

RECENT DEVELOPMENT

A PLACE OF TEMPORARY SAFETY FOR THE “DOLPHIN SAFE” STANDARD

I. SUMMARY

In August 2004, environmental and conservation organizations achieved a victory on behalf of dolphins in the Eastern Tropical Pacific Ocean (ETPO). The United States Court for the Northern District of California found that these organizations were entitled to a judgment as a matter of law on their challenge of the U.S. Secretary of Commerce’s final findings regarding the detrimental impact on dolphin stocks caused by commercial fishing activities in the ETPO. Specifically, the organizations challenged the Secretary’s final finding that the intentional encirclement of dolphins with purse seine nets¹ during tuna fishing operations was not having a significant adverse impact on dolphin stocks in the ETPO. The court found that the Secretary, in failing to conduct the proper stress studies and favoring political and diplomatic considerations over scientific data, had sacrificed the integrity of the decision making process. Consequently, the court determined that the Secretary of Commerce abused his discretion, and that the findings were arbitrary and capricious, and contrary to law. The court set aside these final findings and ordered the Secretary of Commerce to abide by the standard set forth by Congress, which requires that tuna sold within the United States may only be labeled “dolphin safe” if that tuna was not harvested by “setting on dolphins.”²

1. A purse seine is a net constructed from netting with floats along the top edge and a series of cables and weights running through the bottom edge. Purse seine nets can be up to 2000 meters long and reach depths of up to 300 meters. Once a school of fish is located, the fishing vessel moves around the school deploying the net. After the fish have been encircled with a wall of netting, the bottom of the net is pulled closed via the cable, creating a bag or “purse” with the fish enclosed within.

2. *Earth Island Inst. v. Evans*, No. C 03-0007, 2004 U.S. Dist. LEXIS 15729, 34

II. LEGISLATIVE BACKGROUND

In the early 1950s, fishermen discovered that large schools of yellowfin tuna often congregated beneath schools of dolphins, especially in the waters of the ETPO.³ Following this discovery, commercial fishermen began to chase and encircle dolphin schools with large purse seine nets in order to catch the tuna beneath them.⁴ While dolphins were not an intended quarry, many became trapped within the nets along with the tuna. This wasteful and irresponsible practice, known as “setting on dolphins,” led to the needless killing of millions of dolphins within the ETPO.⁵ Public outcry over the high dolphin mortality resulting from this practice led to legislation and international programs aimed at minimizing its adverse impact.⁶

In 1972, Congress passed the Marine Mammal Protection Act (“MMPA”).⁷ The MMPA was passed to protect dolphin stocks, including those within the ETPO.⁸ Amendments to the MMPA in later years banned tuna imports from countries that did not have proper laws in place to limit dolphin mortality.⁹ In 1990, Congress passed the Dolphin Protection Consumer Information Act (“DPCIA”),¹⁰ which provides that tuna sold within the United States can be labeled “dolphin safe” only if that tuna was not caught using the “setting on dolphins” method.¹¹ Countries that continued the practice of “setting on dolphins” in violation of the congressional action lost a large market within the United States.¹² As a result, the United States and several Central and South American countries that use purse seine fishing vessels in the ETPO entered into the non-binding La Jolla Agreement in 1992.¹³ Participating countries “agreed to maintain dolphin kill

ENVTL. L. REP. 20069, 26 Int'l Trade Rep. (BNA) 1993 (N.D. Cal. 2004).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 4.

7. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified at 16 U.S.C. §§ 1361–1421h (2005)).

8. 16 U.S.C. § 1411 (2005) (finding that the yellowfin tuna fishery of the ETPO has resulted in the deaths of millions of dolphins, and stating the policy of eliminating the marine mammal mortality resulting from the intentional encirclement of dolphins).

9. 16 U.S.C. § 1417 (a) (2005).

10. Pub. L. No. 101-627, 104 Stat. 4465 (1990) (codified at 16 U.S.C. § 1385 (2005)).

11. 16 U.S.C. § 1385 (d) (2005).

12. *Brower v. Evans*, 257 F.3d 1058, 1061 (9th Cir. 2001) [hereinafter *Brower II*].

13. La Jolla Agreement For The Reduction Of Dolphin Mortality In The Eastern Pacific Ocean, Apr. 23, 1992, *available at* <http://www.oceanlaw.net/texts/lajolla.htm> (last accessed May 5, 2005); *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1339–40 (Ct. Int'l Trade 2001) (describing the La Jolla agreement as setting forth programs to

levels at or below a ‘dolphin mortality limit’ assigned to each vessel and to work towards reducing dolphin mortality to levels approaching zero.”¹⁴ This was formalized into a binding declaration in 1995 and was thereafter referred to as the Panama Declaration.¹⁵ As part of its agreement within the Panama Declaration, the U.S. Secretary of Commerce agreed to seek changes to loosen restrictions and reduce embargoes regarding the importation of tuna.¹⁶ Part of this effort was to include the relaxation of the “dolphin safe” label standard to allow tuna caught with purse seine nets to be labeled “dolphin safe,” provided that no observations were made that any dolphins were killed or injured during the fishing process.¹⁷

Congress responded to the Panama Declaration with the passage of the International Dolphin Conservation Program Act (IDCPA), which implemented many of the goals of the Panama Declaration, but did not call for a softening of the “dolphin safe” label standard.¹⁸ Having rejected the Panama Declaration on this point, Congress instead mandated that any change to the label standard would be determined by “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 [EPTO].”¹⁹ To answer this question, Congress mandated that the Secretary take certain actions in consultation with the Marine Mammal Commission and the Inter-American Tropical Tuna Commission. First, Congress required the Secretary to conduct population abundance studies and three different specified stress studies to determine whether “setting on dolphins” was having a significant adverse impact on dolphin stocks.²⁰ In addition, the Secretary was required to make an initial finding as to whether the practice was having a significant adverse impact on any depleted dolphin stock in the ETPO prior to issuing final findings with respect to the same question.²¹

Following this mandate of Congress, the Secretary of Commerce issued initial findings under the IDCPA that evidence

protect dolphins from harm in the ETPO).

14. *Brower v. Daly*, 93 F. Supp. 2d 1071, 1074 (N.D. Cal. 2000) [hereinafter *Brower I*].

15. Panama Declaration, Oct. 4, 1995, available at <http://www.oceanlaw.net/texts/panama.htm> (last visited May 5, 2005); Earth Island Inst., *supra* note 2, at 6.

16. Earth Island Inst., *supra* note 2, at 7.

17. *Brower I*, *supra* note 14, at 1075.

18. Pub. L. No. 105-42, § 5, 111 Stat. 1125 (1997) (codified at 16 U.S.C. § 1385 (2005)).

19. *Brower I*, *supra* note 14, at 1075 (citing 16 U.S.C. § 1385 (g) (2005)).

20. *Id.* (citing 16 U.S.C. § 1414a (a) (1)–(3) (2005)).

21. *Id.* at 1076 (citing 16 U.S.C. § 1385 (g) (1)–(2) (2005)).

was insufficient to conclude that “setting on dolphins” by the commercial purse seine tuna fishing fleet was having a significant adverse impact on dolphin stocks in the ETPO.²² Using these initial findings, the Secretary set out to change the “dolphin safe” label standard under the IDCPA.

III. LITIGATION HISTORY

The Secretary’s initial findings were set aside by the federal district court in *Brower v. Daley*.²³ This decision was affirmed by the Court of Appeals for the Ninth Circuit which held that the Secretary was required by congressional mandate to determine conclusively whether the fishery was or was not having a significant adverse impact on dolphin stocks.²⁴ The court went on to state that the Secretary would not be permitted to rely on insufficient evidence to produce a finding of no significant impact.²⁵ The court also found that the Secretary had unjustifiably failed to consider available data indicating that the fishery was having a detrimental impact on dolphin stocks.²⁶

Subsequently, the Secretary amassed research to support the initial findings in an attempt to meet the requirements of the courts’ mandate, and in doing so, felt that he could adequately support the decision to loosen the meaning of the “dolphin safe” label standard.²⁷ Final findings by the Secretary, ignoring evidence of a detrimental impact on dolphin stocks, were issued in December 2002.²⁸ The final findings concluded that the practice of “setting on dolphins” did not have a significant adverse effect on dolphins in the ETPO.²⁹ Following the issuance of the final findings, the Secretary redefined the term “dolphin safe” under the IDCPA so that tuna caught using purse seine nets could be labeled “dolphin safe” so long as no dolphins were reported to have been killed or otherwise injured during the fishing operation in which the tuna was harvested.³⁰

IV. FILING OF EARTH ISLAND INSTITUTE V. EVANS

Following the issuance of the Secretary’s final findings,

22. 64 Fed. Reg. 24,590 (May 7, 1999).

23. *Brower I*, *supra* note 14, at 1090.

24. *Brower II*, *supra* note 12, at 1061.

25. *Id.* at 1070.

26. *Id.* at 1071.

27. 64 Fed. Reg. 24,590 (May 7, 1999).

28. 68 Fed. Reg. 2010, 2011 (Dec. 31, 2002).

29. *Id.*

30. *Id.*

Earth Island Institute filed suit in the U.S. District Court for the Northern District of California on December 31, 2002. The conservation organizations advocating on behalf of the dolphins filed a motion for summary judgment, specifically asking that the court find that the Secretary's findings ran counter to the scientific data. The conservation organizations further alleged that the Secretary had relied on political, trade, and other economic considerations that Congress had not intended him to consider in making the final findings.³¹

The court found that evidence produced by the Secretary was little more than a revisiting of the errors that the Secretary's office had made in previous proceedings.³² Additionally, the court found that the Secretary had failed to heed the warnings in the previous legal proceedings that the office would not be permitted to neglect performing the research mandated by Congress only to later state that sufficient evidence had not yet been obtained to make final findings.³³ The court was unwilling to allow the Secretary to state that the insufficiency of its own evidence was adequate to conclude that the intentional encirclement of dolphins during purse seine operations was not having an adverse impact on dolphin stocks.³⁴ Furthermore, the court held that while the "best available scientific evidence" standard does not require conclusive evidence, Congress intended to give the benefit of the doubt to the species at risk.³⁵ The court stated that the best available evidence suggested that the tuna fishery was having a significant adverse impact on dolphin stocks, even though the evidence was not conclusive.³⁶ The court also noted that the Secretary had acted contrary to the directives of Congress in basing findings on political and economic policy considerations rather than on available scientific evidence.³⁷

After concluding that the conservation organizations were entitled to summary judgment, the court went a step further. Upon finding that the Secretary's final finding was arbitrary, capricious, an abuse of discretion, and not in accordance with the law, the court held that the Secretary would not be permitted to

31. Earth Island Inst., *supra* note 2.

32. *Id.* at 93.

33. *Id.* at 93.

34. *Id.* at 93–94.

35. *Id.* at 95.

36. *Id.* at 95–96.

37. *Id.* at 96. *See also id.* at 78–92 (indicating that the Secretary's final findings were more likely based on trade issues with Mexico, and noting that the court had never reviewed a record of agency action that contained such an obvious example of political meddling and influence).

amend the final findings.³⁸ The court agreed with the conservation organizations that, since the Secretary had repeatedly ignored the congressional mandates and the teachings of prior court decisions, it would be proper for the court to remand to the Secretary with specific instructions.³⁹ The court then ordered that the term “dolphin safe” would “continue to mean that ‘no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins and that no dolphins were killed or seriously injured during the sets in which the tuna were caught’ as defined in 16 U.S.C § 1385(h)(2).”⁴⁰ The court further ordered that the Commerce Department “shall not allow any tuna product sold in the United States to be labeled as ‘dolphin safe’ that does not meet the aforesaid statutory definition.”⁴¹

V. CONCLUSION

This case marks a great victory for conservation organizations working on behalf of dolphins. The case also sends a strong message that the health and sustainability of ecosystems will not suffer at the whims of government officials more interested in diplomatic relations than scientific research and environmental protection. It is encouraging to see that the courts and Congress are requiring sound fishery management practices, backed by scientific research, to dictate the future of the world’s oceans and its resources.

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38. *Id.* at 97–98.

39. *Id.*

40. *Id.* at 99.

41. *Id.*