

Authority Concerning Environmental Protection Regulations

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In April, the U.S. Supreme Court rejected an attempt to overturn an important D.C. Circuit Court of Appeals decision supporting Tribal authority to develop and promulgate environmental protection regulations. That case, *Arizona Public Service Co. v. EPA*, 2000 WL 493047 (D.C. Cir.), was the subject of Special Environmental Counsel Memo 2000-1. Without comment, on April 16, 2001, the U.S. Supreme Court issued an order denying *certiorari* (discretionary review) of the case, thus precluding any further appeals of the case and leaving the Court of Appeals opinion as important precedent in federal Indian environmental law.

We are pleased with this result as it sets aside, at least for now, the challenge which placed at risk the role of Tribes, as sovereign governments, to manage their own environmental programs and ensure protection of Tribal natural resources consistent with Tribal cultural, spiritual, health, and business development goals. EPA and the Department of Justice Solicitor General, as well as a number of Tribes, opposed U.S. Supreme Court review of the D.C. Circuit decision. Had the case gone up for U.S. Supreme Court review, Tribal participation in the Supreme Court case in the form of *amicus curiae* briefs and Tribal resolutions in support of the Solicitor General's position would have been essential to protect Tribal interests.

In *Arizona Public Service Co. v. EPA*, the Court of Appeals for the District of Columbia Circuit upheld Congress's express delegation, under the Clean Air Act, of regulatory and enforcement authority to Tribes and the subsequent EPA rulemaking implementing that delegation. The specific rulemaking upheld by the Court was the EPA Tribal Authority Rule (TAR) which outlined the process for EPA administration of Tribal Clean Air Act programs (Fed. Reg. Feb. 16, 1998). The *Arizona Public Service Co.* decision rejected the assertion that EPA's regulations gave Tribes more jurisdictional and regulatory authority than Congress authorized. Specifically, it was alleged that Tribes do not have authority to regulate air pollution sources if such sources are located outside reservation boundaries on trust or Pueblo lands, or on fee land within reservation boundaries. The Court of Appeals, however, rejected these assertions and found in favor of EPA. The Supreme Court's decision not to review the case maintains the Tribe's authority to effectively regulate air pollution sources and preserve the Reservation Environment.

For additional information on the status of this case, contact Richard Du Bey at (206) 682-3333; facsimile (206) 340-8856; or e-mail rdubey@scblaw.com. For more information about Mr. Du Bey, click here: [Richard Du Bey](#)