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

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1982

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

Dear John:

I join.

Regards,

WEB

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 1, 1981

RE: Nos. 80-11 and 15 Merrion, et al. & Amoco Production Company and Marathon Oil Co. v. Jicarilla Apache, etc.

Dear Thurgood:

I agree.

Sincerely,

Bill

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 8, 1981

Re: 80-11 and 80-15:

Merrion and Bayless v. Jicarilla Apache Tribe

Amoco Prod. Co., etc. v. Jicarilla Apache Tribe

Dear Thurgood,

I am awaiting John's dissent.

Sincerely yours,

Justice Marshall

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1982

Re: 80-11 - Merrion v. Jicarilla Apache Tribe

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

Dear Thurgood,

Although I was with you only in part last term, I have reconsidered and now join your proposed opinion for the Court.

Sincerely,

Justice Marshall
Copies to the Conference
bkh

P. 25

1st 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 INDIAN TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[November ——, 1981]

JUSTICE MARSHALL delivered the opinion of the Court.

Pursuant to long-term leases with the Jicarilla Apache Tribe, petitioners, 21 lessees, extract and produce oil and gas from the Tribe's reservation lands. In these two consolidated cases, petitioners challenge an ordinance enacted by the Tribe imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." See Oil and Gas Severance Tax No. 77–0–02, App. 38. We granted certiorari to determine whether the Tribe has the authority to impose this tax, and, if so, whether the tax imposed by the Tribe violates the Commerce Clause.

I

The Jicarilla Apache Tribe resides on a reservation in northwestern New Mexico. Established by Executive

STYLISTIC CHANGES THROUGHOUT
+ other changes
P.P. 9, 10, 13, 15, 16, 17

5 JAN 1982

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 INDIAN TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January ——, 1981]

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I

The Jicarilla Apache Tribe resides on a reservation in northwestern New Mexico. Established by Executive

3rd 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 INDIAN TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January ——, 1982]

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I

The Jicarilla Apache Tribe resides on a reservation in northwestern New Mexico. Established by Executive

19 JAN 1982

4th 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 INDIAN TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January ——, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

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I

The Jicarilla Apache Tribe resides on a reservation in northwestern New Mexico. Established by Executive

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 11, 1982

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

Dear Lewis:

I appreciate your letting me see your proposed letter to Thurgood. I enclose a copy of what I propose to write him. I shall not release it until I have your approval. Would you let me know?

Sincerely,

Harry

Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 11, 1982

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

Dear Thurgood:

Lewis joined me last Term in a proposed short "dissent" concerning (1) the Indian Commerce Clause/Interstate Commerce Clause relationship and (2) the satisfaction of the fourth prong of Complete Auto Transit.

In your presently circulating majority opinion, you have accommodated the first of these two points, and I am content as to that feature. Because of the second point, however, I am concerned with the last two sentences of your footnote 23 and would prefer to have at least those two sentences eliminated.

Lewis Powell is writing separately with four suggestions. One of these has to do with footnote 23. If you see your way clear to adopt his first two suggestions, you have my vote. You also may wish to go along with his last two suggestions. I have no objections to them, but you have my vote whether or not you adopt them.

Sincerely,

HAB

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 198

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

Dear Thurgood:

Please join me.

Sincerely,

HAB

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 3, 1981

80-11 and 80-15 Jicarilla Apache Tribe Cases

Dear Chief:

One of the parties in these cases is Continental Oil Company (Conoco, Inc.). Among the subsidiaries of Conoco listed in the special appendix is Hudson Bay Oil & Gas Company, Ltd., and also listed is Cansulex, Ltd., a subsidiary of Hudson Bay.

We own, and trusts from which income is derived also own, shares of Dome Petroleum, Ltd., another Canadian company. I was advised during the summer that Dome acquired a majority interest in Hudson Bay. My understanding is that this acquisition had not occured when I participated in these cases last Term.

The present situation, however, presents the following question: although my family has no interest of which I am aware in any of the parties to this litigation, we do have an interest in Dome Petroleum which in turn now owns a controlling interest in Hudson Bay. Does this present a situation for disqualification?

Stating the question generally, should one disqualify where the only interest is in a subsidiary of a party to litigation where the subsidiary itself is not a party, and there is no indication that the outcome of the litigation will affect the subsidiary?

We required the listing of subsidiaries, as I understand it, for another purpose. If a subsidiary itself is the party in a case, and a Justice owns an interest in a parent, there is - or at least may be - a reason to disqualify. Where, as here, the only party is the parent and the Justice owns an interest only in a subsidiary, I would think the outcome of the case rarely would affect the subsidiary.

The question with respect to subsidiaries in the context of the present cases has not previously arisen for me (at least to my knowledge). Yet, we also have two Mobil

Oil Corp. cases on the list for tomorrow, and in checking again its subsidiaries I find that it lists as a subsidiary in which it owns "a five percent or greater interest", the Canadian company mentioned above called Cansulex. Hudson Bay has some interest (apparently more than five percent) in Cansulex and - as noted above - the company in which we do have an interest, Dome Petroleum, now controls Hudson Bay. What a tangle!

In view of the conjectural and remote relationship, it would never have occurred to me to disqualify in these situations were it not for the continuing efforts of Mr. Cranberg to embarrass the Court and me. I therefore would appreciate the views of the Conference. Perhaps we could agree that where the subsidiary itself is not a party, and the papers do not indicate that the outcome of the case would affect the subsidiary in any significant way, that disqualification is unnecessary.

I regret having to impose on you for advice!

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 11, 1982

80-11 and 80-15 Jicarilla Apache Cases

Dear Thurgood:

After reviewing your opinion again, I will be happy to join all of it if you could accept changes along the lines indicated below.

1. In the introduction to Part III, you state the position of the SG with respect to the Commerce Clause. On page 21, you refrain from adopting the SG's views, but you commence the first full paragraph by stating that "While these arguments are not without force . . ."

In my view, the SG's position is highly doubtful. In commercial matters, tribes resemble states more closely than they do foreign nations. It is unnecessary to imply any approval of the SG's position. Could you not make it clear that we find it unnecessary to consider in this case the merits of the SG's arguments?

2. I have a somewhat similar problem with footnote 23 (p. 24). In the text on p. 24 you state that "petitioners do not challenge the tax on the ground that the amount of the tax is not fairly related to the services provided by the tribe". The first sentence of n. 23 adds that the Court of Appeals, for this reason, found no basis in the record to find that "the tax was not fairly related to the services provided by the tribe." If n. 23 were concluded with this sentence, I would have no difficulty with it. The remainder of n. 23, however, is in effect a finding that "the tax is reasonably related to the extent of the taxpayer's activities within the taxing jurisdiction". As it is unnecessary to make such a holding in view of the record, could you not follow the example of the Court of Appeals?

3. The second paragraph of footnote 26 (p. 26) suggests in effect that the multiple tax burden doctrine of the Commerce Clause can never apply to multiple taxation by states and Indian tribes. Again, it is unnecessary to say

this. I know of no decision of this Court that has expressly gone so far as to say that there are no limitations to multiple taxation by a tribe, a state in which the tribe is located, and the federal government.

I enclose a suggested revision of this second paragraph for your consideration.

4. Finally, I note that Reeves and Hughes v. Alexandria Scrap are cited (last sentence commencing at the bottom of p. 25) for the view that this Court imposes no "Commerce Clause limitations on the proprietary activities of the states". Justices Brennan, White and Stevens joined me in dissent in Reeves, and I think the Court's decision there properly could be limited to its facts. In any event my opinion in Alexandria Scrap was based on the fact that Maryland had created a market for hulks by paying a subsidy for their retrieval in furtherance of the state's special interest. I do not view Hughes as supporting a general rule that the Commerce Clause is inapplicable whenever the state is acting in a proprietary capacity. I would be content, however, if you simply omitted the two final sentences in Part III-B, beginning with the words "In order to reach . . ."

* * *

Although I have written at some length to state my concerns, I think you could meet all of them without altering the basic analysis or force of your generally fine opinion.

Sincerely,

L Lewis

Justice Marshall

lfp/ss

cc: The Conference

lfp/ss 01/11/82 Jicarilla Apache Cases

Suggested revision of the second paragraph of note 26:

This rule can have no bearing here, however, for there can be no claim that the Tribe seeks to tax any more of petitioners' mining activity than the portion occurring within Tribal jurisdiction. In the absence of an assertion that the amount of the Tribal taxation is not fairly related to the services provided by the Tribe, see note 23 and accompanying text supra, the risk of excessive multiple taxation could arise only if a State attempted to levy a disproportionately large tax on the activity in question. This law suit, of course, does not involve a challenge to excessive State taxation, and we intimate no opinion regarding State taxation that might create a multiple burden in this case. We do note that a State tax could offend the Commerce Clause's multiple interstate taxation proscription only in the absence of congressional authorization of such a state tax, e.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 421-427 (1946), and that petitioners contend that here the State of New Mexico has taxed the production of oil and gas from the Tribe's Reservation "[p]ursuant to authority granted in 1927 (25 U.S.C. § 398c)) . . . ." Brief for Petitioners in No. 80-15, at 3.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 15, 1982

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

Dear Thurgood:

Please join me.

Sincerely,

L. Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 21, 1981

Re: Nos. 80-11 & 80-15 Merrion v. Jicarilla Apache Trib

Dear John:

Please join me in your dissent.

Sincerely,

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 1, 1981

Re: 80-11; 80-15 - Merrion et al. v. Jicarilla Apache Tribe

Dear Thurgood:

It will come as no great surprise that I intend to circulate a dissent. I expect to concentrate on Parts II-A and II-B (pages 5-15) of your circulation.

It seems to me that your discussion in Part II-A does not adequately confront the critical distinction between an Indian tribe's power over its own members, which is a good deal greater than the power possessed by many sovereigns, and its much more limited power over nonmembers. And in Part II-B, I do not believe you adequately explain how a tribe can grant a lessee access to the reservation and the privilege of extracting minerals and thereafter impose a tax based on a power to exclude which has been surrendered by the terms of the lease. In all events, I shall circulate my dissent as soon as I can.

Respectfully,

JPS

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 3, 1981

Re: 80-11 and 80-15 - Jicarilla Apache Tribe Cases

Dear Lewis:

In your letter to the Chief on the subject of disqualification, you indicated that you would welcome the views of the Conference. My own view is that the situation you describe is not disqualifying. When we discussed the amendment to the rule, I took the position that we should not even require the listing of subsidiaries. I believe it was Potter who felt that subsidiaries should be listed and the rest of us deferred largely to his judgment in the matter.

In all events, I would think the subsidiary situation in both this case and in the Mobil cases is not a sufficient reason for disqualification.

Respectfully,

JPS

Justice Powell

Copies to the Conference

From: Justice Stevens

Circulated: DEC 19

Recirculated: _____

80-11 - Mérrion v. Jicarilla Apache Tribe et al.

80-15 - Amoco Production Co. v. Jicarilla Apache Tribe et al.

JUSTICE STEVENS, dissenting.

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 performing that task, this Court has guarded carefully the unique status of Indian tribes within this Nation. Over its own members, an Indian tribe's sovereign powers are virtually unlimited; the incorporation of the tribe into the United States has done little to change internal tribal relations. In becoming part of the United States, however, the tribes yielded their status as independent nations; Indians and non-Indians alike answered to the authority of a new Nation, organized under a new

pp. 21, 32

Justice Stevens

Circulated: DEC 22

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 INDIAN TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[December ——, 1981]

JUSTICE STEVENS, dissenting.

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Pg. 1, 25, 27, 28

2nd DRAFT

Circulated: JAN

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 INDIAN TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January ——, 1982]

JUSTICE STEVENS, with whom JUSTICE REHNQUIST joins, dissenting.

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.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 15, 1982

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

Dear Thurgood,

Please join me in the third draft of your opinion in the referenced cases.

Sincerely,

Justice Marshall

Copies to the Conference