

# The Burger Court Opinion Writing Database

## *Merrion v. Jicarilla Apache Tribe*

455 U.S. 130 (1982)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

MEMBERS OF  
THE CHIEF JUSTICE

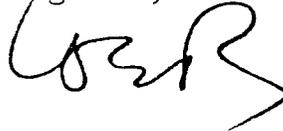
June 5, 1981

(80-11 - Merrion v. Jicarilla Apache Tribe  
(  
(80-15 - Amoco Production Co. v. Jicarilla Apache Tribe

Dear John:

I can join an opinion along the lines of your  
June 1 memorandum.

Regards,



Justice Stevens

Copies to the Conference

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Supreme Court of the United States  
Memorandum

80-11

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 7, 1981

RE: Nos. 80-11 & 15 Merrion; Amoco Prod. Co. v.  
Jicarilla Apache Tribe

Dear Thurgood:

You, Byron and I are in dissent in the above. Would you care to take the dissent. It seems to me that it's related to the issues you'll be dealing with in the Court opinion Commonwealth Edison v. Montana.

Sincerely,

*Bill*

Mr. Justice Marshall

cc: Mr. Justice White

CC 15-  
84

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 2, 1981

RE: Nos. 80-11 & 15 Merrion; Amoco Prod. Co. v.  
Jicarilla Apache Tribe

Dear John:

I'll await the dissent.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 26, 1981

RE: Nos. 80-11 and 15 Merrion & Amoco Productions Co.  
v. Jicarilla Apache Tribe

Dear Thurgood:

Since your opinion reflects my view and conference vote I'll be happy to join your memorandum when it is converted into an opinion.

Sincerely,

*Bill*

Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 1, 1981

Re: 80-11; 80-15 - Amoco Production Co. v.  
Jicarilla Apache Tribe, etc.

Dear John:

I took no part in the consideration or  
decision of these cases.

Sincerely yours,

P.S.  
/

Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 3, 1981

Re: 80-11 and 80-15 -  
Merrion v. Jicarilla Apache Tribe; and  
Amoco Production Co. v. Jicarilla Apache Tribe

Dear John,

I shall await the dissent in this  
case.

Sincerely yours,

Justice Stevens

Copies to the Conference

cpm

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 26, 1981

Re: Nos 80-11 and 80-15 - Merrion and Amoco  
Productions Co. v. Jicarilla Apache Tribe

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Dear John:

With one reservation of some substance about which I shall chat with you, I could make a fifth vote for Part II of your memorandum, i.e., that an Indian Tribe's power to tax non-Indians engaged in activities or transactions on tribal land is derived from the Tribe's power to exclude. Nevertheless, for the reasons stated in Parts I-B and II-B of Thurgood's memorandum and without expressing agreement with any other parts of his opinion, I would affirm the judgment below.

If there are not five for your Part II, I would affirm but only assume that you are correct in that Part.

Sincerely yours,



Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 7, 1981

Re: Nos. 80-11 & 15 - Merrion; Amoco Prod. Co. v.  
Jicarilla Apache Tribe

Dear Bill:

I will try my hand at a dissent in this case.

Sincerely,



T.M.

Justice Brennan

cc: Justice White

25 JUN 1981

80-11; 80-15 - Amoco Production Co v. Jicarilla Apache Tribe;  
Merrion v. Jicarilla Apache Tribe

MEMORANDUM OF JUSTICE MARSHALL

The boundaries of Indian land and the scope of Indian sovereignty often are disputed by those seeking for themselves the benefits of resources within Indian dominion. JUSTICE STEVENS properly emphasizes the breadth of authority enjoyed by each Indian tribe to govern its own affairs, and to protect tribe members and their land through the power to tax members and nonmembers doing business on tribal lands. Memorandum of JUSTICE STEVENS, at 17-18, 19-20.<sup>1</sup> He concludes, however, that the Jicarilla Apache Tribe may not exercise its sovereign power to tax petitioners, who lease tribal lands for the purpose of mining the resources therein. This conclusion rests on the novel notion that an Indian Tribe's sovereign power to tax nonmembers engaging in economic activity on its reservation may lapse in the absence of contractual terms reaffirming that power or particularized notice to and acceptance by persons subject to it. I cannot agree that the Tribe's power to tax is contingent on the expectations of private parties. Instead, I am convinced that the Tribe retained the power to impose the severance taxes involved here, and I agree with the Court of Appeals for the

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 6, 1981

Re: No. 80-11 - Merrion v. Jicarilla Apache Tribe  
No. 80-15 - Amoco Production Co. v. Jicarilla Apache Tribe

Dear Lewis:

You and I stand alone as the swing votes for the judgment in this case. May I try to write something that sets forth my views? I feel the Commonwealth Edison case is the more vital one, and I shall regard that as the primary writing.

Sincerely,

*Larry*

Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 17, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-11 - Merrion v. Jicarilla Apache Tribe  
No. 80-15 - Amoco Production Company v.  
Jicarilla Apache Tribe

Because I agreed with Thurgood at Conference that the Jicarilla possess the sovereign power to levy the challenged severance tax, I shall await his dissent on this point. As my dissent in Commonwealth Edison indicates, however, Thurgood and I are not in agreement on the Commerce Clause issue presented in both of these cases. I expect, therefore, that I shall write a short opinion explaining my view that Jicarilla should be remanded to determine whether the tax was "fairly related" within the meaning of the fourth-prong of the Complete Auto Transit test.

HAB.

7/11

June 26, 1981

Re: No. 80-11 - Merrion v. Jicarilla Apache Tribe  
No. 80-15 - Amoco Production Company v.  
Jicarilla Apache Tribe

Dear John:

I have a suggestion that I know is gratuitous, but I offer it for your consideration. On page 25 of your opinion you refer to Judge Sanborn and his opinion in Buster v. Wright. My suggestion is that he be referred to as Judge Walter H. Sanborn. There were two Sanborns, as you know, on the Eighth Circuit, first cousins, but a generation removed. Their periods of service overlapped a little. Walter was the author of many of the Eighth Circuit's Indian cases. He deserves identification, and I know that John B. Sanborn, for whom I clerked and whom I revered, would like it that way.

Sincerely,

HAB

Mr. Justice Stevens

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 26 1987

Recirculated: \_\_\_\_\_

No. 80-11 - Merrion v. Jicarilla Apache Tribe  
No. 80-15 - Amoco Production Co. v. Jicarilla Apache Tribe

JUSTICE BLACKMUN, dissenting.

I

For the reasons stated by JUSTICE MARSHALL, I agree that respondent Jicarilla Apache Tribe retained the sovereign power to impose the severance tax at issue here, and that its power has not been divested by subsequent legislation.

I do not agree, however, that the Indian Commerce Clause insulates this tax from challenge under the Interstate Commerce Clause. While it is true that the former Clause was designed to shield Indian tribes from state and local interference, it does not follow that the negative implications of the latter Clause do not place any limitations on the actions of Indian Tribes; the Indian Commerce Clause cannot be used as a sword to carve out what essentially would be foreign nations within the United States.

But here, as JUSTICE MARSHALL notes, Congress explicitly has provided a scheme whereby any Indian tax must secure federal approval, and the tax challenged in this case has been approved under that scheme. A court acts as the "final arbiter" under the Commerce Clause only when Congress has not acted. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 454 (1979).

April 6, 1981

80-11 Merrion v. Jicarilla Apache Tribe  
80-15 Amoco v. Jicarilla Apache Tribe  
80-581 Commonwealth Edison v. Montana

Dear Harry:

I am happy for you to write for us in the above cases.

I agree that they are important, particularly Commonwealth Edison. It is especially appropriate for you - as the author of Complete Auto - to write.

Sincerely,

Mr. Justice Blackmun

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 3, 1981

80-11 Amoco Prod. Co. v. Jicarilla Apache

Dear John:

In accord with my vote at Conference, I will await Harry's dissent in this case and in Commonwealth Edison v. Montana.

I will say that you have written an excellent opinion and on a theory that - if accepted - would make it unnecessary to reach the Commerce Clause issue.

Sincerely,



Mr. Justice Stevens

lfp/ss

cc: The Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 27, 1981

80-11 Merrion v. Jicarilla Apache Tribe  
80-15 Amoco v. Jicarilla Apache Tribe

Dear Harry:

Please add my name to your dissenting opinion in  
the above cases.

Sincerely,

LFP

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 1, 1981

Re: Nos. 80-11 & 80-15 Amoco Production Co. v.  
Jicarilla Apache Tribe; Merrion v. Jicarilla  
Apache Tribe

Dear John:

Your opinion of June 1st, while as you note in your cover letter is somewhat different than the reasoning of the Conference discussion, seems persuasive to me and I am prepared to join it. I wonder if you could cite somewhere in the opinion Byron's Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), and Thurgood's McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). They are more or less the "flip side" of this case, but since they are fairly recent opinions dealing with state authority to tax income of a tribe or individual Indians residing on a reservation I think they are consistent with your analysis and are more tax-related than Fisher v. District Court, 424 U.S. 382 (1976), which you cite on p. 17 of your draft.

Sincerely,



Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 1, 1981

MEMORANDUM TO THE CONFERENCE

Re: 80-11; 80-15 - Amoco Production v.  
Jicarilla Apache Tribe; Merrion v.  
Jicarilla Apache Tribe

My study of what has turned out to be an especially interesting assignment has persuaded me that this case should be decided on a quite different rationale than seemed correct at the time of our conference. Accordingly, with apologies for taking so much time with this important case, I submit herewith a memorandum that will speak for itself and that I recommend as the basis for a Court opinion.

Respectfully,



Attachment

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 1 '81

80-11; 80-15 - Amoco Production Co. v. Jicarilla Apache Tribe;

Merrion v. Jicarilla Apache Tribe

MEMORANDUM OF JUSTICE STEVENS

The Indian tribes that occupied North America before Europeans settled the continent were unquestionably sovereigns. They ruled themselves and they exercised dominion over the lands that nourished them. Many of those tribes, and some attributes of their sovereignty, survive today. This Court, since its earliest days, has had the task of identifying those inherent sovereign powers that survived the creation of a new nation and the introduction of an entirely new system of laws applicable to both Indians and non-Indians. In this case we must decide whether one such surviving attribute of tribal sovereignty is the power to lease tribal property to a non-member and, after the lease is signed, to impose a tax on the exercise of the rights granted by the lease.

The lessor in this case is the Jicarilla Apache Tribe. The 21 petitioner-lessees in these two consolidated cases are extracting oil and gas from tribal lands pursuant to long-term leases, some of which have been in effect since 1953. In 1976

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 3, 1981

Re: 80-11; 80-15 - Amoco Production Co.  
v. Jicarilla Apache Tribe

Dear Bill:

Thanks for you letter. I think your suggestion is a good one and I will insert an appropriate footnote citing Mescalero and McClanahan.

Respectfully,



Justice Rehnquist

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

77, 79, 13, 28, 34

+ Stylistic changes

From: Mr. Justice Stevens.

Circulated: \_\_\_\_\_

Recirculated: Jan 1981

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 80-11 AND 80-15

J. Gregory Merrion and Robert L.  
Bayless, etc., et al., Petitioners,  
80-11

v.

Jicarilla Apache Tribe et al.

Amoco Production Company and  
Marathon Oil Company,  
Petitioners,  
80-15

v.

Jicarilla Apache Tribe et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the  
Tenth Circuit.

[June —, 1981]

Memorandum of JUSTICE STEVENS.

The Indian tribes that occupied North America before Europeans settled the continent were unquestionably sovereigns. They ruled themselves and they exercised dominion over the lands that nourished them. Many of those tribes, and some attributes of their sovereignty, survive today. This Court, since its earliest days, has had the task of identifying those inherent sovereign powers that survived the creation of a new Nation and the introduction of an entirely new system of laws applicable to both Indians and non-Indians. In this case we must decide whether one such surviving attribute of tribal sovereignty is the power to lease tribal property to a nonmember and, after the lease is signed, to impose a tax on the exercise of the rights granted by the lease.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 30, 1981

MEMORANDUM TO THE CONFERENCE

Re: 80-11; 80-15 - Amoco Production v.  
Jicarilla Apache Tribe; Merrion v.  
Jicarilla Apache Tribe

Although there is a slight possibility that you may not wish to feast on this fare immediately, you may want to have the latest version of my memorandum in your files for future reference. The changes from the last circulation have been marked.

Respectfully,



Attachment

PP. 24, 27, 32, 33, 35-37

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: 11 2 81

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 80-11 AND 80-15

J. Gregory Merrion and Robert L.  
Bayless, etc., et al., Petitioners,  
80-11 v.

Jicarilla Apache Tribe et al.

Amoco Production Company and  
Marathon Oil Company,  
Petitioners,

80-15 v.

Jicarilla Apache Tribe et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the  
Tenth Circuit.

[June —, 1981]

Memorandum of JUSTICE STEVENS.

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