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BROWER v. EVANS:
THE COURT'S EFFORTS TO PROTECT
DOLPHINS IN THE EASTERN TROPICAL
PACIFIC OCEAN

*Sarah H. McCready**

I. INTRODUCTION

The Secretary of Commerce (Secretary) erred when he issued, prior to receipt of substantiating research, an Initial Finding that a certain fishing technique did not harm dolphins.¹ The Secretary erroneously concluded that the mere lack of evidence (without research) was sufficient to substantiate his Initial Finding that there was no evidence that the fishing technique harmed dolphins.² The United States Court of Appeals for the Ninth Circuit, in its July 2001 decision *Brower v. Evans*,³ affirmed judgment in favor of plaintiff and set aside the Secretary's Initial Finding.⁴

The broad implication of the holding in *Brower v. Evans* is that the government must comply with congressional statutes even if such laws are contrary to international trade. The narrow holding of this case is to continue efforts to protect dolphins in the Eastern Tropical Pacific Ocean (ETP)⁵ even though such actions might conflict with international trade.⁶ The Secretary's support of a less protective standard to apply to dolphin safe tuna labels apparently applies most directly to international vessels. *Brower v. Evans* represents an international trade issue because United States vessels do not use fishing techniques that are harmful to dolphins.⁷

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1. *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir 2001).

2. *Id.*

3. *Id.*

4. *Id.* at 1071.

5. The ETP is an area which spans "between five and seven million square miles and extends from the southern Californian to the South American coastlines." *Id.* at 1060.

6. *Id.* at 1061-62.

7. *Id.* at 1061.

The Secretary's action is contrary to recent congressional acts that indicate a trend toward protecting the ETP dolphins from certain fishing practices, such as purse seine fishing. Such acts also indicate a growing awareness that fishing not only causes injuries and death to dolphins, but also causes physiological stress.⁸

This Casenote advocates for the court's conclusion that the Secretary's decision to allow more relaxed tuna labeling guidelines undermines the Administrative Procedures Act (APA) and congressional mandates designed to protect dolphins.⁹ From a policy standpoint, upholding the Secretary's decision will thwart efforts to protect ETP dolphins.

II. BACKGROUND

The ETP is home to the yellowfin tuna.¹⁰ Dolphins are often observed swimming immediately above tuna and consequently fishermen have used the presence of dolphins to locate tuna. Prior to 1959, tuna were caught with little destruction to the dolphins.¹¹ In 1959, "purse seine" nets began to be used to catch tuna.¹² Fishermen use explosives, helicopters and speed boats in order to drive the tuna, and also the dolphins, into a tight group so that they can be encircled with purse seine nets.¹³ The driving process, known as "dolphin setting" can last from twenty minutes to an hour.¹⁴ The

8. *Brower v. Daley*, 93 F. Supp. 2d 1071, 1077-78 (N.D.Cal., 2000). *aff'd*, 257 F.3d 1058 (9th Cir 2001). "Psycho-social stressors that are likely to affect the dolphins include separation of mother and young, separation from social groups, social aggression during net confinement, and novelty. Other potential short-term responses of dolphins to chase and capture include severe muscle damage, resulting in a condition known as capture myopathy and hyperthermia. Both of these conditions could cause unobserved mortality.

The potential effects of long-term stress include stress induced pathologies, impairment to the immune system, and impaired reproduction, growth, and metabolism. Based on information from other mammals it seems likely that the reproductive cycle for some female dolphins will be disrupted, either as a result of the hypothalamic-pituitary-adrenal response to stress or through the development of pathologies resulting from chronic stress. Cow-calf separation can occur as the result of chase and capture, and it is likely that this separation will result in the calf's death, at least for younger calves. Further, it appears that young animals may be particularly vulnerable to impacts of fisheries operations. Maternal separation and novelty are likely to induce significant hypothalamic-pituitary-adrenal response in young animals, and this can result in impaired growth." NMFS Report to Congress, AR, Tab 73 at 2141-42.

9. *See Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001).

10. *Id.* at 1060.

11. *Id.*

12. *Id.*

13. *Id.*

14. George A. Chmael II, Esq. and Nancy E. Whiteman, Esq., *Caught in the Net of*

purse seine nets are thrown around both the dolphins and the tuna and the netting is tightened at the bottom to prevent the tuna from escaping, thus also capturing the dolphins.¹⁵ From 1959 to 1972,¹⁶ purse seine tuna fishing killed millions of dolphins by asphyxiation from entanglement in the nets or during the hauling of the nets back to the fishing vessel.¹⁷

In 1972¹⁸ the Marine Mammal Protection Act (MMPA)¹⁹ was enacted in response to public outrage over the deaths of dolphins as well as other marine mammals.²⁰ Prior to the Act, the National Marine Fisheries Service's (NMFS) studies indicated that three ETP dolphin stocks were depleted:²¹ the coastal dolphin, the northeastern offshore spotted dolphin, and the eastern spinner dolphin.²² The Act created the National Marine Fisheries Service (NMFS) and authorized it to regulate tuna purse seine fishing. NMFS is a branch of the National Oceanic and Atmospheric Administration (NOAA), housed in the Department of Commerce.²³

Although dolphin setting was still used during the 1970's and 1980's, the number of dolphin mortalities decreased dramatically because of the new legislation.²⁴ Amendments to the MMPA in 1984,²⁵ 1988,²⁶ and

Environmental Law and Policy, Moral Outrage versus Cool Analysis in the ETP Tuna-Dolphin Controversy, 6 U. BALT. J. ENVTL L. 163, 166 (1998).

15. Carol J. Miller and Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 74 (1999).

16. *Brower v. Evans*, 257 F.3d 1058, 1060 (9th Cir. 2001).

17. See Chmael, *supra* note 14, at 166–67.

18. *Brower v. Evans*, 257 F.3d at 1060. In 1972, an estimated 423,678 dolphins were killed each year due to purse seine net fishing. Twenty years later, the number had decreased to 15,550. *Id.* at 1061.

19. 16 U.S.C. §§ 1361–1421 (1994).

20. “The MMPA directed the Secretary of the Treasury to ‘ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States Standards.’” *Brower v. Evans*, 257 F.3d at 1060–61.

21. *Brower v. Daley*, 93 F. Supp. 2d 1071, 1073–74 (N.D. Cal. 2000). The dolphin stocks are deemed “depleted” when the stock falls below the “optimum sustainable population” (OSP). “OSP is defined as a range of population levels between maximum net productivity and carrying capacity—i.e. the historic marine mammal stock levels prior to extensive development of the tuna purse seine fishery.” *Id.* at 1074 n.2 (citing 16 U.S.C. § 1362(9)). “A species falls below its OSP if its population is less than 60 percent of its estimated ‘historic’ levels.” *Id.* (citing 45 Fed. Reg. 72,178 (1980)).

22. *Brower v. Evans*, 257 F.3d 1058, 1061 (9th Cir. 2001).

23. Chmael, *supra* note 14, at 171.

24. *Id.* at 171. Such regulations included requiring vessels to use rescue rafts and divers to assist dolphins caught in nets and technological improvements to the purse seine methods. *Id.*

25. Fishing Act Amendments, Pub. L. No. 98-364, § 101, 98 Stat. 440 (1984). *See also*

1992²⁷ added further bans against the importation of tuna caught by international vessels which did not follow the United States' guidelines that were designed to protect dolphins.²⁸

Congressional acts and international agreements during the past decade indicate that the United States has increased pressure on other nations to comply with the United States' fishing guidelines to eliminate dolphin kills in the ETP.²⁹ In 1992, the United States and other nations signed the International Dolphin Conservation Program (the La Jolla Agreement)³⁰ which banned, effective June 1, 1994, the sale or transportation of tuna that was not "dolphin safe."³¹ The 1995, La Jolla Agreement, which was formalized as the Panama Declaration,³² was intended to further dolphin protection on an international level and to lower dolphin mortality to

H.R. No. 758, 98th Cong. 2nd Sess., 5, reprinted in 1984 U.S.C.C.A.N. 635, 638.

26. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4, 102 Stat. 4755 (1988). See H.R. REP. NO. 970, 100th Cong., 2d Sess. 14-19 (1984), reprinted in 1988 U.S.C.C.A.N. 6154, 6155-59.

27. 16 U.S.C. §§ 1371(a)(2)(B) & 1411 (1992).

28. *Brower v. Evans*, 257 F.3d at 1061. In 1990, Congress created the Dolphin Protection Consumer Information Act (DPCIA), which furthered the protection of ETP dolphins by mandating that tuna sold in the United States can not have a "dolphin safe" label if the tuna was caught using purse seine nets that entrapped the dolphins. *Id.* (citing 16 U.S.C. § 1385). "Intentional false labeling of tuna products could result in a civil penalty of up to \$100,000." See Jennifer Ramach, Note, *Dolphin-Safe Tuna Labeling: Are the Dolphins Finally Safe?* 15 VA. ENVTL. L.J. 743, 751-752 (1996). "Tuna was considered 'dolphin safe' if it was: (1) caught in the ETP, but with a small vessel that did not intentionally set on dolphins; (2) caught outside the ETP, using purse seine fishing methods, but accompanied by a written statement certified by the captain stating no nets were intentionally set on or encircled dolphins; or (3) not harvested by a vessel engaged in driftnet fishing (seining)." Carol J. Miller and Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives, Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L. J. 73, 99 (1999) (citing 16 U.S.C. § 1417 (d)).

29. See *Brower v. Evans*, 257 F.3d at 1061.

30. "The La Jolla Agreement established an International Review Panel to review compliance with the standards, and to verify annual performance of individual vessels. Members included representatives of governments, the fishing industry, and environmental organizations." Carol J. Miller and Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L. J. 73, 108 (1999) (referring to Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, June, 1992, done at La Jolla Calif., reprinted in 33 I.L.M. 936 (1994)).

31. Miller, *supra* note 30, at 97.

32. *Id.* See also Rachel C. Hampton, Note, *Note of Dolphins and Tuna: The Evolution to an International Agreement*, 10 FORDHAM ENVTL. L.J. 99 (1998). The Panama Declaration added slight changes to the La Jolla Agreement. The former established a limit on mortality rates for dolphin stocks rather than a limit based on the total dolphin population. *Id.* at 139.

acceptable levels. This would be accomplished by establishing a new “dolphin safe” labeling standard that allowed tuna caught with purse seine nets to carry the “dolphin safe” label only where dolphins were not visibly killed during the set.³³

In 1997, to enforce the Panama Declaration domestically and to amend the MMPA, Congress enacted the International Dolphin Conservation Program Act (IDCPA).³⁴ The IDCPA lifted the ban on countries adhering to the Act.³⁵ However, Congress did not accept the language of the Panama Agreement that would have lowered the standard for a dolphin safe label.³⁶ The IDCPA also reflected congressional concern that the mortality of dolphins was not the only cause of dolphin stock depletion; physiological stress induced by year round tuna fishing also might have detrimental effects on dolphin populations.³⁷

Other nations have not always complied with the United States’ fishing standards. International lawsuits such as *Tuna Dolphin I*³⁸ and *Tuna Dolphin II*³⁹ arose from the United States’ efforts to protect dolphins in the ETP. Such attempts have violated the goals⁴⁰ of the World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT).⁴¹

33. *Brower v. Evans*, 257 F.3d at 1061.

34. *Miller*, *supra* note 15, at 110. The Act mandated the captain to guarantee that “no dolphins were killed or seriously injured during the sets in which tuna were caught” and the tuna were not “harvested using a purse seine net intentionally deployed on or to encircle dolphin.” *Id.* at 118–19 (citing Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (d)(1)(A), (d)(2)(B)(i), (h) (1994 & Supp. III 1997)). 16 U.S.C. § 1385 (d)(1)(A), (d)(2)(B)(i), (h) (1994 & Supp. III 1997)).

35. *Brower v. Daley*, 93 F. Supp. 2d 1071, 1074 (N.D. Cal. 2000).

36. *Brower v. Evans*, 257 F.3d at 1061.

37. *Id.*

38. This case known as *Tuna-Dolphin I*, decided in 1991, held that the United States failed to comply with the National Treatment Principle “when it prohibited the importation and sale of Mexican-caught tuna based on the ‘process’ by which it was caught.” *Miller*, *supra* note 15, at 101–02 (citing General Agreement on Tariffs and Trade: Dispute Settlement Panel on U.S. Restrictions on Imports of Tuna, Sept. 3, 1991, 30 I.L.M. 1594, 1598 par. 2.1, 2.2). Furthermore, “[t]he Tuna-Dolphin I panel ruled that jurisdiction to protect plant or animal life does not extend outside the territory of the nation implementing the protection.” *Miller*, *supra* note 15, at 103.

39. The *Tuna-Dolphin II* decision held that the United States’ embargoes on tuna products from other countries not complying with United States’ standards were unnecessary. *Miller*, *supra* note 15, at 106 (citing General Agreements on Tariffs and Trade: GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, June 16, 1994, 33 I.L.M. 839).

40. The main objectives of the WTO and GATT are to encourage international trade through limiting trade restrictions. *Miller*, *supra* note 15, at 83.

41. *Id.*

There are relatively few recent cases that address the protection of dolphins in the ETP from harmful fishing practices. The only other federal case that addresses protection of ETP dolphins is the 1994 case, *Earth Island Inst. v. Brown*.⁴² Other federal court cases that speak to tuna fishing regulations regarding dolphins and porpoises are *Earth Island Inst. v. Mosbacher*,⁴³ *American Tunaboat Ass'n v. Brown*,⁴⁴ *United States v. Hayashi*,⁴⁵ *Kokechik Fisherman's Ass'n v. Sec'y of Commerce*,⁴⁶ and *Sabella v. United States*.⁴⁷ *Defenders of Wildlife v. Dalton*⁴⁸ is the only case in the last five years tried in the International Trade Court, other than *Brower v. Evans*, that addressed the effect of tuna purse seine fishing on

42. 865 F. Supp. 1364 (N.D. Cal. 1994). This case has enforced the Marine Mammal Protection Act (MMPA). Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421 (holding that further taking of northeastern offshore spotted dolphin in the ETP is not permitted even though it is not deemed to be depleted). *Earth Island Inst. v. Brown*, 865 F. Supp. at 1377.

43. 929 F.2d 1449 (9th Cir. 1991) (holding that the government must comply with the Marine Mammal Protection Act). The court upheld the trial court's decision to grant plaintiff's injunction barring the importation of yellowfin tuna from Mexico. *Id.* at 1453.

44. 67 F.3d 1404 (9th Cir. 1995) (holding that the plaintiff was restricted from using the purse seine method of fishing when the dolphin mortality quota for the year had been met).

45. 22 F.3d 859 (9th Cir. 1993) (holding that reasonable actions, those not resulting in severe disruption of a mammal's normal routine, to deter porpoises from eating fish or bait off a fishing line are not rendered criminal by the Marine Mammal Protection Act or its regulations).

46. 839 F.2d 795 (D.C. Cir. 1988) (holding that a permit granted by the Secretary of Commerce to a group of Japanese fishermen allowing them to take a certain number of porpoises was contrary to the requirements of the MMPA). The court found it contrary "in that it allowed incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level. If it is appropriate to grant foreign commercial fishermen some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for the Congress, not the Secretary to decide." *Id.* at 802.

47. 863 F. Supp. 1 (D.D.C. 1994) (holding that the case was not ripe because final agency action had not been taken). This case involved U.S. citizens employed as captains or crew aboard tuna vessels requesting that NOAA issue a definitive statement as to whether International Dolphin Conservation Act of 1992, 16 U.S.C. § 1417(a)(2) applied to United States citizens who work as captains or crew on foreign flag tuna fishing vessels. *Id.* at 2.

48. No. 00-02-00060, 2000 Ct. Int'l. Trade, LEXIS 130 (Ct. Intl. Trade Oct. 12, 2000) (holding that defendants must complete the administrative record under the Administrative Procedure Act, 5 U.S.C.S. § 706, before lifting the Eastern Tropical Pacific yellowfin tuna embargo against tuna from Mexican fishing vessels).

dolphins.⁴⁹ The Supreme Court has not reviewed cases involving the protection of dolphins in the ETP from purse seine fishing.

III. THE SUBJECT CASE

A. *Factual Background*

Current amendments to the DPCIA required that the Secretary of Commerce's Initial and Final Findings include evidence as to "whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the [ETP]."⁵⁰ The Secretary's findings were to be based on NMFS's research from October 1, 1997 to March 1, 1999.⁵¹ On May 7, 1999, the Secretary of Commerce reported in his Initial Finding mandated by the IDCPA that there was insufficient evidence to conclude that purse seine fishing practices, including chase and encirclement of dolphins, had a detrimental impact on depleted stocks of dolphins.⁵²

As a result of the Initial Finding, effective February 2, 2000, the Secretary lowered the dolphin safe tuna label standards, allowing fishermen to set on the dolphins and to use purse seine nets "as long as no dolphins were observed to have been killed or seriously injured during the set."⁵³ This standard lowered the protection of ETP dolphins to the standard which existed prior to the 1997 enactment of the IDCPA.

49. *Humane Soc'y of the United States v. Brown*, is the only other federal court case on point within the last five years, and the court found that drift nets used in the Mediterranean were causing depletion of dolphins and that defendants, U.S. Secretary of Commerce and Secretary of State, must enforce the High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 106-582, 106 Stat. 4900 (Nov. 2, 1992). Enforcing the act would put pressure on the Italian government to end large scale driftnet practices. *Humane Soc'y of the United States v. Brown*, 920 F. Supp. 178, 205 (Ct. Intl. Trade, 1996).

50. *Brower v. Evans*, 257 F.3d 1058, 1062 (9th Cir. 2001) (citing 16 U.S.C. § 1385 (g)(1) & (g)(2))

51. "NMFS found that the currently depleted populations of both northeastern offshore spotted dolphins and eastern spinner dolphins were 'not increasing at the rate expected based on the low rate of reported mortalities from the fishery since 1991 and the reproductive potential for these populations.'" *Id.*

52. *Brower v. Daley*, 93 F. Supp. 2d 1071, 1073 (N.D. Cal. 2000).

53. *Id.* at 1079.

B. The District Court Opinion

In 2000, David Brower et. al⁵⁴ sued Secretary of Commerce William Daley and other defendants,⁵⁵ alleging that the Secretary's Initial Finding violated the Administrative Procedures Act (APA)⁵⁶ and the National Environmental Policy Act (NEPA).⁵⁷

Plaintiffs first claimed that the Secretary violated the APA in failing to comply with the IDCPA by not using the best available evidence, by neglecting to "undertake the mandated stress effects research,"⁵⁸ and by failing to determine whether purse seine nets had an adverse effect on the dolphins.⁵⁹ The Secretary disputed Plaintiffs' arguments that he violated the APA, asserting that he did not consider preliminary data from the stress tests because the data would not be available until the Final Finding; accordingly, he based his findings on the available information.⁶⁰ The court ruled in favor of Plaintiffs, concluding that the Secretary delayed action, abused his discretion, and acted arbitrarily and capriciously for the reasons plaintiff cited.⁶¹ Further, the court held that the lack of evidence did not justify the Secretary's decision to lower the dolphin safe tuna standard.⁶² The court ruled in favor of Plaintiffs on the APA claim and set aside the Secretary's initial finding until the congressionally mandated stress research had been reviewed.⁶³ A preliminary injunction was denied as moot.⁶⁴

As a second claim, Plaintiffs argued that the Secretary had violated NEPA because he had not prepared an Environmental Assessment or Environmental Impact Statement, prior to issuing the Initial Finding.⁶⁵ The court found that NEPA did not apply in this case because the Secretary's finding was a nondiscretionary act and NEPA "only applies to 'discretion-

54. Additional plaintiffs included, the Earth Island Institute, The Humane Society of the United States, the American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, International Wildlife Coalition, Environmental Solutions International, Animal Welfare Institute, Society for Animal Protective Legislation, Animal Fund, and the Oceanic Society. *Brower v. Evans*, 257 F.3d at 1058.

55. *Brower v. Daley*, 93 F. Supp. 2d at 1071.

56. Administrative Procedure Act § 7, 5 U.S.C.S. § 706 (1) & (2) (2001).

57. *Brower v. Daley*, 93 F. Supp. 2d at 1073.

58. *Id.* at 1079.

59. *Id.*

60. *Id.* at 1086.

61. *Id.* at 1089.

62. *Id.*

63. *Id.*

64. *Id.* at 1073.

65. *Id.* at 1090 n.21.

ary federal action.”⁶⁶ Additionally, the court granted defendant’s motion for summary judgment as to the second claim, based on Plaintiffs’ inability to cite authority where NEPA had been “applied to a scientific finding comparable to the finding required in the case at bar.”⁶⁷

The Secretary raised as an affirmative defense that the court lacked jurisdiction over the case because: (1) Plaintiffs did not have standing to bring the claim; and (2) this case was not ripe and could not be reviewed because it was not a final agency action.⁶⁸ The court held that the case was ripe and that the Secretary’s decision was a final agency action.⁶⁹

C. The Appeals Court Opinion

In December 2000, the Secretary of Commerce appealed the district court’s summary judgment in favor of Plaintiffs.⁷⁰ On appeal, the Ninth Circuit addressed two issues: (1) whether the international trade ramifications outweighed the domestically mandated protection of dolphins; and (2) whether the Secretary violated the APA in his administration of the IDCPA.⁷¹

The court summarily dismissed the Secretary’s first argument, that because this case had international implications its results, although inconsistent with protecting the dolphins, outweighed the security of these mammals.⁷² The court concluded that such an issue is outside the court’s authority, holding that Congress, not the judicial branch, has jurisdiction over such claims.⁷³

The court then addressed whether the Secretary violated the APA through his actions with the IDCPA by delaying action,⁷⁴ abusing his discretion, and acting arbitrarily and capriciously and not in accordance with the law.⁷⁵ The Secretary maintained that he did not violate the APA by using an improper legal standard to enact the less protective dolphin safe label. The Secretary had found that there was insufficient information to

66. *Id.* at 1090 (quoting *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (1995)).

67. *Brower v. Daley*, 93 F. Supp. 2d. at 1090.

68. *Id.* at 1079.

69. *Id.* at 1081. The Secretary has determined the date when the new dolphin safe tuna label standard will be effective and that date has been passed by Congress. *Id.* at 1082.

70. *Brower v. Evans*, 257 F.3d 1058, 1060 (9th Cir. 2001).

71. *Id.* at 1065–66. The first issue was raised by the Secretary and other *amicus curiae* briefs. However, the first issue is not the main issue on appeal.

72. *Id.*

73. *Id.* at 1066.

74. *Id.* at 1068–70.

75. *Id.* at 1070.

determine whether or not fishing has a destructive effect on the ETP dolphin stock.⁷⁶ He argued that IDCPA guidelines were met, even though he had enacted the less protective label, because he had found insufficient evidence that purse seine fishing has an adverse effect on dolphins.⁷⁷ The court stated that under the Secretary's reasoning he could enact a less protective dolphin labeling as a default standard, if he failed to find evidence establishing that purse seine fishing has a negative effect on dolphins.⁷⁸ The appellate court upheld the district court's decision, holding that the Secretary must affirmatively determine the impact or lack of impact from purse seine nets, or from the intentional deployment or encirclement of dolphins.⁷⁹

The court addressed in greater detail the second issue of whether the Secretary violated the APA when he "failed to obtain and consider preliminary data from any of the mandated stress research projects" in his Initial Finding.⁸⁰ The Secretary claimed that the Initial Finding could be made using limited evidence and that he had the discretion to conduct the studies after the Initial Finding.⁸¹ The Secretary contended that the district court erred in finding that NMFS unreasonably delayed the stress studies. He claimed that the delay for the test involving the necropsy samples was not his responsibility.⁸² Brower claimed that under the APA,⁸³ the Secretary "abused his discretion, and acted arbitrarily and capriciously by failing to find significant adverse impact given the best available evidence."⁸⁴ The court dismissed the Secretary's arguments, asserting that the explicit language of the statute makes it clear that conducting the stress tests was a prerequisite to the issuance of an Initial Finding.⁸⁵ Further, the court concluded that the Secretary did not have discretion to schedule the stress studies after the Initial Finding and that he unreasonably delayed the stress studies.⁸⁶

76. *Id.*

77. *Id.*

78. *Id.* at 1067.

79. *Id.*

80. *Id.* at 1064.

81. *Id.* at 1068.

82. The Secretary argued that the delay was due to the lack of cooperation from non-United States vessels. However, the Report to Congress demonstrates Mexico's efforts to cooperate with the United States. *Id.* at 1069.

83. 5 U.S.C. § 706 (1994).

84. *Brower v. Evans*, 257 F.3d, 1058, 1064 (9th Cir. 2001).

85. *Id.* at 1068.

86. *Id.* at 1070.

IV. DISCUSSION

This Note supports the court's reasoning that Defendants should have followed the IDCPA's procedures, and that in failing to adhere to IDCPA guidelines the Secretary of Commerce violated the APA. For the court to review an agency action under the APA, that action must be final.⁸⁷ For the agency's action to be regarded as "final" under the APA, the Supreme Court held that it must meet the following two provisions: "[f]irst, the action must mark the 'consummation' of the agency's decision making process" and "second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"⁸⁸

One of the court's main purposes is to interpret statutes.⁸⁹ In this case the court accorded deference to Congress and concluded that "[i]n construing federal statutes, we presume that the ordinary meaning of the words chosen by Congress accurately express its legislative intent."⁹⁰ The meaning of a statutory provision can be interpreted from the entirety of a statute's purpose, and by determining "whether the proposed interpretation would frustrate or advance that purpose."⁹¹

Addressing the first issue of whether the Secretary used the proper legal standard to make his Initial Finding under IDCPA Section 1385(g), the court compared the language of the statute to the Secretary's interpretation of the statute.⁹² The court concluded that the Secretary incorrectly interpreted the word "whether" in the following provision:

Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 304(a) of the Marine Mammal Protection Act of 1972 [16 USCS § 1414a(a)] information obtained under the International Dolphin Conservation Program, and any other relevant information make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having

87. 5 U.S.C. § 704 (1994).

88. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

89. "An agency's interpretation or application of a statute is a question of law reviewed de novo." *Brower v. Evans*, 257 F.3d at 1064 (citing *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998)).

90. *Brower v. Evans*, 257 F.3d at 1065.

91. *Id.*

92. *Id.* at 1066.

a significant adverse impact on any depleted dolphin stock in the [ETP].⁹³

The court concluded that “whether” should be read as “whichever of the two,”⁹⁴ meaning that the Secretary should have found that “‘yes’ there was a significant adverse impact, or ‘no’ there was no significant adverse impact.”⁹⁵ Instead the Secretary found a lack of evidence that the purse seine fishing had an adverse impact on the dolphins.⁹⁶

The court used proper reasoning in reaching its conclusion. The ordinary meaning of words in a statute can naturally be found in a dictionary. Although the court did not cite any authority other than *Webster’s Dictionary*⁹⁷ to substantiate the reasoning, it is consistent with other federal court cases. For example, the holding in *Defenders of Wildlife v. Norton*⁹⁸ hinged on the definition of the word “extinct,” and the court used the definition from the *Oxford English Dictionary* to substantiate its reasoning.⁹⁹

Next, the court addressed Congress’s intended meaning for the IDCPA.¹⁰⁰ The Supreme Court has held that, in reviewing an agency’s interpretation of a statute, courts should “reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement.”¹⁰¹ Applying the Supreme Court’s standard, the Ninth Circuit concluded that, based on Congress’s reluctance to accept the less protective standard used in the Panama Declaration, Congress would also be reluctant to adopt the less restrictive standard in this case.¹⁰²

This argument was convincing because the facts surrounding the two decisions were similar. Congress did not lower the standard at the time of the Panama Declaration. Instead Congress awaited evidence of a possible connection between purse seine fishing and the physiological stress on dolphins.¹⁰³ Although more information regarding the possible connection

93. 16 U.S.C. § 1385(g)(1).

94. *Brower v. Evans*, 257 F.3d at 1066 (citing MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993)).

95. *Brower v. Evans*, 257 F.3d at 1066.

96. *Id.* at 1059.

97. *Id.* at 1066.

98. 258 F.3d 1136, 1141 (9th Cir. 2001).

99. *Id.*

100. 16 U.S.C. § 1385(g)(1) (1992).

101. *Brower v. Evans*, 257 F.3d at 1065 (referencing *Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778 (1984)).

102. *Brower v. Evans*, 257 F.3d at 1067.

103. *Id.* at 1061.

was available to the Secretary, he did not use the studies in reaching his Initial Finding.¹⁰⁴

Next, the court reasoned that the Secretary's legal standard was a "default construction [that] should be avoided because it would lead to absurd results."¹⁰⁵ The court properly applied the holding of *Griffin v. Oceanic Contractors, Inc.*,¹⁰⁶ in which the Supreme Court held that the default reasoning should not be used where it would lead to an absurd result.¹⁰⁷ Likewise, the court was correct that if the Secretary is allowed to defer to the default guidelines while research is pending, there is no incentive for the Secretary to expedite the research.¹⁰⁸ The court, however, overstepped a reasonable analysis in concluding that once the lower standard was in place, the Secretary would be reluctant to remove the standard and he would receive pressure to keep the labeling standard for the Final Finding.¹⁰⁹ In order to make the Final Finding, the Secretary would have to rely on scientific evidence and thus it seemed highly illogical to conclude that the Secretary would be able to keep the same lower standard if evidence supported a contrary conclusion.

Further, the court addressed the issue of whether the Secretary was required by law to follow the IDCPA guidelines. In *Natural Resources Defense Council v. EPA*,¹¹⁰ the Ninth Circuit concluded that executive agencies must adhere to the law and the court must uphold this rule.¹¹¹ Thus, the court properly concluded that the Secretary should have followed the IDCPA's guidelines to commence and to review the following stress tests before the Initial Finding was reached:

- (1) literature review of relevant research;
- (2) three-year series of dolphin necropsy samples obtained by commercial vessels;
- (3) a one-year review of relevant historical demographic and biological data; and
- (4) an experiment involving repeated chasing and capturing of dolphins by means of intentional encirclement.¹¹²

104. *Id.* at 1068.

105. *Id.* at 1067 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)).

106. 458 U.S. 564 (1982).

107. *Brower v. Evans*, 257 F.3d at 1067.

108. *Id.*

109. *Id.*

110. 966 F.2d 1292 (9th Cir. 1992).

111. *Id.* at 1300.

112. *Brower v. Evans*, 257 F.3d at 1062.

Next, the court analyzed the Secretary's assertion that he did not violate the APA by unreasonably delaying¹¹³ the stress studies or by failing to collect and analyze data from the stress studies. This court used the factors from *Telecommunications Research & Action Ctr. v. FCC (TRAC)*,¹¹⁴ to decide whether NMFS unreasonably delayed the studies.¹¹⁵ "[C]ourts generally apply the so-called *TRAC* factors in deciding whether to order relief in claims of agency delay brought under the APA."¹¹⁶ Some of these factors are as follows:

- (3) delays that might be reasonable in the sphere of economic regulations are less tolerable when human health and welfare are at stake
- (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority
- (5) the court should also take into account the nature and extent of the interests prejudiced by the delay.¹¹⁷

The issue before the court, although not involving human health and welfare, did involve the welfare of highly intelligent mammals—dolphins, the welfare of which was compromised by the delay in research.

"At the time of the Initial Finding, NMFS had commenced and completed only the literature review."¹¹⁸ The over 500 biopsies from the one-year study should have been used to determine fishing related stress on the ETP dolphins.¹¹⁹ These biopsies were not even considered for the Initial Finding.¹²⁰ Further, NMFS delayed research on the chase and recapture project for two years after Congress requested the study.¹²¹ The court properly concluded that the Secretary violated the APA when he "unreasonably delayed action" and "abused his discretion and acted arbitrarily and capriciously and not in accordance with the law" when he did not consider the relevant evidence before determining the Initial Finding.¹²²

113. 5 U.S.C. § 706(1) (1994).

114. 720 F.2d 70 (1984).

115. *Brower v. Evans*, 257 F.3d at 1068.

116. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *TRAC*, 750 F.2d at 79–80).

117. *Id.* at 507 n.7 (quoting *TRAC*, 750 F.2d at 80).

118. *Brower v. Evans*, 257 F.3d at 1069.

119. *See id.*

120. *Id.*

121. *Id.* at 1070.

122. *Id.*

The court further concluded that the Secretary did not use the “best available evidence” standard.¹²³ *Conner v. Burford*¹²⁴ held that incomplete information about a study does not justify failing to comply with a statute that mandates a thorough opinion using the best information available.¹²⁵ The Secretary’s findings were contrary to the results of the Report,¹²⁶ which covered the abundance study and the stress literature review.¹²⁷ Thus, the court properly held that the Secretary should have used the information in the Report to conclude that dolphins are adversely affected by the fishing.

The statutory language of the IDCPA, the Secretary’s failure to commence the mandated studies, and the “best available information” all indicate that the Secretary violated the previously mentioned sections of the APA. Overall, the court arrived at the proper conclusion.

V. CONCLUSION

The court properly asserted that government officials, such as the Secretary of Commerce, need to comply with congressional acts. The outcome of this case was refreshing because the environment is often given secondary consideration to political issues such as international trade. This case will be helpful to environmentalists who bring future claims against the government for violating congressional statutes at the expense of the environment. Further, *Brower v. Evans* conveys the message that

123. *See id.* at 1070–71.

124. 848 F.2d 1441 (9th Cir. 1988).

125. *Id.* at 1454. The report available to the Secretary before the issuance of the Initial Finding concluded: “Chase and capture operations of the fishery *are likely to* cause immediate or short-term physiological responses such as activation of the hypothalamic-pituitary-adrenal axis in response to psychological or social stressors associated with these operations.” *Brower v. Daly*, 93 F. Supp. 2d 1071, 1077 (N.D. Cal. 2000) (quoting the Secretary’s Report at 2141–42 (emphasis added by the court)).

126. NMFS found that northeastern offshore spotted dolphins and eastern spinner dolphins were “not increasing at the rate expected based on the low rate of reported mortalities from the fishery since 1991 and the reproductive potential for these populations.” *Brower v. Evans*, 257 F.3d at 1062–63. The report did not give concrete data for the depleted stock of northeastern offshore spotted and eastern spinner dolphins because of the trouble with identifying causes other than fishing to slow population growth of the dolphins. The only non-fishing related factor that it named was a possible environmental change in the ocean habitat. Furthermore, the report refuted this explanation because there is a lack of evidence that there is a large scale change in oceanographic habitat. *Id.* at 1063.

127. The stress literature review indicates there is a likelihood that the fishing creates physiological stress, which affects dolphin population growth. *Id.* “We believe that research on the effects of human activities on dolphins demonstrates that it is highly likely that the activities of the [ETP] tuna fleets are causing significant negative impacts on dolphins in addition to the direct mortalities counted by observers.” *Id.* at 1064 n.6.

government officials need to strictly adhere to provisions in congressional statutes that are designed to protect certain depleted species. The holding in this case is consistent with the court's ruling in previous cases that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages, and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely . . . the balance of harms will usually favor . . . protect[ing] the environment."¹²⁸

128. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 975 (N.D. Cal. 1990) (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987)).