should precede the entry of a decree of dissolution.

Based upon the state's inherent interests in monitoring 501(c)(3) corporations, NAB chose state court over federal court. Pursuant to well-established case law, NAB was not foreclosed from making this determination.

II. THE FORUM SELECTION CLAUSE IS PERMISSIBLE, AND THEREFORE, JURISDICTION AND VENUE ARE PROPER IN THE STATE OF SOUTH DAKOTA.

The Circuit Court judge also erred in making his decision without reference to the clear intent of the parties to the agreement as to the intended forum for resolution of disputes despite attempts by the parties to raise the issue. For example, at the hearing, the attorney for Cangleska argued the following:

> They have a number of loan documents pertaining to this transaction, all of which set jurisdiction squarely - - I'll take it right out the document - - I'd refer the Court to Page 2 of the commercial loan agreement, which incorporates the construction agreement eventually. App. X. Tr. lns. 8-13.

Instead of firmly addressing the issue, the Court simply stated he didn't want that "stuff" read to him. App. X. Tr. lns. 14-15. Clearly, the Court erred in not giving any credence to the parties' intent, because it is understood that "[p]arties to an agreement "may contractually specify and consent to a state's jurisdiction over legal actions which arise under a contract." Baldwin v. Heinold Commodities, Inc., 363 N.W.2d 191, 194 (SD 1985) (*citing* Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 84 S.Ct 411, 11 L.Ed.2d 354 (1964)).[4] Here, the parties agreed to resolve their disputes in several different forums

[4] *See also* Green v. Clinic Masters, Inc., 272 N.W.2d 813, 815 (SD 1978) (holding forum-selection clauses are enforceable unless unreasonable); *see also* Burger King v. Rudzewicz, 471 U.S. 462, 473 n14, 105 S.Ct 2174, 2182 n14, 85 L.Ed.2d 528 (1985) ("[P]arties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process.")

without relying on any particular one. The Commercial Loan Agreement dated October 10, 2008, provides the following:

> After Borrower defaults, and after Lender gives any legally required notice and opportunity to cure, ***Lender may at its option use any and all remedies Lender has under state or federal law*** or in any of the Loan Documents, including, but not limited to, terminating any commitment or obligation to make additional advances or making all or any part of the amount owing immediately due. Emphasis added. *See* App. R ¶ 88.

The Agreement also provides that "[t]he Agreement is "governed by the laws of the jurisdiction where Lender is located, the United States of America and to the extent required, by the laws of the state where the property is located." Id.

The Commercial Security Agreement similarly dated October 10, 2008, provides that the terms of that agreement shall be governed by the terms of the Loan Agreement and the laws of the State in which Lender is located. App. U ¶ 110.

The Construction Loan Agreement dated October 2006 provides:

> This Agreement and the other Transaction Documents and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Arizona, including the Uniform Commercial Code.

See App. S ¶ 104. As neither party has any significant affiliation with the State of Arizona, it is obvious that reference to same was merely a typographical error. However, the Agreement also provides that the Plaintiff may "[a]vail itself of any other relief to which Lender may be legally or equitably entitled." Id. at ¶ 102.

A. THE FORUM SELECTION CLAUSE AGREED TO BY THE PARTIES WAS PERMISSIVE.

The forum selection clauses agreed to by both parties allowed this case to be brought in several different forums at the discretion of NAB. Accordingly, the clause is permissive, and South Dakota has the requisite jurisdiction to preside over this matter.

Courts have distinguished between mandatory and permissive forum selection clauses. McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 345-46 (8th Cir. 1985). A mandatory clause requires a case to be brought in an identified venue using specific language to require such action.[5] While an exclusive forum selection clause will give defendants a basis for objecting to venue in any other jurisdiction, a permissive forum selection clause does not prevent suits from going forward outside of the selected forum. *See* id. at 1036-37.

To be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify a venue in mandatory language, or contain other language demonstrating the parties' intent to make a jurisdiction exclusive. A forum selection clause is mandatory if the jurisdiction and venue are specified with mandatory or exclusive language. Generally, mandatory forum selection clauses have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive. If jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.[6]

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[5] *See* N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1037 (9th Cir.1995)(To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one.)

[6] *See* Akima Corp. v. Satellite Services, Inc., 639 S.E.2d 142 (N.C. Ct. App. 2006) (The court noted that generally, mandatory forum selection clauses have contained words such as "exclusive" or "sole" or "only"); JHB Resource Management, LLC v. Henkel Corp., 41 Conn. L. Rptr. 475, 2006 WL 1681079 (Conn. Super. Ct. 2006), opinion supplemented on reargument, 42 Conn. L. Rptr. 295, 2006 WL 3360922 (Conn. Super. Ct. 2006) (Court held that a forum selection clause providing that the agreement shall be construed under and governed by the laws of the jurisdiction where the defendant's office was located and shall be decided by a court of competent jurisdiction in that state, contained insufficient language to create mandatory, exclusive, and sole jurisdiction); Mark Group Intern., Inc. v. Still, 151 N.C. App. 565, 566 S.E.2d 160 (2002)(Court recognized that when a

None of the forum selection clauses contained in the parties' agreements contain exclusive terminology. If the parties wanted or intended to have exclusive jurisdiction for claims arising from the loan agreement, they could have and would have specified same.

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jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive); Management Computer Controls, Inc. v. Charles Perry Const., Inc., 743 So. 2d 627, 39 U.C.C. Rep. Serv. 2d 1162 (Fla. Dist. Ct. App. 1st Dist. 1999)(Court held that a venue selection clause was mandatory, where the contract stated that any action arising out of the agreement would be prosecuted in a certain county, and nowhere else); Halpern Eye Associates, P.A. v. E.A. Crowell & Associates, Inc., 2007 WL 3231617 (Del. C.P. 2007)(Court held that the use of the words "exclusive venue" to be mandatory); In re Automated Collection Technologies, Inc., 156 S.W.3d 557 (Tex. 2004)(Court held that a forum selection clause providing that a designated county in Pennsylvania had exclusive jurisdiction over any claims arising from the contract was mandatory); S & S Directional Boring And Cable Contractors, Inc. v. American Nat. Bank of Minnesota, 961 So. 2d 1046 (Fla. Dist. Ct. App. 2d Dist. 2007)(Court held that a forum selection clause providing that the lessee consented to jurisdiction in the state of the owner's principal place of business was permissive rather than mandatory); Mena Films, Inc. v. Painted Zebra Productions, Inc., 13 Misc. 3d 1221(A), 831 N.Y.S.2d 348 (Sup 2006)(Court held that a contractual provision providing that the agreement shall be governed by California law and shall be subject to the jurisdiction of the federal and state courts located in Los Angeles County regarding jurisdiction was not a mandatory); Converting/Biophile Laboratories, Inc. v. Ludlow Composites Corp., 296 Wis. 2d 273, 2006 WI App 187, 722 N.W.2d 633 (Ct. App. 2006)(Court held that a forum selection clause providing that the buyer consents to and submits to the jurisdiction of the courts of the State of Ohio or the United States District Court for the Northern District of Ohio was merely permissive); Cardoso v. FPB Bank, 879 So. 2d 1247 (Fla. Dist. Ct. App. 3d Dist. 2004)(Court held that a forum selection clause, which stated that the action may be brought in either of two foreign fora at the option of the lender was permissive); Murray v. The Educ. Resources Institute, Inc., 272 Ga. App. 171, 612 S.E.2d 23 (2005)(Court held that a clause in which the borrower stated that he consented to jurisdiction of Massachusetts courts and to placement of venue in Boston, Massachusetts, did not require the lender to bring an action in Massachusetts or prohibit the lender from bringing an action in Georgia, but rather merely provided that borrower could be sued in Massachusetts); Thompson v. Founders Group Intern., Inc., 20 Kan. App. 2d 261, 886 P.2d 904 (1994)(Court held that a forum selection clause which provided that any action brought shall properly lie in either of two named Florida courts was permissive, not mandatory); HCR Pool III Funding Corp. v. PARCC Healthcare, Inc., 32 Conn. L. Rptr. 252, 2002 WL 1455775 (Conn. Super. Ct. 2002) (Court noted that forum selection clauses providing that jurisdiction and venue "shall" be in a particular forum have been found to be permissive, not mandatory); JP Morgan Chase Bank, N.A. v. Reijtenbagh, 611 F. Supp. 2d 389 (S.D. N.Y. 2009)(A forum selection clause that permits an action in either state or federal court is a permissive clause.)

However, the parties did not use exclusive language, and in fact, the parties provided for exactly the opposite by leaving the choice of remedies to the discretion of NAB. Here, the Circuit Court erred in not giving any credence to the clear intent of the parties.

B. THE FORUM SELECTED BY NAB WAS AGREED TO BY THE PARTIES VIA THE LOAN DOCUMENTS.

Because the forum selection clause was permissive, rather than mandatory, NAB's selection of South Dakota is proper and enforceable. However, assuming *arguendo*, the Court holds that the forum selection clause is mandatory, the courts of the State of South Dakota are still a proper forum for resolution of this dispute. The Commercial Loan Agreement dated October 10, 2008, provides that "[t]he Agreement is "governed by the laws of the jurisdiction where Lender is located, the United States of America and to the extent required, by the laws of the state where the Property is located." *See* App. R ¶ 88. In addition to the unperfected leasehold mortgage, the Property in question includes the following: (1) All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned; (2) All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in Debtor's business; (3) All equipment, including but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts and tools; (4) All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of monetary obligations, and tangible and electronic equipment; (5) All general intangibles, including, but not limited to, tax refunds, patents and applications for

patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use Cangleska's name; and (6) All deposit accounts including, but not limited to, demand, time, savings, passbook and similar accounts. Id.

Cangleska makes, and the Court accepted, the inane argument that all of the foregoing is located on trust land within the Pine Ridge Reservation. However, both Cangleska and the Court completely failed to address the fact that Cangleska operates a shelter and maintains at least two other properties in or by Rapid City which is clearly not within the boundaries of the Oglala Sioux Tribe and therefore is not located on trust land. Instead, the Court accepts the unsworn testimony of Cangleska's Executive Director who has not been in that position for more than a year as gospel regarding the use of the off-reservation property despite the receipt of written evidence providing otherwise and appeared to base his decision thereon. Despite the conflicting evidence regarding the use of the above described property, the Circuit Court completely failed to address why the presence of other collateral situated off-reservation did not bestow the state with some authority over Cangleska. For example, upon information and belief, the Oglala Sioux Tribe does not operate any sort of financial institution so it is hard to conceive that their bank accounts are located on trust land. Further, the majority, if not all, of Cangleska's funding derives from federal and state programs which also are not located on trust land. The Court clearly erred in not taking into consideration all the collateral subject to the Loan Documents and being sought by NAB.

III. THE MONTANA TEST WEIGHS IN FAVOR OF STATE COURT JURISDICTION.

Unfortunately, the Circuit Court provided little to no guidance as to the legal justification for his decision. Accordingly, NAB will address Cangleska's arguments made at the lower level but not fully addressed by the Court for purposes of exhaustion to demonstrate that even the Tribal Court would not have jurisdiction over NAB's claims. The decision issued by the lower court evidences a clear attempt to shift jurisdiction over this matter into federal court despite assertions by Cangleska that even Tribal Court may have jurisdiction. Indeed, the Court would not listen to argument and refused to address the applicable test in determining whether a state or a Tribe may assert jurisdiction over a party's claims. Any such analysis would begin with the Supreme Court's decision in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), a "pathmarking case concerning tribal civil authority over nonmembers." Strate v. A-1 Contractors, 520 U.S. 438, 445, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). In Montana, the Supreme Court established "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court has since held that, under Montana's general rule, tribal courts lack subject matter jurisdiction to adjudicate claims against nonmembers of the tribe even if those claims arise on tribal land within an Indian reservation. Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997) ("tribal courts may not entertain claims against nonmembers" arising on land owned by nonmembers within a reservation); Nevada v. Hicks, 533 U.S. 353, 368, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (tribal court may not adjudicate claims against nonmembers arising on tribal lands). Thus, "[i]f the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., ---U.S. ---128 S. Ct. 2709, 2717, 171 L.Ed.2d 457

(2008). Montana's general rule "remains in effect," MacArthur v. San Juan County, 497 F.3d 1057, 1070 (10th Cir. 2007), unless the tribe shows that one of two exceptions apply:

> [1] 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.
>
> [2] 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.

Montana, 450 U.S. at 565. But "[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule' or 'severely shrink' it." Plains Commerce Bank, 128 S. Ct. at 2720 (citations omitted). As no party contends that Congress has expressly granted the Oglala Sioux Tribe the authority to hear this suit, the only issue involved here is whether the Tribe has such inherent authority pursuant to the Montana exceptions. *See* United States v. Lara, 541 U.S. 193, 210, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).

A. THE FACTS OF THIS CASE DO NOT SATISFY THE FIRST EXCEPTION ENUMERATED IN MONTANA.

Montana's first exception—the consensual relationship exception—does not allow a tribal court to exercise jurisdiction over a nonmember of the tribe unless two limiting conditions are satisfied: First, the nonmember must form a separate consensual relationship with an Indian tribe or tribal member based on "commercial dealing, contracts, leases, or other arrangements." Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 655, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001). Second, the tribe's or tribal member's claim must arise directly out of that consensual relationship. Id. at 656 ("Montana's consensual relationship exception requires that the tax or regulation imposed by the

Indian tribe have a *nexus* to the consensual relationship itself.") (emphasis added). As explained below, the Oglala Sioux Tribe does not have jurisdiction over a case involving two non-member entities and a cause of action that arose off-reservation.

i. CANGLESKA, INC. IS A NON-MEMBER OF THE OGLALA SIOUX TRIBE.

The Court's decision conveniently avoids addressing the fact that NAB did not, as required by the consensual relationship exception, enter into a consensual relationship with the ***tribe or a member of the tribe***. This exception simply does not include corporate entities.

It is readily apparent that Cangleska is neither a Tribe nor a member of the Oglala Sioux Tribe. Cangleska did not contend at the lower level that it shares the Tribe's immunity. Nor does Cangleska contend that it is eligible for tribal membership, which under the Tribe's constitution is limited to natural persons as follows:

> The membership of the Oglala Sioux Tribe shall consist as follows: (a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935, provided, that correction may be made in the said rolls within five years from the adoption and approval of this constitution by the tribal council subject to the approval of the Secretary of the Interior; (b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.

OST Constitution, Article II, Section 1. App Y ¶ ¶ 149-150. In fact, Cangleska readily conceded that it is not a member of the Oglala Sioux Tribe. App. Z ¶ 206.

ii. CANGLESKA IS NOT A TRIBAL ENTITY.

It is common knowledge in Indian law that oftentimes an entity is so connected to the Tribe that the two cannot be separated and the former can legally be considered the "tribe" itself and is subsequently bestowed with Tribal attributes such as sovereign

immunity. Of course, not every enterprise that is owned or staffed by members of a tribe may be considered a tribal entity for purposes of tribal jurisdiction. *See* Atkinson Trading, 532 U.S. at 657, 121 S.Ct. 1825. That is the case here.

Whether an entity is a tribal entity depends on the context in which the question is addressed. *See* Dille v. Council of Energy Res. Tribes, 801 F.2d 373, 376 (10th Cir.1986) (stating that "the definition of an Indian tribe changes depending upon the purpose of the regulation or statutory provision under consideration"). Admittedly, courts have fairly consistently stated that a corporation lacks racial identity because it is a separate and distinct legal entity. However, courts have occasionally been willing to go beyond the corporate fiction to reach the people behind the corporate veil. In Sage v. Sicangu Oyate Ho, Inc., 473 N.W.2d 480 (S.D. 1991), the South Dakota Court went beyond the corporate shield and looked at the characteristics of the entity to find that the state court had no subject matter jurisdiction over a school operating on the Rosebud Reservation. Specifically, the Court looked to factors such as people who were members in the corporation, the purposes the corporation served and the fact that it was granted a tribal charter by the Tribal Council.

The factors enumerated in Sage are not satisfied in this case to subvert the jurisdiction of this Court for the following reasons:

- State Incorporation. Cangleska was incorporated under South Dakota as a 501(c)(3) corporation on March 11, 1996. *See* App. F. There is no evidence that Cangleska itself was ever incorporated under Tribal law. In fact, Cangleska unambiguously stated that Cangleska is only a part of a larger organization known as "Project Medicine Wheel." Specifically, Cangleska stated:

The office in Rapid City at 777 West Boulevard is above a printing plant, and it's basically substantially donated, but they lease that because that is part of a greater organization called Project Medicine Wheel[7], which is kind of an umbrella of Indian/Native American projects through which they secure grants for various projects. Cangleska is part of that. App. X, ¶ 14, lns. 1-8.

- Formation Under State Law. Cangleska's status as a non-profit corporation formed under South Dakota law was not altered by Tribal resolution.[8]
- Annual Reports. No annual reports submitted to the South Dakota Secretary of State reference "Medicine Wheel a/k/a Cangleska, Inc." App. I - P.
- No Merger. There was no merger between Cangleska, Inc. and Medicine Wheel a/k/a Cangleska, Inc. pursuant to the requirements of SDCL 47-25-1.[9]
- Authority to be Sued. Cangleska has the authority to be sued pursuant to SDCL 47-22-53 Powers of corporation--Capacity to sue and be sued that provides: "Each corporation shall have power to sue and be sued, complain and defend, in its corporate name."
- State Authorities. Cangleska had the authority to enter the loan document and incur liability pursuant to SDCL 47-22-59.[10]

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[7] OST Resolution 96-78 was not enacted until October 8, 1996 granting a charter to "Medicine Wheel a/k/a Cangleska, Inc." App. H

[8] SDCL 47-22-52. Powers of corporation--Perpetual succession. Each corporation shall have power to have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation.

[9] SDCL 47-25-1. Merger of corporations--Plan of merger--Contents of plan: Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this chapter. Each corporation shall adopt a plan of merger setting forth: (1) The names of the corporation proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation; (2) The terms and conditions of the proposed merger; (3) A statement of any changes in the articles of incorporation of the surviving corporation to be effected by such merger; (4) Such other provisions with respect to the proposed merger as are deemed necessary.

- Cangleska's Representations. NAB was told by Cangleska that they had incorporated under the laws of the State of South Dakota as a 501(c)(3) corporation. *See* App. E ¶ 15.
- Board of Directors. The Articles of Cangleska do not require that members of the Board of Directors also be members of the Oglala Sioux Tribe. *See* App. F.
- Authority to Remove/Suspend Board Members. The governing body of the Tribal Council does not have the authority to remove or suspend members of the Board of Directors. Id.
- No Tribal Council Approval required. During negotiations, representatives from Cangleska specifically stated that the Tribal Council of the Oglala Sioux Tribe did not need to give its approval for execution of the loan documents. *See* App. E ¶ 16.
- Representations in the Articles of Incorporation. The Articles of Incorporation of Cangleska make no reference at all to the Oglala Sioux Tribe.
- No Limit of Assistance. The Articles of Cangleska do not limit assistance provided by the corporation to members of the Oglala Sioux Tribe. *See* App. F.
- Assets Upon Dissolution. Pursuant to the Articles of Incorporation of Cangleska all assets upon dissolution are to be turned over to another 501(c)(3) corporation – there is no mention that the 501(c)(3) corporation must have any ties to the Oglala Sioux Tribe. *See* App. F.

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[10] SDCL 47-22-53. Powers of corporation--Contracting--Borrowing--Issuance of securities: Each corporation shall have power to make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income.

- No Approval of Amendments to Articles of Incorporation. The Oglala Sioux Tribe does not have to approve any amendments to the Articles of Incorporation of Cangleska. Id.
- No Requirement for Residence of Board Members. The Articles of Incorporation for Cangleska do not require that officers or directors of the Board maintain a residence on the Pine Ridge Reservation. Id. (Marilyn Pourier lists address as Rapid City, South Dakota).
- No Oversight Role. The Articles of Incorporation of Cangleska do not require that the Board of Directors make any reports or submit any documentation to the Oglala Sioux Tribe. Id.
- Assertions to the Internal Revenue Service. Cangleska stated to the Internal Revenue Service for tax years 2005-2007 that it was not "related (other than by association with a statewide or nationwide organization) through common membership, ***governing bodies***, trustee officers, etc. to any other exempt or nonexempt organization." Emphasis added. App. AA ¶ ¶ 233, 249, 270.
- Failure to Adhere to Tribal Requirements. Cangleska cannot be considered as a "tribal entity" or as chartered under the Ogala Sioux Tribe because it has not adhered to the Tribal requirements for obtaining such a status. App. KK.
    - Financial Reports. Cangleska failed to adhere to Oglala Sioux Tribal Ordinance No. 90-07 that requires "[a]ny and all corporations chartered by the Oglala Sioux Tribe shall submit Quarterly financial reports to the Oglala Sioux Tribal Council. The quarterly financial reports shall be filed with the Office of the Secretary, Oglala Sioux Tribe. Failure to timely file

such financial reports may result in suspension or revocation of the respective charter. App. BB. Quarterly financial reports were not filed with the Secretary of the Tribe.

- Monthly Financial Reports. Oglala Sioux Tribal Ordinance No. 98-17 requires the submission of monthly financial reports to the Tribal Council and to the Budget and Finance Committee no later than five (5) days after the regular monthly meeting of such chartered entity. Additionally, such monthly financial reports shall be submitted to the Office of the Tribal Treasurer and to the Office of the Tribal Secretary. App. CC. According to the Tribe's own records, Cangleska has not submitted any financial reports to the Tribal Committees, the Tribal Treasurer or the Tribal Secretary.
- Foreign Business Corporations. Oglala Sioux Tribal Ordinance No. 90-07 Section 41-1-4 provides that "[n]o foreign corporation, profit or non-profit, shall have the right to do or engage in any business within the exterior boundaries of the Pine Ridge Indian Reservation until it shall have procured a certificate of authority to do so from the Oglala Sioux Tribal Council." *See* App. BB. Cangleska was incorporated as a 501(c)(3) corporation under the laws of the State of South Dakota. Despite its existence as a foreign corporation, Cangleska failed to procure a certificate of authority in accordance with Tribal law.
- Removal Procedures for Board Members. Oglala Sioux Tribal Ordinance No. 07-14A provides that "each organization chartered under Oglala Sioux

Tribal Law shall hence forth be required to have in place procedures by which any members of any board, council, and committee governing or advising that charter may be removed from office." App. DD. Cangleska never made the required revisions to their governing documents and a review of records on file with the Tribal Secretary's office illustrate that no such procedures have been filed on behalf of Cangleska.

- Oglala Sioux Tribal Ordinance No. 02-06 requires "that beginning July 1, 2002, all Tribally Chartered Corporations shall make the minutes of meetings held by their respective Board of Directors, or Board of Trustees, public by publication in at least two (2) local newspapers, and that the Board of Directors or Board of Trustees shall cause the minutes to be published, no later than sixty (60) days after the meeting from which such minutes derive. App. EE ¶ 291. A search of records on file with the Tribal Secretary's office demonstrates that no minutes have been publicized by Cangleska.
- Oglala Sioux Tribal Ordinance No. 06-20 requires that "all chartered entities of the Oglala Sioux Tribe immediately established a position for a qualified internal auditor to ensure that all chartered entities of the Oglala Sioux Tribe are in compliance with the rules and regulations promulgated by the Oglala Sioux Tribe and the federal government that pertain to financial management and other financial affairs related to chartered entities of the Oglala Sioux Tribe." App. FF ¶ 293. A review of the OVW 2009-2011 Rural Budget Summary and Narrative demonstrates that

an internal auditor is not listed as a member of Cangleska's personnel. App. GG.

Finally, and certainly most importantly, holding Cangleska immune from state jurisdiction would make it extremely difficult for the Attorney General for the State of South Dakota to enforce any of the statutory provisions relevant to corporate entities. For example, SDCL 47-22-72 provides the following:

> Circumstances under which ultra vires may be asserted--Actions by attorney general to dissolve or enjoin corporation. Notwithstanding § 47-22-69, the fact that a corporation is without capacity or power to do an act or to make or receive a conveyance or transfer of real or personal property may be asserted in a proceeding by the attorney general, as provided in chapter 47-26, to dissolve the corporation, or in a proceeding by the attorney general to enjoin the corporation from performing unauthorized acts, or in any other proceeding by the attorney general.

If the state doesn't have jurisdiction over Cangleska, how would the Attorney General ever exert his authority to dissolve a corporation that has a portion of its assets within reservation boundaries? Clearly, the identity of Cangleska as an entity separate and apart from the Tribe subjects it to state court jurisdiction when it conducts business off the reservation and avails itself of the privileges of conducting business as a 501(c)(3) corporation organized under the laws of the State of South Dakota.[11]

iii. CLAIMS DO NOT BEAR A CONNECTION TO INDIAN LANDS.

[11] NAB's contentions that the State of South Dakota has jurisdiction over this matter is buttressed by the recognized authority on Felix Cohen's Federal Indian Law (1982 ed.) at pages 355-56, dealing with the state of corporations for purposes of determining if state or trial jurisdiction applies noted the following: "For purposes of jurisdictional analysis, because state court jurisdiction is predicated on non-Indian status or non-interference with tribal self-government, tribal governments, their agencies, authorities and arms, IRA corporations, and tribally chartered corporations with a majority ownership either in the tribe or in private Indians' hands, should all be treated the same as Indians and under tribal authority to the same extent. State chartered corporations, being fictional persons created by the states, should be treated as non-Indians even if owned by Indians. State court jurisdiction over tribally chartered corporations owned by non-Indians should depend on whether tribal government is involved sufficiently in their activities so as to preclude state jurisdictions."

The Circuit Court erred in focusing on the status of the property, i.e., property located in Kyle, South Dakota, subject to the unperfected leasehold provision in making his decision. In direct contrast to his decision, the instant claim bears no connection to Indian lands. In Hicks, the Court emphasized that "Montana applies to both Indian and non-Indian land. The ownership status of the land, in other words, is only one factor to consider." Hicks, 533 U.S. at 360, 121 S.Ct. 2304; *see also* id. at 381, 121 S.Ct. 2304 (stating that "a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted"). Rather, the inquiry is whether the cause of action brought by these parties bears some direct connection to tribal lands. *See* Allstate Indem. Co. v. Stump, 191 F.3d 1071, 1073-74 (9th Cir.1999); Stock W. Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir.1992). This inquiry must simply be answered in the negative.

As previously stated, the majority of the collateral in question does not lie within the jurisdiction of the Oglala Sioux Tribe, i.e., Rapid City property, bank accounts. Further, the Oglala Sioux Tribe would not have jurisdiction over NAB due to the lack of any contacts with their jurisdiction. It was Ben Artichoker from Cangleska, who approached NAB in its Denver, Colorado office to discuss the financing for his project. App. E ¶ 15. Mr. Artichoker actually resided in or near Denver, Colorado at this time. Id. Mr. Artichoker met with bank representatives approximately eight times at the office of NAB in Denver, Colorado. Id. In fact, NAB never met with any Cangleska, Inc. representatives on the Pine Ridge Indian Reservation during negotiations of the loan

documents. Id. Accordingly, NAB's claims bear no connection to the lands of the Oglala Sioux Tribe.

B. THE FACTS OF THIS CASE DO NOT SATISFY THE SECOND EXCEPTION ENUMERATED IN MONTANA.

Montana's second exception provides that "[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." Requiring a non-Tribal entity which is organized under state law to uphold their contractual obligations that were entered off-reservation does not threaten the sovereignty or jurisdiction of the Tribe and certainly has absolutely nothing to do with the political integrity of the Oglala Sioux Tribe.

In fact, it is patently clear that the Oglala Sioux Tribe would not have jurisdiction over this matter. Chapter Two Section 20 of the Oglala Sioux Tribe's Law and Order Code provides for jurisdiction as follows:

> The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of all other suits between members and non-members who consent to the jurisdiction of the tribe.

As stated in preceding sections, the Constitution of the Oglala Sioux Tribe does not allow corporate entities to attain membership status, and therefore, to exercise jurisdiction over NAB consent would be required as mandated by Chapter Two 20 of the Oglala Sioux Tribe's Law and Order Code that provides:

> 1. Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally through an employee, through an agent or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation. 1. The transaction of any business.

> 2. The commission or omission of any act which results in a tort action. 3. The ownership use or possession of any property situated within the exterior boundaries of the Pine Ridge Indian Reservation. 4. Engaging in any employer-employee relationship. 5. Leasing or permitting of any land or property. 6. Residing on the Pine Ridge Indian Reservation. 7. Commission of any act giving rise to claims for spousal support, separate maintenance, child support, child custody, divorce or modification of any decree of divorce or separate maintenance proceeding. 8. Any contractual agreement entered into within the exterior boundaries of the Pine Ridge Indian Reservation.

The first requirement that must be satisfied before the Oglala Sioux Tribe can assume jurisdiction over a non-member is that one of the mentioned acts must have occurred "within the boundaries of the Pine Ridge Indian Reservation." As Appendix E illustrates, all negotiations and the final execution of the loan agreement occurred outside the boundaries of the reservation. Accordingly, the Oglala Sioux Tribe does not have jurisdiction over this dispute as evidenced by its own Law and Order Code. "Indians who leave the exterior boundaries of the Pine Ridge Reservation are subject to the laws of South Dakota. This is true even if the Indian has left the Pine Ridge Reservation to receive medical treatment not available on the Pine Ridge Reservation." Wilson v. Clifford, OSTSCT 93-396 (Oglala Sioux Tribe Supreme Court 1993). Because the Oglala Sioux Tribe does not have jurisdiction over this dispute, the political integrity of the Tribe is not at issue.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed and NAB should be allowed to pursue their remedies under the jurisdiction of the State of South Dakota.

Respectfully submitted,

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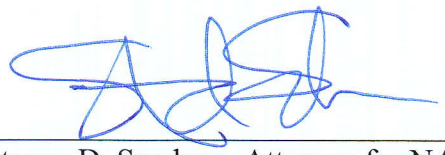

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2010, I served two (2) true and correct copies of the foregoing Brief and accompanying Appendix by depositing copies thereof in the United States mail, postage for first class mail prepaid, to the following person, to-wit:

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