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September 8, 2000

BC00/4600

Ms. Jayne Harkins, BC00-4600
Lower Colorado Regional Office
Bureau of Reclamation
P.O. Box 61470
Boulder City, Nevada 89006-1470

Re: Comments on the Draft Environmental Impact Statement for Lower Colorado River Interim Surplus Criteria (ISC), 65 Fed.Reg. 42028 (July 7, 2000) and 65 Fed.Reg. 48531 (August 8, 2000)

Dear Ms. Harkins:

These comments are intended to supplement my oral comments given at the Public Hearing on this subject on August 24, 2000 in Phoenix, Arizona, which oral comments are incorporated by reference. We also endorse and support the comments that have been filed by the Colorado River Energy Distributors' Association and the oral comments and written comments provided by the Arizona Power Authority Commission, the Arizona Department of Water Resources and the Central Arizona Water Conservation District.

These comments will deal with four subjects; the comment period and late comments, the preferred alternative, power impacts, and the extraterritorial application of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

COMMENT PERIOD

1 At the hearing in Phoenix, there was some discussion about the need for acquisition of additional information and additional comments. After the original notice of availability and the availability of the Draft Environmental Impact Statement (DEIS), the seven Basin states proposed an alternative not included in the DEIS. That alternative was published in the Federal Register on August 8, 2000 and has since undergone some additional modification. The question arose whether the Bureau of Reclamation (Reclamation) could accept additional comments and information after the close of the comment period on September 8, 2000. The simple answer to that question is yes. Commenting is covered by the Council on Environmental Quality (CEQ) regulations

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1: Consultation and coordination is an ongoing process during the preparation of an EIS. Reclamation is aware of the regulations and guidance you cite, and makes every reasonable effort to include and respond to late comments from regulatory agencies. To the extent possible, Reclamation also includes other substantive comments received after the close of the public comment period for the DEIS.

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at 40 C.F.R., Part 1503. While the regulations in that part do not specifically address the question of comments received after the expiration of a comment period set under 40 C.F.R. § 1501.8, the regulations do anticipate that all substantive comments received will be attached to the Final Environmental Impact Statement (FEIS) and those meriting response will be included in the responses in the FEIS. The clear implication is that substance will control over form and that information received prior to the completion of the FEIS should be included in the process. Additionally, the Department of Interior Manual, at 516 DM 4.17, says

> "B. When other commenters are late, their comments should be included in the final EIS to the extent practicable."

And the Bureau of Reclamation Handbook, paragraph 8.15.2.4 contains a similar requirement.

Thus, additional information and comments can be obtained by Reclamation for the FEIS. It would be important to have that material in writing so it can be included with the FEIS, as required by 40 C.F.R. § 1503.4(b).

PREFERRED ALTERNATIVE

2

In the FEIS, Reclamation must designate a preferred alternative. 40 C.F.R. § 1502.14(e). That should be the seven-state alternative articulated in the August 8, 2000 Federal Register notice as further modified and discussed at the Phoenix hearing and, we presume, the other hearings. NEPA is a planning process and the EIS a planning analysis document focused on environmental consequences to a proposed action and reasonable alternatives. As such, it is perfectly positioned to make the sort of adjustments necessary that are called for here in order for the seven-state alternative to be the preferred alternative in the final EIS. See Answer to Question 29b., 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations. Indeed, the dialogue necessary to refine the seven-state alternative as the preferred alternative enhances the quality of the NEPA process by clarifying the proposed action and allowing the environmental analysis of it to be more discrete and comprehensive.

2: The preferred alternative in this FEIS is derived from the Seven State Proposal. Reclamation did not structure the preferred alternative precisely as described in that draft proposal, but made some changes for consistency with the purpose and need for the proposed action, Reclamation policy and operational procedures.

POWER IMPACTS

3

Without belaboring comments you have already received and other comments you are receiving on this subject, from the Arizona Power Authority, the Colorado River Energy Distributors' Association and others, let me focus on the cure to the

3: Comment noted. Reclamation believes that the level of analysis for energy resources presented in the EIS appropriately identifies the potential effects of interim surplus criteria compared with baseline conditions.

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inadequacies of Section 3.10 on energy resources in Chapter 3 on Affected Environment and Environmental Consequences. You must agree that the oversimplified discussion in this section does not pass the pink-face test. This region of the country is no longer capacity rich nor is it in a surplus condition with regard to energy, especially in summer months. If such surpluses existed, the 13 merchant plants being built in Arizona, or at least planned, would not even be being discussed. Nor would power bills have tripled this summer in San Diego. To correct the deficiencies in impact analysis on customers of the affected hydropower resources and the total lack of analysis of reliability impacts, I suggested to you at the hearing and I will repeat the suggestion that you reach out to the Western Systems Coordinating Council, the Colorado River Energy Distributors' Association, the Arizona Power Authority and other power customer organizations, including ours, for information on impacts that can be incorporated in the final EIS. Others have already volunteered to assist and we do likewise. These impacts must be quantified because the EIS is totally devoid, as are all of the action proposals, of any discussion of compensating those who will lose benefits from lost hydropower production and are not in a position to enjoy any of the benefits of water supply in return during times of shortage. One cannot ignore the class of beneficiaries of the hydropower projects involved that have this single source of benefit from these multi-purpose hydropower projects, i.e., hydropower.

EXTRATERRITORIAL APPLICATION OF NEPA

I. It is inappropriate and unnecessary to include an analysis of impacts to the Mexican Delta in the ISC EIS.

A. There is a strong presumption against extraterritorial application of statutes.

4

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' ... This 'canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained.'" EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

"The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done... [This] would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."

4: The applicable guidance appears to be contrary to your comment. EO 12114, Environmental Effects Abroad of Major Federal Actions, 44 FR 1957, 1979 WL 25866 (Pres.) requires that Federal agencies "... consider the significant effects of their actions on the environment outside the U.S., its territories and possessions,..." Recent CEQ guidance for transboundary impacts, dated July 1,1997, appears consistent with the approach in the Executive Order.

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American Banana Co. v. United Fruit Co., 213 U.S. 347, 356, 357 (1909).

The presumption against extraterritorial application is expressed most clearly by the holding in Aramco, 499 U.S. 244 (1991). The Aramco Court applied the presumption to Title VII, concluding that the statute did not apply to employment discrimination by an American company against an American citizen that occurred beyond U.S. boundaries. Despite the argued evidence that Congress intended Title VII to apply extraterritorially (i.e., Congress' specific reference which exempted employers "with respect to the employment of aliens outside any State" 42 U.S.C. 2000e-1 (1988)), Chief Justice Rehnquist held that only a "clear statement" in the language of the statute would be sufficient to overcome the presumption. 499 U.S. at 258.

Congress subsequently amended Title VII to overcome the result in Aramco. See 42 U.S.C. 2000e(f) (1994); id. 2000e-1(c); and id. 2000e-1(b). However, this does nothing to the presumption as declared by Chief Justice Rehnquist. In fact, Congress' action in this instance highlights three of the six (see II.F., post) sound policy reasons for the presumption. They are (1) the presumption provides legislators with a clear rule which allows them to predict the application of their statutes; (2) "the commonsense notion that Congress generally legislates with domestic concerns in mind," (Smith v. United States, 507 U.S. 197, 204 (1993)); and (3) separation-of-powers concerns (i.e., determination of how to apply federal legislation is beyond the constitutional scope of the judicial branch).

Furthermore, the Supreme Court has recently applied the presumption against extraterritoriality not only to Title VII, but also to the Foreign Sovereign Immunities Act, the Federal Tort Claims Act, the Immigration and Nationality Act, and, in a concurring opinion, Justice Stevens applied it to the Endangered Species Act. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440-41 (1989); Smith v. United States, 507 U.S. 197, 203-04 (1993); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173-74 (1993); and Lujan v. Defenders of Wildlife, 504 U.S. 555, 585-89 (1992), respectively. In Smith, Chief Justice Rehnquist applied the presumption again noting that it requires "clear evidence of congressional intent." 507 U.S. at 204. Similarly, in Sale, the Court held that Acts of Congress "do not have extraterritorial application unless such an intent is clearly manifested." 509 U.S. at 188. Therefore, in order to rebut the presumption against extraterritoriality, the statute must reflect the clear intent of Congress to do so. Language subject to varied interpretation is not sufficient. Aramco, 499 U.S. 244, 266-78 (1991).