Federal Court Update

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I. Supreme Court – 2010 Term Grants

United States v. Tohono O'Odham
Status: The case was be argued in front of the Court on November 1st.

Question Presented: "Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff * * * has * * * any suit or process against the United States" or its agents "pending in any other court." The question presented is: Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits." Petition for Certiorari, United States v. Tohono O'Odham, No. 09-846.

Tohono O'odham filed two claims within a day of each other—one for equitable relief in federal district court and one for money damages in the Court of Federal Claims. As the lower court points out, the Court of Federal Claims is powerless to award equitable claims, which is likely why the tribe chose to file two separate claims in two separate courts. In addition, the lower court points out, §1500 governs the timing of the claims, and argues that if the tribe had filed the claim in the Court of Federal Claims first, this case would have never arisen. Finally, while claiming that §1500 has virtually no use today, the lower court nonetheless argued that "claim" under §1500 means a claim arising under the same operative facts *and* seeking the same relief. While the operative facts are essentially the same, the lower court found that the relief sought in each case was substantially different.

Commentary: Justice Kagan has recused herself from this case, having participated in the decision to file a cert petition and (likely) in the petition writing. As a result, the respondents need only attract the votes of four Justices to prevail (though no precedent would be set). United States v. Tohono O'odham was argued this past week, and though the government was put to some hard questions, there still appear to be good reasons for the Court to find against the Nation, reasons including Navajo Nation, Cobell and a whole lot of money. While the tribal attorney did a great job explaining the difference between the two types of accounting available to the tribe in the different venues, and the importance of both, the Court did not seem entirely convinced the tribe needed to bring both suits. Obviously, the question remains whether the Court will determine whether a similar claim requires both an common nucleus of operative fact and requests the same relief, or whether a claim of differing relief is enough to differentiate claims under 28 USC 1500, and allow suit to be brought in both the court of federal claims and the federal district court. Depending on who you talk to about this case, this either most affects tribes, or affects tribes and another whole class of litigants.

Madison County v. Oneida Indian Nation
Status: date for oral argument has not yet been set.

Question Presented: "1. whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes. 2. whether the ancient Oneida reservation in New York was disestablished or diminished." Petition for Certiorari, Madison County v. Oneida Indian Nation, No. 10-72.

In the long running series of suits that is the Oneida Indian Nation land claims, this one out of the Second Circuit was one of the tribe's first wins since the *Sherrill* decision. The lower court found that while *Sherrill* did limit tribal sovereignty over historic reservation repurchased by the Oneida Nation, it did not limit tribal sovereign immunity from suit. Rather, while the counties (Madison and Oneida) could tax the land at issue, they could not foreclose on the properties due to non-payment of taxes because of tribal sovereign immunity. Now the Supreme Court has granted cert with a broad and sweeping question presented over the role of tribal sovereign immunity.

Commentary: Justice Sotomayor appears to have recused herself from this matter (no explanation why). A difficult road likely has become even more difficult with one of the four Justices most likely to be persuaded by the tribal position out of the case. However, when it comes to questions of immunity, tribal interests generally have prevailed. *See Kiowa Tribe v. Manufacturing Technologies* (1998); *Oklahoma Tax Commission v. Citizen Potawatomi Nation* (1991). However, only Justices Scalia and Kennedy remain from the *Citizen Potawatomi* case. And two if the dissenters from *Kiowa Tribe* remain on the Court (Justices Thomas and Breyer), three are from the majority (Justices Scalia, Kennedy, and Ginsburg). Given Justice Ginsburg's infamous *Sherrill* opinion, however, it will be interesting to see how she comes down on another case involving Oneida Indian Nation.

2. Supreme Court – 2010 Term Denials

Schaghticoke Tribal Nation v. Kempthorne

Denied: October 4, 2010
Question Presented: "Whether certiorari should be granted to resolve a conflict among the Courts of Appeals on this question: when reviewing a petitioner's Due Process claim that undue political pressure has *actually* affected or influenced a federal administrative *adjudicative* decision, must a federal court also consider the petitioner's claim that Due Process was violated by the *appearance* of bias or impropriety arising from the political pressure." Petition for Certiorari, Schaghticoke Tribal Nation v. Kempthorne, No. 09-1433.

After a final determination of federal recognition of the Schaghticoke Tribal Nation, a flurry of political activity lead the Department to withdraw that recognition and reissue a final determination denying federal recognition. The lobbying and *ex parte* communications the

Nation discovered through FOIA requests are breathtaking, and the end of the case with the Supreme Court's denial is also breathtaking.

Gould v. Cayuga Indian Nation

Denied: October 4, 2010
Question Presented: "1. Whether the New York State Court of Appeals in its 4-3 decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010), properly interpreted federal law on a matter it believed the United States Supreme Court had not yet addressed in holding that two parcels of land purchased by a successor to the historical Cayuga Indian Nation in 2003 and 2005 were exempt from New York's cigarette sales and excise taxes after two hundred years of non-Indian ownership and governance. 2. Whether in that decision the New York Court of Appeals properly hand both that (i) the Cayuga Indian Nation possessed a federal reservation in pursuant to the 1794 Treaty of Canandaigua despite the fact that the Cayuga Indian Nation had ceded all of its land to the New York State in 1789; and 9ii0 the United States did not subsequently disestablish any purported federal reservation." Petition for Certiorari, Gould v. Cayuga Indian Nation, No. 10-206.

In a somewhat surprising development, the Supreme Court failed to grant cert in *Gould*, even though the case was brought by the Counties because of their loss in the New York state courts. The Cayuga Nation was selling unstamped cigarettes on two parcels of land it had purchased in its historical reservation boundaries. The tribe argued that it could sell the cigarettes untaxed on the land because it fell under the "qualified reservation" in state tax law. Somehow the New York Court of Appeals (the highest court in New York) managed to find for the Cayuga Tribe, even in the face of *Sherrill*. Interestingly, where *Sherrill* has been expanded in all the other cases involving the New York Indian tribes, the New York Court of Appeals rejects the reasoning. The Court of Appeals flips the usual *Sherrill* analysis. Rather than following the Supreme Court's line that the Oneida Indian Nation cannot reassert tribal sovereignty over property by seeking immunity from state law, the state court here finds that Cayuga is attempting to submit to state tax laws, by claiming it is a "qualified reservation." Which, needless to say, means the tribe does not need to submit to New York tax laws. Where *Sherrill* took a tax case and provided the basis for a broad repeal of tribal land claims, the Court of Appeals takes *Sherrill* as *too broad* for a case just dealing with tax issues. "In this case, however, the Nation does not suggest that its reacquisition of the convenience store parcels revives its ability to exert full sovereign authority over the property. Rather than seeking immunity from state tax laws, it is actually relying on state tax laws . . ." 14 N.Y.3d 614, 641 (2010).

Maybee v. Idaho

Cert Denied: October 4, 2010
Question Presented: "In 1998, the Attorneys General of 46 states, five U.S. territories and the District of Columbia (the "Settling States") settled various legal actions involving antitrust, product liability and consumer protection claims against the nation's four largest tobacco companies. In exchange for substantial sums of monies, tied in part to sales volume, to be paid by settling manufacturers, each Settling State agreed to enact and diligently enforce a qualifying escrow statute that would artificially inflate costs for other tobacco manufacturers and which

"effectively and fully neutralizes the cost disadvantage that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers." The question presented to the Court is whether a Settling State may prohibit the sale of certain brands of cigarettes manufactured by tobacco companies that have never been sued, or otherwise alleged or found culpable for conduct giving rise to liability." Petition for Certiorari, Maybee v. Idaho, No. 09-1471.

There are a series of tobacco Master Settlement Cases in a few state courts. These will never be granted by the Supreme Court unless a tribe manages to win a case. In this case, the Idaho Supreme Court held that the Idaho statutes (Master Settlement Agreement Act and the Complementary Act) apply to Maybee, a citizen of the Seneca Nation and a resident of an Indian reservation in western New York. Maybe sells cigarettes over his websites, as an out-of-state "delivery seller" and has sold over 2.5 million cigarettes to Idaho consumers. The State claimed these cigarettes were "noncompliant" cigarettes under the statutes. The Court held, *inter alia*, that the Indian Commerce Clause did not preclude the application of these statutes to Maybee because the statutes were regulating his off-reservation activity of selling cigarettes via the Internet in Idaho. 224 P.3d 1109, 1121-4 (Idaho, 2010).

Hogan v. Kaltag

Cert denied: October 4, 2010
Question Presented: There was debate regarding the veracity of the State's version of the question presented in this case. For that reason, both the State and the Village's version of the question presented is listed here.

"Whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other courts as well as with the express intent of Congress—that the hundreds of Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a nonmember and then to compel the State to give full faith and credit to the decrees entered in such proceedings." Petition for Writ of Certiorari, Hogan v. Kaltag Tribal Council, No. 09-960.

"Whether the district court and the court of appeals correctly held – consistent with the decision of the Alaska Supreme Court and all other reported decisions, and consistent with the petitioner State of Alaska's repeated position in prior litigation – that §1911(d) of the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963 (ICWA), requires Alaska to 'give full faith and credit to the judicial proceedings of' the Kaltag Tribe applicable to an 'adoptive placement proceeding' when Indian guardians from a neighboring Tribe invoked the jurisdiction of the Kaltag Tribal Court in order to adopt a child of the Kaltag Tribe." Respondents' Brief in Opposition, Hogan v. Kaltag Tribal Council, No. 09-960.

The lower courts held that the Kaltag Tribal Court had the jurisdiction to issue an adoption judgment over a Kaltag tribal child, and the state agencies had to issue a new birth certificate for the child. The State had to abide by the full faith and credit clause of ICWA. This politically motivated case stems from the Alaska Attorney General switching positions on the jurisdiction

of tribal courts in Alaska, among other things, claiming that tribal courts only have jurisdiction over cases started in state court and then transferred to tribal court.

3. Supreme Court Cert Petitions to Watch

United States v. Jicarilla Apache Nation
Status: The tribe's brief in opposition is due October 21. Turtle Talk gives this about a 75% chance of being granted, simply because about two thirds of all U.S. petitions are granted. Extension to file brief granted until Dec. 8, 2010.

Question Presented: "Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe." Petition for Certiorari, United States v. Jicarilla Apache Nation, No. 10-382.

The lower court adopted a fiduciary exception to tribal trust cases, meaning "a fiduciary may not block a beneficiary from discovering information protected under the attorney-client privilege when the information relates to fiduciary matters, including trust management." In re U.S., 590 F.3d 1305 (2009). In this case, the information is documents and communications between the United States and its attorneys, and the beneficiary is the Jicarilla Apache Nation. The United States argued that it did not have a traditional fiduciary relationship with the tribe, but the lower court found that the relationship between the United States and tribes is "sufficiently similar to a private trust to justify applying the fiduciary exception." Id. at 1313. The court addressed Nevada v. U.S. 463 U.S. 110 (1983) by finding that the United States was not faced with balancing competing interests in this case, but only the management of trust accounts. 590 F.3d at 1315.

Commentary: Chances are high this will be a grant, since historically about 70 percent of the federal government's cert petitions are granted. There are relatively recent examples of federal government cert petitions being denied, however. Examples include a pair of petitions filed by the federal government over Class II bingo game classifications and the authority of CFR courts.

Schwarzeneggar v. Rincon Band of Luiseno Mission Indians
Status: Order extending time to file the response brief to November 12, 2010. Turtle Talk gives this a 25% chance of being granted, because about one quarter of all state petitions are granted.

Questions Presented: "Whether a state demands direct taxation of an Indian tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it bargains for a share of tribal gaming revenue for the State's general fund. 2. Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it weighed the relative value of concessions offered by the parties in those negotiations." Petition for Certiorari Review, Schwarzeneggar v. Rincon Band of Luiseno Mission Indians, No. 10-330.

The Ninth Circuit held that the state of California negotiated in bad faith under the Indian Gaming Regulatory Act. Specifically, a demand of a mandatory 10% payment of net profits into the state's general fund "yields public review and is a 'tax'" 602 F.3d 1019, 1030 (2010). In addition, offering up "exclusivity" for additional revenue sharing is cannot be a new consideration, given that tribal exclusivity to class III gaming is already constitutionally guaranteed in California.

Commentary: This is a difficult case to gauge. First, there simply is no split in authority amongst the federal circuits, and perhaps never will be because of the paucity of states that consent to "good faith" suits under IGRA. Second, the Ninth Circuit is not entirely wrong about the law here; and maybe more importantly, there is no law except a form of common law that has arisen out of the ashes of *Seminole Tribe* relating to gaming revenue sharing. The Court likely is aware, given Judge Bybee's parade-of-horribles-style dissent, that if it were to undercut the common law that has arisen, it could undercut the legal basis for hundreds of millions of dollars of state government revenue in California and nationally. As a national public policy matter, it seems wise to limit *Rincon Band* to its facts, and move on.

That said, the State of California is the petitioner, and state government interests are almost by definition "important" under Supreme Court Rule 10 (about one-third of state government petitions are granted, when they are filed against tribal interests). Moreover, Judge Bybee's strongly-worded dissent is an indicator of the importance of the case.

United States v Eastern Shawnee Tribe of Oklahoma
Status: This case was distributed for the October 15th conference, though was not included in the October 18th order. This case is on hold until the Court decides *U.S. v. Tohono O'odham Nation*.

Question Presented: Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts that seeks relief paralleling the relief available in the CFC. Petition for Certiorari, United States v. Eastern Shawnee Tribe of Oklahoma, No. 09-1521.

This case presents almost the same question as the already granted U.S. v. Tohono O'odham Nation. The lower court opinion held that §1500 did not apply to this case because of its holding in Tohono O'Odham Nation v. United States, 559 Fed.Cl. 1284 (2009). 582 Fed.3d. 1306, 1308. Because the Court of Federal Claims can award monetary and equitable relief for breach of trust duties, and that claim cannot be brought anywhere else, tribes can bring suit in different courts for the same operative facts but seeking different relief. The United States claims the relief is essentially the same in both courts.

Glacier Electric Coop v. Sherburne
Status: Opposition brief due October 25, 2010. Turtle Talk gives this a slim chance of being granted. Opposition brief filed on October 22nd, 2010.

Question Presented: "Whether preclusion of the issue of tribal subject matter jurisdiction to *hear* a case bars the federal courts from considering whether Respondents may enforce *in tribal court* the relief they were granted there – a substantial money judgment - despite the lack of due process at the trial." Petition for Certiorari, Glacier Electric v. Sherburne, No.10-408

Glacier Electric would prefer that Glacier Construction, business owned by Blackfeet tribal members, stop trying to enforce a money judgment against Glacier Electric obtained in tribal court. In a two page, unpublished opinion, the Ninth Circuit affirmed the district court's opinion that the claim was precluded by res judicata.

Commentary: This case involves a possible gray area under *National Farmers Union* and its progeny – what if a federal court order to cease a tribal court proceeding and/or invalidate a tribal court judgment is simply ignored by a tribal court? *Cf.* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, __ UNIVERSITY OF COLORADO LAW REVIEW __ (forthcoming 2010), *available at* http://ssrn.com/abstract=1658124. Since *National Farmers Union* is a "pure common law" question, the Court might just let it go – at least until the tribe actually begins confiscating nonmember property.

Eagle v. Yerington Paiute Tribe
Status: Order extending time to file the response brief to November 8, 2010.

Question Presented: "Does the Due Process Guarantee made applicable to Indian Tribes under 25 U.S.C. §1302(8)(the Indian Civil Rights Act) or the Fifth Amendment Protections applicable to all citizens – require – before an individual may be deprived of her liberty that the prosecuting Tribe allege and prove beyond a reasonable doubt that the charged defendant comes within the limited class of individuals who have the political status of an Indian as defined in 25 U.S.C. § 1301(4) and are thus within the limited subject matter jurisdiction of the Tribe?**"** Petition for Writ of Certiorari, Leslie Dawn Eagle v. Yerington Paiute Tribe (No. 10-5764).

In what could be framed as a subject matter jurisdiction case, a person convicted of child abuse and sentenced to a year in jail in tribal court is contesting the finding that she is an Indian person subject to the jurisdiction of the tribal court. The tribal appellate court found that the evidence pointed to her being an Indian person, and the federal courts agreed. The question becomes who must prove the defendant in tribal court is an Indian and when must that question be raised? The Nevada Inter-tribal Court of Appeals, which found that the defendant failed to timely raise the question of jurisdiction and that there was sufficient evidence demonstrating the defendant was an Indian. Memorandum Decision and Order, Dawn Eagle v. Yerington Paiute Tribe, No. CR-06-001. (Inter-Tribal Court of Appeals of Nevada, September 11, 2006), available at http://itcnca.org/ITCNCA%202007%20Court%20Documents/ITCN%20AC%20CR-06-001.pdf. On an appeal of habeas corpus, the Ninth Circuit agreed with the tribal appellate court. The Ninth Circuit found that Indian status was not an element of the crime of child abuse in tribal

court, and that the tribe had created a procedural rule requiring the non-Indian to prove her non-status as an Indian. In addition, the ICRA does not make "Indian status an essential element of every tribal misdemeanor offense." Eagle v. Yerington Paiute Tribe, 603 F.3d 1161, 1165 (9th Cir., 2010).

Commentary: Difficult question again, since it could also be framed as whether a non-Indian (alleged) that waives the defense of being a non-Indian in tribal court; that is, waiving a clear-cut *Oliphant* defense. The Ninth Circuit certainly is accurate in the final quote above, but the statement seems to conflict with *Oliphant*. On the other hand, there's no split in authority, the defendant very likely is actually an Indian, and so the question really is a rather technical question about the tribal statute that is unworthy of certiorari.

Thunderhorse v. Pierce
Status: The Court asked for the views of the Solicitor General (CVSG) on October 4, 2010. It can take several months for a Solicitor General brief.

Question Presented: "Did the Court of Appeals misinterpret the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, to require only a minimal showing that a prison grooming rule that concededly imposes a substantial burden on religious exercise is the "least restrictive means of furthering [a] compelling governmental interest," contrary to the decisions of other circuits and the literal terms of the statute?" Petition for Certiorari, Thunderhorse v. Pierce, No. 09-1353.

The Fifth Circuit found, using the Religious Land Use and Institutionalized Persons Act (RLUIPA) standard of review, that while the policy of requiring prisoners to cut their hair did substantially burden their religious exercise, it was also the least restrictive way to serve a compelling government interest. 364 Fed.Appx. 141, 146 (2010).

Commentary: This case is worth watching almost entirely because the Supreme Court asked for the views of the U.S. Solicitor General. The Court likely will decide to grant or deny on the OSG's recommendation. We suspect the Court issued a CVSG, in part, because SCOTUSblog put it down as a petition to watch.

Truckee-Carson Irrigation Dist v. United States and Pyramid Lake Paiute Tribe
Status: The U.S. and tribal brief in opposition is due October 22. Turtle Talk gives this a 10 percent chance of being granted. The U.S. waived its right to file a response petition.

Questions Presented: 1. Whether the Congress violates the separation of powers doctrine under Article III of the United States Constitution by enacting retroactive legislation that requires a court to accept a past federal regulation as currently valid, enforceable and immune from judicial challenge, the underlying premise of which was previously found by an all-inclusive federal water rights adjudication proceeding as violating vested water rights confirmed under a final federal district court water decree and judgment. 2. Whether a federal court has either the legal or equitable jurisdiction to make an award of prejudgment or postjudgment in-kind interest, that is, interest that is payable in property, in this case water as interest, and not money. Petition for

Certiorari, Truckee-Carson Irrigation Dist. v. United States and Pyramid Lake Paiute Tribe, No. 10-396.

Osage Nation v. Irby
Status: Osage Nation submitted a cert petition by the October 22 deadline. A response petition is due November 22nd.

Questions Presented: I. Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.
II. Whether the court properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government. Osage Nation v. Irby, Petition for Certiorari, No. 10-537

4. Cases to Watch from Below

Water Wheel v. LaRance (9th Cir. 09-17349) (currently pending in Ninth Circuit; district court held that tribal court had jurisdiction over suit to evict nonmember from tribal lands, but not over related trespass damages claims)

A.A. v. Needville Independent Sch. Dist. (5th Cir. 09-20091) (split panel held that school district violated state RFRA in requiring kindergarten child to cut hair)

Yankton Sioux Tribe v. Scott Podhradsky (8th Cir. 08-01441) (panel decision holding that certain trust lands located within reservation boundaries are "Indian country")

5. Lower Court Cases

Oneida Nation of New York v. Oneida County, 617 F.3d 114 (2nd Cir. 2010) (panel decision dismissing all of the Oneida land claims, following the *Sherrill* reasoning)

City of New York v. Golden Feather Smoke Shop, Inc. 597 F.3d 115 (2nd Cir. 2010)(city could obtain a preliminary injunction under the CCTA without showing irreparable harm, but questions needed to be certified to the New York Court of Appeals to resolve the issue of whether the provisions of the tax code imposing a tax on cigarettes and setting up a tax-exempt coupon program for cigarette sales on reservation land imposed a tax on cigarettes sold on reservations when some or all of the cigarettes might be sold to nonmembers).

Menominee Tribal Enters. v. Solis, 601 F.3d 669 (7th Cir. 2010)(tribe was not exempt from OSHA regulations either through treaty or management plan)

Nebraska ex rel. Bruning v. Salazar, __ F.3d __ (8th Cir., Oct. 19, 2010) (remanding to the National Indian Gaming Commission the question of whether certain lands on the Missouri River are "Indian lands" on which the Ponca Tribe is eligible to commence gaming operations)

Grand River Enterprises Six Nations, Ltd. v. Beebe, 574 F.3d 929 (8th Cir. 2009)(tobacco distributor's attempt to claim an Arkansas statute dealing with tobacco companies who choose not to participate in the master settlement agreement was preempted by the Sherman Act, violated the Commerce Clause, Equal Protection clause, substantive or procedural due process and burdened the company's free speech rights failed on all counts).

Attorney's Process and Investigative Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927 (8th Cir., 2010) (the invasion of a tribal court casino by a private party fulfills the Montana II exception and the resulting torts are subject to tribal court jurisdiction; however, the question of whether the conversion of tribal funds claim falls under Montana I for tribal court jurisdiction is unclear).

Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 606 F.3d 895 (8th Cir. 2010)(interpreting their holding in *Podhradsky*, the 8th Circuit held that land within the exterior boundaries of the 1858 Reservation that was became allotted lands sold to non-Indians was not reservation land, and found the Army Corps of Engineers did not violate the Water Resources Development Act when it transferred the land to the state.)

Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior, 608 F.3d 592 (9th Cir., 2010)(the tribe, along with two environmental groups, sued the government over the development of a gold mine, arguing it violated the National Environmental Policy Act, the National Historic Preservation Act and the Federal Land Policy and Management Act. The 9th Circuit held for the government on the NHPA and FLPMA claims, but reversed and remanded on one of the NEPA claims.)

U.S. v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir., 2010)(the Court held that the Wenatchi Constituent Tribe shares joint fishing rights at the Wenatshapam Fishery with the Yakama Indian Nation, and that both tribes' rights are non-exclusive.)

Bustamante v. Valenzuela (9th Cir.) (No. 10-0910); *Miranda v. Nielson*, (9th Cir.) (Nos. 10-15167, 10-15308) (challenges to the authority of the Pascua Yaqui tribal court to issue consecutive sentences of more than one year under ICRA; district courts split on the question)

U.S. v. Orr Water Ditch Co., 600 F.3d 1152 (9th Cir., 2010)(The Court reversed and remanded the district court decision, holding the Orr Ditch Decree forbids groundwater allocations that adversely affect the Tribe's decreed rights to water flows in the river, and the federal district court has jurisdiction to hear the case.)

U.S. v. Maggi, 598 F.3d 1073 (9th Cir., 2010)(In a conviction under the Major Crimes Act, the Court found that a defendant who is a member of a non-federally recognized tribe and a defendant who is 1/64 from a federally recognized tribe are not Indians under the Act.)(TurtleTalk analysis: The real question here is whether the government thinks this is the

right vehicle to test the Ninth Circuit on the means by which it defines "Indian" under the Major Crimes Act. I'd say definitely not Mann (with no Indian blood from a federally recognized tribe), but maybe Maggi (still only 1/64 blood from a federally recognized tribe). I bet they wait for another case (assuming they want one at all).)

Upper Skagit Indian Tribe v. Washington, 590 F.3d 1020 (9th Cir., 2010)(The Court found that the Suquamish Tribe did not have a treaty fishing right to Saratoga Passage and Skagit Bay.)

Muscogee (Creek) Nation v. Oklahoma Tax Commission, 611 F.3d 1222 (10th Cir. 2010)(Eleventh amendment bars claims to a state tax commission, though not necessarily certain claims against individual tax commissioners; an Indian tribe cannot bring claims under §1983 since they are not considered a "person" and the Indian Commerce Clause does not bar a state from enforcing cigarette tax laws outside of Indian Country).

Hydro Resources, Inc. v. U.S. E.P.A., 608 F.3d 1131 (10th Cir. 2010) (holding that certain Navajo lands in Utah were not "dependent Indian communities" for purpose of Safe Drinking Water Act jurisdiction)

Iowa Tribe of Nebraska and Kansas v. Salazar, 607 F.3d 1225 (10th Cir. 2010)(claims against land held in trust for a tribe by the federal government fell under the Quiet Title Act, and as Congress has not waived sovereign immunity to QTA claims, the court lacked subject matter jurisdiction).

Burrell v. Armijo, 603 F.3d 825 (10th Cir., 2010)(holding that the Governor and Lt. Governor of the Santa Ana Pueblo were acting within the scope of their authority, and enjoyed tribal sovereign immunity from suit, when they promulgated a no-baling over night order and when they attempted to negotiate with non-Indian leaseholders to buyout their lease.)

Dobbs v. Anthem Blue Cross and Blue Shield, 600 F.3d 1275 (10th Cir., 2010))(holding that the amendment to ERISA's exception for government plans to include tribal governments applied retrospectively, though remand was warranted to determine whether the plan was a government plan under the amended definition).

Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Const. Co, 607 F.3d 1268 (11th Cir., 2010))(bringing a suit in federal court for the enforcement of a tribal court judgment is not a federal question, and as such, there is no federal jurisdiction to hear the case).

Menominee Tribe of Wisconsin v. United States, 614 F.3d 519 (D.C. Cir., 2010)(The court held that the six year statute of limitations under the Contract Dispute Act is not jurisdictional, and as such can be subject to equitable tolling. In addition, laches does not apply when the claim does not cause harm to the defendant party and *should not be applied in a motion to dismiss.*)

Butte County, Cal. v. Hogen, 613 F.3d 190 (D.C.Cir., 2010) (the Secretary's decision to take land into trust for the Mechoopda Indian Tribe was arbitrary and capricious because he did not provide a statement to the County opposing the decision with a satisfactory explanation and refused to consider opposing evidence submitted by the County).

Hoopa Valley Tribe v. U.S., 597 F.3d 1278 (Fed.Cir. 2010) (holding that the Hoopa tribe had no standing to challenge trust fund distributions under the Hoopa-Yurok Settlement Act)(Turtle Talk analysis of the District Court case: Classic prisoner's dilemma case. Hoopa, Yurok, and Karuk had been compressed together by the United States in the 19th century, and have been disputing the resources of the Hoopa Valley "square" for decades. Congress settled the thing in 1988, splitting the resources, on the condition that each party would waive the right to continue to sue. Hoopa waived its rights and received its share. Yurok did not, and sued, and lost. But it looks like they still get the money. Odd case.)

Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp., 677 F. Supp. 2d 1056 (E.D. Wis., 2010)(contract between bank and tribe was an unapproved management contract, and as such, the tribe was protected by sovereign immunity; pending in the Seventh Circuit, oral argument on Oct. 20, 2010. Oral arguments in the case were held on October 21st, 2010. A link to the audio is available at www.turtletalk.wordpress.com)(Turtle Talk analysis: Pretty incredible case. Wells Fargo, alleging financial improprieties by the EDC relating to an indentured trust, sought an order from the court appointing a receiver for the EDC. The EDC defended on grounds of sovereign immunity and that the trust had not been approved by the NIGC, apparently prevailing on the latter theory.)

Choctaw Nation of Oklahoma v. Oklahoma, __ F.Supp.2d __, 2010 WL 2802159 (W.D.Okla., 2010)(when an arbitration award agrees that the jurisdiction over all tribal-state gaming Compact based tort claims is properly in tribal forums, the state must honor the arbitration award and is subject to an injunction to prevent the state from trying to exercise jurisdiction over these claims in the future)