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yet chose not to in Section 7. As reasoned above, this absence of Congressional intent necessarily must yield to the presumption against extraterritorial application of statutes.

D. Fish and Wildlife Service's own regulations prevent extraterritorial application.

1. The 1986 changes in the regulations specifically limited application of ESA.

The scope of the ESA is expressed, in pertinent part, as follows:

"Section 7(a)(2) of the [ESA] requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species." (Emphasis added.) 50 C.F.R. § 402.01.

14

The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed. Reg. 4869 (1977)(initial regulations of the Fish and Wildlife Service ("F&WS") and the National Marine Fisheries Service ("NMFS")).

Conversely, in 1978 the F&WS and NMFS promulgated a joint regulation stating that the obligations imposed under 7(a)(2) extend abroad. However, almost immediately the Department of the Interior began to reexamine its position. Consequently, in 1983 a revised joint regulation, reinterpreting 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed (48 Fed.Reg. 29990) and in 1986, promulgated (51 Fed.Reg. 19926; 50 C.F.R. 402.01 (1991)).

That this restriction applies to effects as well as actions must follow for it would prove "illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad." Lujan, 504 U.S. 555, 588.

This analysis is confirmed by the concomitant restrictive language in the definition of "action", in pertinent part, as:

"All activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." (Emphasis added.) 50 C.F.R. § 402.02.

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2. Agency construction of the Act was clearly expressed in the 1986 rulemaking.

14: Comment noted.

15: Comment noted.

One need look no further than the F&WS explanation in its 1986 rulemaking for clear intent that the ESA's operative provisions are not to be applied extraterritorially.

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> "The 1978 rule extended the scope of section 7 beyond the territorial limits of the United States to the high seas and foreign countries. The proposed rule cut back the scope of section 7 to the United States, its territorial sea, and the outer continental shelf, because of the apparent domestic orientation of the consultation and exemption processes resulting from the Amendments, and because of the potential for interference with the sovereignty of foreign nations. Several commenters asserted that the rules should continue to have extraterritorial effect. The scope of these regulations has been enlarged to cover Federal actions on the high seas but has not been expanded to include foreign countries." 51 Fed.Reg. 19929-19930 (1986).

The F&WS has interpreted Congressional amendments to the ESA for over a decade as evincing an intent for domestic application. The F&WS is bound by its own longstanding administrative interpretation and so is Reclamation.

16

E. Using an analysis of extraterritorial impacts effectively applies § 7(a)(2) extraterritorially, which is unlawful.

Because Section 7(a)(2) does not demonstrate any, much less clear, Congressional intent concerning their foreign application, under the presumption against application of statutes, Section 7(a)(2) must be confined to application within the United States. Inserting the ESA analysis in the DEIS, Subsection 3.16.6, coupled with consultation with IBWC, Subsection 3.16.3, constitutes preparation of a de facto Biological Assessment under the ESA. Thus, this analysis of extraterritorial impacts is an impermissible application of the ESA.

16: Comment noted.

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F. Sound public policy demands that ESA application remain focused on impacts in the United States where, as here, a treaty covers the area in question.

There are six oft-cited reasons for the presumption against extraterritorial application. (1) The presumption provides legislators with a clear background 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, 507 U.S. 197, 204 (1993)); (3) Separation-of-powers concerns (i.e., the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the

17: Comment noted. Reclamation acknowledges there are various sound public policy perspectives on this issue. Reclamation has appropriately focused on its ESA compliance within the United States.

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institutional competence and constitutional prerogatives of the judiciary); (4) international law limitations on extraterritoriality, which Congress should have been assumed to observe; (5) consistency with domestic conflict-of-laws rules; and (6) the need to protect against unintended clashes between our laws and those of other nations which could result in international discord. See, Dodge, "Understanding the Presumption Against Extraterritoriality," 16 Berk. J. Int'l Law 85 (1998).

1. Treaty relations and relationships will be impacted even if water deliveries are not. [See I.C.1., supra.]

2. Hydrologic impact would most likely result if extraterritorial impacts colored the decision.

It is difficult to imagine how a decision-maker, let alone the preparers of the EIS, will not be influenced by impact analysis in the Mexican Delta. Even if water deliveries are not impacted, some hydrologic, water quality or other changes will result from merely weighing the information. To think otherwise is to defy common sense. Treaty relations will be affected. Section 3.16 should be deleted from the FEIS.

Thank you for the opportunity to comment on this important proposal.

Sincerely,

Robert S. Lynch
Asst. Secretary/Treasurer

RSL:psr
cc: Hon. Jane Dee Hull, Governor of Arizona
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IEDA Board of Directors
John Leshy, Solicitor, Department of the Interior
Rita Pearson, Director, Arizona Department of Water Resources
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George M. Caan, Director, Colorado River Commission of Nevada
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