Defenders of Wildlife v. Hogarth: Has the Sun Set on Saving the Dolphins

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DEFENDERS OF WILDLIFE V. HOGARTH: HAS THE SUN SET ON SAVING THE DOLPHINS?

I. INTRODUCTION

The Eastern Tropical Pacific Ocean (ETP) is home to large numbers of tuna and dolphins.1 A unique relationship exists between these dolphins and tuna: large schools of tuna tend to swim underneath groups of dolphins.2 By using the “purse seine” method, fishermen take advantage of this relationship to help catch large numbers of tuna.3 The purse seine method uses helicopters and speed boats to spot, chase and herd dolphins and the tuna swimming underneath these dolphins into nets.4 Unfortunately, this process does not discriminate; along with tuna, many dolphins are captured and killed during this process.5 Experts estimate that

1. See Bruce Lieberman & David Hasemyer, Scientists Say Studies of Dolphin Stress Blocked; Tuna Fishing’s Link to Death at Issue, THE SAN DIEGO UNION-TRIBUNE, Jan. 10, 2003, available at 2003 WL 6559435 (noting that about 100,000 to 300,000 metric tons of yellowfin tuna are caught yearly in ETP); see also Dick Russell, Tuna-Dolphin Wars: Conservationists are fighting to save beleaguered dolphin from deadly tuna nets, DEFENDERS MAGAZINE, Summer 2002, available at http://www.defenders.org/defendersmag/issues/summer02/tunadolphin.html (approximating that one quarter of the world’s fish population are located in ETP); THE ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS, Dolphin and the Tuna Fishing Industry, at http://ammpa.org/articles/dolphins.html (last modified Sept. 23, 2002) (describing ETP’s location and geographic specifics). The ETP is “500 miles wide and extends from the middle of California to the middle of South America.” Id.

2. See Richard W. Parker, The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict, 12 GEO. INT’L ENVT’L. L. REV. 1, 13 (1999) (recognizing that schools of tuna will also swim under floating objects such as logs); see also Russell, supra note 1 (noting that large, mature yellowfin tuna often follow dolphins).

3. See Defenders of Wildlife v. Hogarth, 330 F.3d 1358, 1360 (Fed. Cir. 2003) (explaining how dolphins are used to locate tuna). Dolphins have to break the surface every few minutes to breathe. Id. This makes it easy for fishermen to locate groups of dolphins. Id.; see also Lieberman & Hasemyer, supra note 1 (noting surfacing dolphins use in locating tuna schools).

4. See Parker, supra note 2, at 13 (explaining that purse seining involves encircling tuna with nets that are usually up to one mile long and 600 feet deep, “pursing” bottom of net with drawstring which traps fish and then hauling in net); see also Russell, supra note 1 (clarifying that time period starting when net is lowered to when dolphins are released is called “set”); ENVIRONMENTAL NEWS NETWORK, U.S. Implements New Dolphin-Safe Standards (Jan. 4, 2000), at http://www.cnn.com/2000/NATURE/01/04/tuna.enn/index.html (indicating that three million dolphins are encircled by nets each year).

5. See Parker, supra note 2, at 14 (noting that dolphins are caught in nets because they are unwilling to leap over closing nets); see also SEABITS, NEW ENGLAND AQUARIUM MONTHLY EMAIL NEWSLETTER, The Truth About Dolphin-safe Tuna, at http://www.neaq.org/community/seabits/newsletters/99sep.html (Sept. 1999)
tuna nets have killed approximately six million dolphins since fish-
ermen started using the purse seine method in 1959.\textsuperscript{6}

To decrease the number of dolphins killed during purse sein-
ing, fishermen developed a procedure called "backdown."\textsuperscript{7} During a backdown procedure, the fishermen bring most of the net onto the boat, and then draw the remaining part of the net into a long, narrow channel.\textsuperscript{8} The fishermen next put the vessel into reverse, moving the ship away from the net.\textsuperscript{9} This maneuver eases the tension in the net and causes it to drop below the top of the water, thereby allowing the trapped dolphins to escape.\textsuperscript{10} Theoretically, the backdown procedure appears to be a good way to free the dol-
phins caught in the nets, but in reality the procedure is a compi-
lcated one requiring both skill and training.\textsuperscript{11} The success of a backdown procedure is further complicated when attempted during "high-risk" situations, such as those involving darkness.\textsuperscript{12}

This Note will analyze \textit{Defenders of Wildlife v. Hogarth},\textsuperscript{13} in which the Federal Circuit held that the Secretary of Commerce's (Secre-

tary) Interim-Final Rule allowing fishermen to perform backdown procedures one-half hour after sunset was acceptable even though Congress stated in 16 U.S.C. § 1413(a)(1)(B)(v) that backdown procedures should be completed one-half hour before sunset. Part II describes the history of dolphin regulation leading up to the International Dolphin Conservation Program Act and the Interim-Final Rule, and also presents the factual background for the Federal Circuit's decision. Part III of this Note discusses the precedent governing the Federal Circuit's statutory analysis. Part IV then examines the Federal Circuit's reasoning. Part V of this Note is a critical analysis of the Federal Circuit's decision. Finally, Part VI explains the negative impacts the Federal Circuit's decision could have on the dolphin population.

II. FACTS

In 1972, Congress passed the Marine Mammal Protection Act (MMPA), which governed the handling of all marine mammal populations so as to maintain their "optimum sustainable population," and required that steps be taken to replenish mammals whose numbers fell below this standard. Congress gave the National Marine Fisheries Services (NMFS) the authority to supervise marine mammals, including the dolphins located in the ETP. In 1992, the United States entered into a non-binding international agreement (La Jolla Agreement) which established the International Dolphin Conservation Program (IDCP).

14. For an analysis of court's holding, see infra notes 137-72 and accompanying text.
15. For a discussion of dolphin regulations and Defenders' factual basis, see infra notes 20-44 and accompanying text.
16. For a history of statutory construction, see infra notes 45-106 and accompanying text.
17. For a description of the Federal Circuit's holding in Defenders, see infra notes 107-36 and accompanying text.
18. For a critique of the Federal Circuit's holding in Defenders, see infra notes 137-72 and accompanying text.
19. For a discussion of the potential impacts of the Federal Circuit's decision, see infra notes 173-82 and accompanying text.
22. See id. at 174 (noting reasons why La Jolla Agreement was created). The MMPA Amendments and other statutes placed embargos against Latin American
Agreement sought to reduce dolphin mortality in the ETP by: (1) setting annual limits on the number of dolphins that could be killed in tuna nets; and (2) finding new methods of catching tuna that would not affect dolphins.23

In 1995, the United States and eleven other countries signed the Panama Declaration (Declaration), thereby making the La Jolla Agreement binding.24 The Declaration sought to provide greater dolphin protection by: (1) reducing dolphin mortality limits in the ETP to levels near zero; (2) establishing annual dolphin mortality limits; (3) creating incentives for fishermen to reduce dolphin mortality; and (4) creating measures to avoid capturing dolphins.25

In 1997, Congress enacted the International Dolphin Conservation Program Act (the Act) to implement some of the Declaration’s provisions.26 The Act required the Secretary of Commerce to make initial findings, determining whether purse seining had negative impacts on dolphin mortality rates in the ETP.27 Moreover, the Act provided that when the Secretary declared that a legally-binding instrument creating the IDCP had been adopted and enforced, the Act would become effective without further approval from Congress.28 The Act additionally required the Secretary to incorporate specific regulatory provisions in this instrument, including a provision requiring backdown procedures to begin thirty minutes before sundown.29 Specifically, the Act stated that the regulations must “ensur[e] . . . that the backdown procedure during sets of purse
seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown." 30

In May of 1998, pursuant to the Act, the Secretary created the Agreement on the International Dolphin Conservation Program (International Agreement). 31 Through the NMFS, the Secretary published the initial findings of the Act one year later. 32 On June 14, 1999, the Secretary published a proposal to implement the Act. 33 Finally, on January 3, 2000, the Secretary published an Interim-Final Rule implementing the provisions of the Act. 34 The Interim-Final Rule stated that "on every set encircling dolphin, the backdown procedure must be completed no later than one-half hour after sundown . . . ." 35

In Defenders, various non-governmental organizations and individuals (Defenders) brought suit in the United States Court of International Trade, arguing that decisions made by the NMFS' Assistant Administrator, William T. Hogarth (Hogarth), were erroneous. 36 Defenders argued that the Interim-Final Rule did not conform to the Act and was, therefore, not in accordance with the

30. *Id.* at § 1413(a)(2)(B)(v) (emphasis added) (stating requirements of regulation).

31. *Defenders*, 177 F. Supp. 2d at 1341 (noting that International Agreement became effective on February 15, 1999 after involved nations deposited ratifications of agreement).

32. *Id.* at 1341-42 (citing *Taking of Marine Mammals Incident to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding*, 64 Fed. Reg. 24,590, 24,591 (May 7, 1999)) (noting that Secretary determined that there was no sufficient evidence to conclude that encirclement of dolphins with purse seine nets was adversely affecting depleted dolphins stocks in ETP).

33. See *Taking of Marine Mammals Incident to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)*, 64 Fed. Reg. 31,806 (June 14, 1999) (to be codified at 50 C.F.R. pt. 216) (accepting public comments); *see also* *Defenders*, 177 F. Supp. 2d at 1342 (noting that several Plaintiffs submitted written comments and testified at public hearings).


35. 50 C.F.R. § 216.24(c)(6)(iii) (2002) (emphasis added) (defining sunset and requiring fishermen conducting sets extending beyond one-half hour after sundown to use high intensity lighting system).

36. *Defenders*, 177 F. Supp. 2d at 1342 (acknowledging that Defenders requested remand to Secretary); *see also* *Defenders*, 330 F.3d at 1363-64 (noting that Defenders brought case pursuant to 28 U.S.C. § 1581(i)(3) which states that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety . . . ." (citing *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1287 (Fed. Cir. 2002))).
law. 37 Specifically, Defenders claimed that the Secretary ignored the Act’s plain language requiring fishermen to complete backdown procedures one-half hour before sundown by allowing the Interim-Final Rule to require fishermen to complete backdown procedures one-half hour after sundown. 38

The Court of International Trade decided in favor of Hogarth and held the Act’s requirement that fishermen complete all backdown procedures no later than one-half hour before sundown was a drafting mistake not in accordance with congressional intent expressed in previous legislation. 39 The court pointed to prior dolphin protection legislation, the Act’s legislative history, and the International Agreement as proof that Congress mistakenly used the word “before” instead of “after” in setting the permissible time period for backdown procedures. 40 Defenders appealed this decision to the United States Court of Appeals for the Federal Circuit. 41

Although the Federal Circuit disagreed with the reasoning of the Court of International Trade, it ultimately affirmed the lower court’s decision and held that the Court of International Trade did not err in concluding that the Interim-Final Rule was consistent with the Act. 42 The Federal Circuit found that the Act clearly required that fishermen complete backdown procedures one-half hour before sundown, regardless of legislative intent. 43 Nevertheless, the Federal Circuit held that the NMFS possessed the authority to alter the Act’s requirements for backdown procedures. 44

37. Defenders, 177 F. Supp. 2d at 1344 (noting that Defenders also contended that Interim-Final Rule violated amended MMPA).

38. Id. (setting out Plaintiffs’ other arguments which will not be discussed in Note).

39. Id. at 1345-46 (holding also that one-half hour after sunset rule makes practical sense because of difficulty predicting when sun is going to set).

40. Id. (acknowledging that language of regulation conflicts with “express statutory language”).

41. Defenders, 330 F.3d at 1364 (acknowledging that Federal Circuit has jurisdiction pursuant to 28 U.S.C. § 1295(a)(5)).

42. Id. at 1374 (summarizing court’s holding). The Federal Circuit reviewed the Court of International Trade’s ruling de novo and without deference to that court. Id. at 1364 (noting standard of review).

43. Id. at 1367. For a discussion of the Federal Circuit’s reasoning, see infra notes 107-26 and accompanying text.

44. Defenders, 330 F.3d at 1367. For a discussion of the Federal Circuit’s reasoning, see infra notes 127-36 and accompanying text.
III. BACKGROUND

Before analyzing the Federal Circuit’s decision in Defenders, it is necessary to examine statutory construction precedent. Consequently, this section will provide a synopsis of cases involving judicial interpretation of statutes, regulations, and agency action.

A. Judicial Interpretation of Statutes and Regulations


The amended Clean Air Act of 1977 (CAA) required states that had not achieved national air quality standards to create a permit program regulating “new or modified major stationary sources” of air pollution. The Environmental Protection Agency (EPA) created a regulation to implement this permit requirement. This regulation allowed states to adopt a plant-wide definition of “stationary source.” According to this definition, a plant with pollution-emitting devices could install a new piece or modify an existing piece of equipment without conforming to the permit requirements as long as the alteration would not increase total plant emissions. The EPA’s definition of “stationary source” allowed states to consider all devices emitting pollution within the same industrial group, as if they were in a “bubble.”

In Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., the United States Supreme Court considered whether the EPA’s interpretation of “stationary source” was reasonable. The Chevron court created a two-prong test for reviewing an agency’s construction.

45. For a historical analysis of statutory construction, see infra notes 45-106 and accompanying text.

46. For a review of cases concerning judicial interpretation of statutes and regulations, see infra notes 47-83 and accompanying text. For a review of cases concerning judicial interpretation of agency action, see infra notes 84-106.


48. Id. at 840 (noting that question in case rests on definition of “stationary source” in 42 U.S.C. § 7502(b)(6)).

49. Id. (identifying permit requirement).

50. Id. (defining stationary source).

51. Id. (noting that generally permit applicants needed to meet several stringent conditions before permits would be issued for new or modified stationary source).

52. Chevron, 467 U.S. at 840 (pointing out issue was whether EPA’s decision was rooted in reasonable construction of “stationary source”).

53. Id. (noting 42 U.S.C. § 7502(b)(6)(i) definition of “stationary source”). “Stationary source” means “any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.” Id. at 840 n.2.
tion of a statute. The first prong asks whether Congress specifically addressed the issue in question within the statute itself. If Congress has spoken directly to the issue, "that is the end of the matter," because courts and agencies must give effect to the expressed intent of Congress if that intent is unambiguous. If it appears Congress has not spoken directly to the issue in question, the court must decide whether the agency's interpretation is "based on a permissible construction of the statute."

In *Chevron*, the Supreme Court held that Congress had not spoken directly to the issue in question because it had not explicitly defined to what "stationary sources" the permit program might apply. Having negatively answered the first question, the Court turned to the second prong of the test. Under the second prong, the *Chevron* court held that the EPA's interpretation of "stationary source" was permissible.

2. *Bohac v. Department of Agriculture*

In 1989, Congress passed the Whistleblower Protection Act (WPA) to protect government employees who revealed potentially damaging information about the government. Under the 1994 Amendments to the WPA, Congress allowed the board hearing employee claims to give protected whistleblowers corrective action, such as: "back pay and related benefits, medical costs incurred,

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54. Id. at 842-43 (setting out two prongs of test).
55. Id. at 842 (specifying that question is whether "Congress has directly spoken to the precise question at issue.").
56. *Chevron*, 467 U.S. at 842-43 n.9 (noting additionally that court has final say on issues of statutory construction and must reject constructions by agencies that are inconsistent with clear congressional intent); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (holding that, in any case of statutory construction, court's analysis begins with language of statute, and where statutory language is clear, "it ends there as well.").
57. *Chevron*, 467 U.S. at 843 (acknowledging that to uphold agency's construction, court does not have to conclude that construction was only one agency could have adopted).
58. Id. at 845 (noting that court based its decision on examination of legislation and legislative history).
59. Id. at 845-66 (analyzing whether EPA's use of bubble concept was reasonable).
60. Id. at 866 (giving reasoning for holding). The court also held that "an initial agency interpretation is not instantly carved into stone." Id. at 863.
61. 239 F.3d 1334 (Fed. Cir. 2001).
62. See id. at 1337 (quoting *Weber v. Dep't of the Army*, 9 F.3d 97, 101 (Fed. Cir. 1993)) (noting that Congress wanted to strengthen existing protections of federal whistleblowers).
travel expenses, and any other reasonable and foreseeable consequent changes.”63

In Bohac v. Department of Agriculture, the Court of Appeals for the Federal Circuit analyzed the meaning of the phrase “any other reasonable and foreseeable consequential changes” after a claimant, who was denied non-pecuniary damages, challenged the use of the word “changes.”64 The Federal Circuit held that the use of the word “changes” was an “obvious mistake.”65 Consequently, the Federal Circuit stated that it had authority to disregard the word “changes” and supplant it with “damages.”66

3. Garcia v. United States67

In Garcia v. United States, the United States Supreme Court examined the meaning of the phrase “any money, or other property of the United States” contained in 18 U.S.C. § 2114.68 Petitioners were convicted of assaulting a Secret Service Agent, who was considered a “lawful custodian of Government money,” with the intent of stealing that money.69 Petitioners argued that their conviction was unlawful because Congress intended the statute to protect only “postal” money or property.70

The Garcia court held that the statute’s language had a plain and unambiguous meaning.71 The Garcia court continued its analysis by looking to the legislative history, but recognized that “only the most extraordinary showing of contrary intentions . . . would justify

63. Id. at 1337-38 (quoting 5 U.S.C. § 1221(g)(1)(A)) (pointing out that amendments also required that whistleblower be placed in same position as before).
64. Id. at 1338 (quoting 5 U.S.C. § 1214(g)(1)(A)(ii)) (noting most agreed word should have been “damages”).
65. Id. (acknowledging that in addition to support provided by legislative history that word was supposed to be “damages,” support was also provided by 5 U.S.C. § 1214(g), counterpart provision of 5 U.S.C. § 1221(g)).
66. Bohac, 239 F.3d at 1338-39 (noting courts can interpret statutes to correct obvious mistakes).
68. Id. at 73. 18 U.S.C. § 2114 prohibits assault with intent to rob “any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States . . . .” Id. (quoting 18 U.S.C. § 2114).
69. Id. at 72 (noting that Petitioners were sentenced to maximum allowed (twenty-five years) because assault with dangerous weapon put Secret Service agent’s life in danger).
70. Id. at 73 (recognizing that language of statute contradicts Petitioner’s argument because language extends to custodians of any mail matter, United States money, and other United States property).
71. Garcia, 469 U.S. at 73-75 (noting facial analysis of statute does not suggest congressional intent to limit protection of statute to postal workers).
a limitation on the ‘plain meaning’ of the statutory language.” 72

The Garcia court further limited the role of legislative history in interpreting unambiguous statutes by holding that, in these cases, “judicial inquiry is complete except in ‘rare and exceptional circumstances.’” 73 Ultimately, the Garcia court refused to disregard the statute’s plain meaning based on Petitioner’s theory of congressional intent. 74


In Connecticut National Bank v. Germain, the United States Supreme Court held that it would not consider the legislative history of a statute. 76 Germain, a trustee of O'Sullivan's Fuel Oil Company (Fuel), sued Connecticut National Bank (Bank), a creditor of Fuel, in state court during O'Sullivan's bankruptcy proceedings. 77 Bank removed the case to the United States District Court for the District of Connecticut which, pursuant to a local rule, transferred the case to Bankruptcy Court. 78 The Bankruptcy Court denied one of Bank's motions, and the District Court affirmed this ruling. 79 Bank appealed the ruling, but the Court of Appeals for the Second Circuit dismissed the case for lack of jurisdiction. 80 Bank argued that 28 U.S.C. § 1292 gave the court appellate jurisdiction. 81 Germain argued that section 1292 did not apply to his case because Congress

72. Id. at 75-76 (indicating most authoritative source for determining legislative intent was in Committee Reports on bill).
73. Id. at 75 (quoting TVA v. Hill, 437 U.S. 153, 187 n.33 (1978); Crooks v. Harrelson, 282 U.S. 55, 60 (1930)) (implying that issue presents rare and exceptional circumstance).
74. Id. at 79 (saying answer to Petitioner’s claims was that “Congress did not write the statute that way.” (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).
76. Id. at 254 (holding that “judicial inquiry into the applicability of § 1292 begins and ends with what § 1292 does say . . . ”).
77. Id. at 250 (noting Germain was suing for various torts and breaches of contract).
78. Id. (acknowledging that Bankruptcy Court was overseeing liquidation of Fuel).
79. Id. (noting Germain demanded jury trial, which Bank moved to strike).
80. Conn. Nat. Bank, 503 U.S. at 250 (disallowing appeal). A court of appeals can only exercise jurisdiction over a bankruptcy court's interlocutory orders when a district court gave the order after withdrawing the case from bankruptcy court and not when a district court acts as a court of appeals for a bankruptcy court. Id. at 251.
81. Id. (noting that 28 U.S.C. § 1292 states that courts of appeals have jurisdiction over interlocutory orders of district courts).
intended 28 U.S.C. § 158(d) to override section 1292. The Supreme Court found for Bank, refusing to consider legislative history because the language of both statutes was unambiguous.

B. Judicial Interpretation of Agency Action

1. Securities and Exchange Commission (SEC) v. Chenery Corporation

The issue in SEC v. Chenery Corporation stemmed from the SEC's approval of an order based on the reorganization of a company pursuant to the Public Utility Holding Company Act of 1935. Under this order, while reorganizations plans brought by management were being considered by the SEC, the preferred stock acquired by company officers and directors would not be converted into stock of the reorganized company, like all other preferred stock. Instead, directors and officers would have to surrender the stock purchased at cost. The SEC upheld the order, basing its decision upon precedent analyzing the fiduciary duties of a reorganizing company's management.

In Chenery, the United States Supreme Court overturned the SEC's decision because it was not in accordance with the principles of fiduciary duties as determined by other courts. The SEC then argued that the Court should still uphold the plan because, during reorganization, management could take advantage of their positions. The Chenery court, however, determined that it could not examine other grounds for the SEC's ruling because it must review an administrative order solely on the grounds upon which the re-

82. Id. at 251-53 (noting that while 28 U.S.C. § 1292 confers jurisdiction over interlocutory orders, 28 U.S.C. § 158(d) confers jurisdiction over appeals from final decisions of district courts when they act as appeals courts for bankruptcy courts).

83. Id. at 253-54 (presuming that "a legislature says in a statute what it means and means in a statute what it says.").

84. 318 U.S. 80 (1942)

85. Id. at 81 (noting that company brought proceeding to SEC to review order approving company's plan for reorganization).

86. Id. (pointing out that order applied to "successive" plans proposed).

87. Id. (noting that provision would allow other preferred stock holders to participate in reorganization on higher level than preferred stock members affected by provision).

88. Id. at 87 (noting that SEC stated that management violates fiduciary duty to stockholders if it purchases stock).

89. Chenery, 318 U.S. at 88 (recognizing that courts do not impose any fiduciary duty on management to refrain from buying stock simply because they are managers).

90. Id. at 90 (identifying another reason court should uphold organizational plan).

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cord showed the agency originally based its decision. Therefore, even though Congress had given the SEC the power to judge reorganization plans, an SEC determination would not be upheld on different grounds simply because the SEC could have based its determination on those grounds. Furthermore, the Cherry court found that the review process mandated that the grounds upon which an agency acts be clear and sustainable.

2. **Fleshman v. West**

In *Fleshman v. West*, Fleshman’s damages claim for injuries obtained while on duty with the United States Army was denied by the Department of Veteran Affairs (Department) because Fleshman failed to completely fill out the report necessary to file a claim. Five years later, Fleshman filed a new claim which became effective when it was received by the Department. Fleshman initiated a suit to have the latter claim applied retroactively from the date he filed his first application. The Board of Veterans’ Appeals (Board) denied Fleshman’s claim for an earlier effective date, holding that Fleshman abandoned his original claim because his form was not properly completed. The Court of Veterans Appeals affirmed this decision, but based its decision on a different ground. The court held that Fleshman’s original claim did not comply with the form prescribed by the Secretary of Veteran Affairs. Fleshman argued that when reviewing a decision of the Board, the Court of Veterans Appeals was restricted to examining only the grounds upon which

91. Id. at 92-94 (holding that “action must be measured by what the Commission did, not by what it might have done.”).
92. Id. at 94 (noting that if Congress gave courts review of agency’s determination, courts could overturn order when agency has misinterpreted law).
93. Id. (noting courts cannot review decisions unless they are aware of considerations supporting action).
94. 138 F.3d 1429 (Fed. Cir. 1998).
95. Id. at 1430 (noting Fleshman’s claim was returned to him with instructions to complete form and Fleshman never complied with instructions).
96. Id. at 1431 (acknowledging that second form was properly filled out).
97. Id. (relying on 38 U.S.C. § 5110(b)(1)). 38 U.S.C. § 5110(b)(1) says that the effective date shall be the day following the date of discharge if the application is filed within one year. *Id.* Fleshman used 38 U.S.C. § 5110(b)(1) to argue that his earlier application allowed his effective date to be the day after his discharge from service. *Fleshman*, 138 F.3d at 1431.
98. Id. (holding Fleshman was entitled to benefits when Department received his completed claim form).
99. Id. (setting out Court of Veterans Appeals’ reasoning).
100. Id. (relying on 38 U.S.C. § 5101(a) which states that “specific claim in the form prescribed by the Secretary [of Veteran Affairs] must be filed . . . .” (alteration in original)).
the Board relied to make its decision and could not substitute its own ground.\textsuperscript{101}

The Court of Appeals for the Federal Circuit held that the Chenery\textsuperscript{1} doctrine must be flexible.\textsuperscript{102} A court, therefore, does not have to remand a case to an agency if it is obvious that the agency would have "reached the same ultimate result" if it had considered the alternative ground.\textsuperscript{103} Specifically, the Federal Circuit stated that the Board would have reached the same conclusion if it had considered whether or not Fleshman complied with the form's requirements because the Board’s findings showed that it decided what information was needed to comply with the form prescribed by the Secretary.\textsuperscript{104}

According to the Federal Circuit, under the Chenery doctrine, a court is not prohibited from affirming an agency's decision on a different ground if that ground does not need "a determination of judgment which an administrative agency alone is authorized to make."\textsuperscript{105} In addition, the Federal Circuit distinguished Chenery from Fleshman and explained that the Board in Fleshman took an additional step when it decided what information was necessary for compliance with the Secretary’s requirements.\textsuperscript{106}

\begin{itemize}
\item \textsuperscript{101} Id. (arguing that Board relied on abandonment ground, so Court of Veterans Appeals could not affirm on ground that Fleshman failed to comply with statute).
\item \textsuperscript{102} Fleshman, 138 F.3d at 1433 (citations omitted) (acknowledging that other courts recognize principle).
\item \textsuperscript{103} Id. (quoting Ward v. Merit Sys. Protection Bd., 981 F.2d 521, 528 (Fed. Cir. 1992)) (noting that agency would have reached same conclusion if it had considered ground relied upon by Court of Veteran Appeals); see also Chenery, 318 U.S. at 88 ("It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.").
\item \textsuperscript{104} Fleshman, 138 F.3d at 1433 (holding that Board’s finding that Plaintiff did not originally file completed claim form is sufficient to provide factual basis for conclusion that Plaintiff did not file form which conformed to Secretary’s requirements). The court also noted that the Board’s underlying findings demonstrated that the Board had already exercised its discretion. Id.
\item \textsuperscript{105} Id. (quoting Koyo Seiko Co. v. United States, 95 F.3d 1094, 1101 (Fed. Cir. 1996)) (discussing Chenery doctrine).
\item \textsuperscript{106} Id. (noting that Board’s conclusion contained explicit findings that Plaintiff’s original form was incomplete); see also Chenery, 318 U.S. at 93-94 (holding that because Commission made no judgment regarding what is "detrimental to the public interest or the interest of investors or consumers," court cannot independently make that determination).
\end{itemize}
IV. NARRATIVE ANALYSIS

In *Defenders of Wildlife v. Hogarth*, Defenders argued that the Interim-Final Rule created by the NMFS did not conform to the International Dolphin Conservation Act.107 Specifically, Defenders argued that the Interim-Final Rule was contrary to the Act’s plain language and, therefore, hindered Congress’ intent to protect dolphins.108 Hogarth contended that use of the word “before” was an “inadvertent drafting mistake” which the Federal Circuit needed to correct.109 Specifically, Hogarth argued that Congress intended to use the word “after” instead of the word “before” because the MMPA required fishermen to complete backdown procedures one-half hour after sunset.110 Furthermore, Hogarth argued that Congress intended the one-half hour after sunset international standard to govern the Interim-Final Rule because the Act authorized the Secretary to create and implement the International Agreement without congressional approval.111

A. Chevron Analysis

To determine whether the Secretary lawfully interpreted the Act, the Federal Circuit conducted a *Chevron* analysis.112 The court examined the Act’s language and concluded that because the statute clearly used the word “before,” and did not define or place limits on that term, it would assume that the ordinary meaning of the word “before” applied.113 Furthermore, the court said that the Interim-Final Rule and the Act could not be reconciled because the

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107. See *Defenders*, 330 F.3d at 1364-65 (noting that Defenders chose not to appeal Court of International Trade’s decision regarding embargo against Mexico).

108. *Id.* at 1365. Defenders argued that Act required backdown to be completed one-half hour before sundown, but Interim-Final Rule required backdown to be completed one-half hour after sundown. *Id.* at 1363.

109. *Id.* at 1365-66 (acknowledging that Court of International Trade held that use of “before” was drafting error).

110. *Id.* (noting that MMPA Amendments as prior legislative enactment is evidence of congressional intent).

111. *Defenders*, 330 F.3d at 1367 (arguing that “the statutory scheme of the [Act], where Congress directed the [Secretary] to negotiate and implement an International Agreement without returning to Congress for approval, . . . suggest[s] that Congress intended the international standard to govern the implementing regulations.”).

112. *Id.* at 1366. The first prong of the test asks whether Congress has spoken directly to issue; if that question is answered in the negative, the second prong asks whether agency’s interpretation “is based on a permissible construction of the statute.” *Id.* (quoting *Chevron*, 467 U.S. at 843).

113. *Id.* (explaining that statute’s text is first place to look to determine intent of Congress (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999))).
Interim-Final Rule’s use of the word “after” was also clear.\textsuperscript{114} Under \textit{Chevron}, the court held that the use of the word “before” in the Act denoted a clear indication of congressional intent.\textsuperscript{115}

**B. Bohac Analysis**

Next, the court rejected the Court of International Trade’s conclusion that the use of the word “before” in the Act was a drafting mistake.\textsuperscript{116} In overturning this ruling, the court considered Hogarth’s contention that a court may change a word in a statute if the use of a word is an “obvious mistake.”\textsuperscript{117} The court held that \textit{Bohac} did not apply because in \textit{Bohac} the statute’s text indicated a clear mistake.\textsuperscript{118} Here, however, the Act’s text was understandable with the word “before,” so the use of “before” was not a clear drafting mistake.\textsuperscript{119}

**C. Garcia Analysis**

The court then performed a \textit{Garcia} analysis to determine if Congress clearly intended to use the word “after.”\textsuperscript{120} If congressional intent to use “after” was clear, then the court could construe the Act “contrary to the plain meaning of its text.”\textsuperscript{121} The court noted a prior enactment, standing alone, did not indicate that later changes were contrary to congressional intent.\textsuperscript{122} Further, the court asserted that the use of the word “after” in previous statutes was not indicative of whether the use of the word “before” in the

\textsuperscript{114} \textit{Id.} (recognizing that Interim-Final Rule directly conflicts with Act).

\textsuperscript{115} \textit{Defenders}, 330 F.3d at 1366 (noting that because Congress directly answered precise question at issue, analysis of \textit{Chevron}’s second prong was unnecessary).

\textsuperscript{116} \textit{Id.} at 1365-67 (recognizing that both Court of International Trade and Hogarth relied on prior legislation, legislative history, practical considerations, and International Agreement in determining that word “before” was drafting mistake).

\textsuperscript{117} \textit{Id.} at 1366-67 (addressing Hogarth’s argument to change “before” in Act to “after” based on \textit{Bohac}’s doctrine of mistake).

\textsuperscript{118} \textit{Id.} at 1366 (noting that use of word “changes” in \textit{Bohac} was obvious mistake because that statute dealt with what successful plaintiff could recover; it was obvious that word used was supposed to be “damages”).

\textsuperscript{119} \textit{Id.} (explaining that doctrine of mistake usually involves drafting mistake by someone unfamiliar with law (citing \textit{United States Nat’l Bank v. Indep. Ins. Agents of Am.}, 508 U.S. 439, 462 (1993))).

\textsuperscript{120} \textit{Defenders}, 330 F.3d at 1367 (setting out requirements of \textit{Garcia}).

\textsuperscript{121} \textit{Id.}; see also \textit{Garcia}, 469 U.S. at 75 (“[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.”).

\textsuperscript{122} \textit{Defenders}, 330 F.3d at 1367 (noting that Congress can change meaning of statute so that it differs from previous statutes).
Act was deliberate or a mistake.\textsuperscript{123} Moreover, the court pointed out that the Supremacy Clause requires a statute to take precedent over an executive agreement.\textsuperscript{124} As a result, Congress could not have intended the International Agreement to govern the Interim-Final Rule.\textsuperscript{125} Consequently, the court held that the Act "clearly require[d]" fishermen to complete backdown procedures one-half hour before sunset.\textsuperscript{126}

D. Chenery Analysis

Hogarth alternatively argued that the Secretary had congressional authority to alter the Act's provisions as long as the alterations conformed to the IDCP.\textsuperscript{127} Specifically, Hogarth contended that 16 U.S.C. § 1413(a)(2)(C) gave the Secretary the power to alter regulations dealing with "fishing practices," and that the permissible time period for backdown procedures was a "fishing practice."\textsuperscript{128} The court agreed with Hogarth and held that, pursuant to section 1413(a)(2)(C), the Secretary was allowed to change the backdown procedure set forth in the Act.\textsuperscript{129} Consequently, the court held that the Secretary's decision to adopt the "after" sunset standard was in accordance with the law.\textsuperscript{130}

Defenders, however, objected to the court's approach, arguing that, under the Chenery doctrine, the alteration was improper because the Secretary did not rely on section 1413(a)(2)(C) when promulgating the Interim-Final Rule.\textsuperscript{131} The court dismissed De-
fenders' *Chenery* claim for two reasons. First, the court found that the NMFS supported its decision by relying on the fact that the Interim-Final Rule was consistent with the International Agreement. Second, the court determined that it was not required to make factual findings; instead, it was only required to decide whether section 1413(a)(2)(C) gave the NMFS the authority to create the Interim-Final Rule. The court concluded that the NMFS would still have changed “before” to “after” had it considered section 1413(a)(2)(C) because the NMFS already made the Interim-Final Rule consistent with the IDCP. The Federal Circuit rejected Defenders' arguments and upheld the Court of International Trade's decision that the Interim-Final Rule and the Act did not conflict.

V. CRITICAL ANALYSIS

A. **Chevron**

Both statutory language and case law support the Federal Circuit's holding that the Secretary erred in concluding that Congress made a mistake in requiring backdown procedures to be completed one-half hour before sunset. Congress met the first prong of the *Chevron* test because it spoke directly to the “precise question at issue” by using the word “before.” A court cannot disregard a stat-

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132. Id. (noting that *Chenery* doctrine states that “[i]f the action rests upon an administrative determination— an exercise of judgment in an area which Congress has entrusted to the agency— of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.”) (quoting *Chenery*, 318 U.S. at 94).

133. Id. (noting that International Agreement created IDCP).

134. Defenders, 330 F.3d at 1368 (relying on *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1988), which states “the [Chenery] doctrine does not require a remand to the agency if it is clear that ‘the agency would have reached the same ultimate result’ had it considered the new ground.” (citations omitted)).

135. See id. (noting additionally that in response to comment to proposed Interim-Final Rule, NMFS relied on Interim-Final Rule being consistent with International Agreement, MMPA Amendments, and La Jolla Agreement as supporting its decision to require backdown procedures to be completed one-half hour after sunset).

136. See id. (addressing additional holdings of lower court). The Federal Circuit also held that the Court of International Trade did not err in concluding that the NMFS' decision not to prepare an environmental impact statement was not arbitrary or capricious. *Id.* at 1374. That holding will not be discussed in this Note.

137. See id. at 1374-75 (noting that issue was promulgation of Interim-Final Rule which directly contradicted Act authorizing Interim-Final Rule).

138. *Chevron*, 467 U.S. at 842 (recognizing that when court reviews construction of statute, first step in analysis asks whether Congress has spoken directly to question at issue).
ute's comprehensible meaning, and the Act's use of the word "before" gave the statute a comprehensible meaning. Consequently, Congress' intent in using "before" is clear; therefore, that is "the end of the matter," and the court must give effect to the plain language of the statute.

B. **Bohac**

Additionally, the court properly rejected the applicability of *Bohac*. In *Bohac*, the mistaken word made the statute incoherent. Here, the word "before" does not make the statute incoherent; as a result, *Bohac* is inapplicable.

C. **Garcia**

The court's *Garcia* analysis, however, was unnecessary because the contradictions regarding backdown procedures in the legislative history did not make this a "rare and exceptional circumstance." In *Garcia*, the court continued its analysis by examining the legislative history. In *Connecticut National Bank*, however, the court stated that legislative history should not be considered if the statute is unambiguous. According to the precedent set in *Chevron* and *Connecticut National Bank*, the court's consideration of legislative history was inconsistent with case law because, unlike *Garcia*, this case did not involve "rare and exceptional circumstances." Regardless of the *Garcia* analysis, the court properly determined

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139. Id. at 842-43 (holding that court must give effect to "unambiguously expressed intent of Congress.").

140. See id. (noting that if intent of Congress is clear, court need not consider second prong which questions whether agency's interpretation is permissible construction of statute). Additionally, "[an] agency may not ignore Congress." Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001) (citations omitted).

141. See *Defenders*, 330 F.3d at 1375 (Newman, J., dissenting) (noting Hogarth argued that because Congress made mistake, Secretary was not required to follow statute).

142. See *Bohac* v. Department of Agriculture, 239 F.3d 1334, 1338 (Fed. Cir. 1993) (noting appellate court can interpret statute to correct obvious mistake).

143. See *Defenders*, 330 F.3d at 1366 (pointing out doctrine of mistake applies to cases where mistake is clear from text of statute).


146. See *Crooks*, 282 U.S. at 60 ("[T]o justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense.").
that the Secretary could not ignore the word “before” when promulgating the Interim-Final Rule. 147

D. Chenery

The court’s holding allowing the Interim-Final Rule to stand is inconsistent with precedent. 148 The court should have only conducted a Chevron analysis. 149 The court determined that Congress unambiguously expressed its intent as to the timing of backdown procedures. 150 Accordingly, it could not construe the statute contrary to the plain meaning of the text. 151 Thus, the court should have concluded that the Interim-Final Rule could not contradict the Act because of the statute’s unambiguous language. 152

Instead, the court decided that the Secretary could alter the statute because 16 U.S.C. § 1413(a)(2)(C) allowed the Secretary to adjust “fishing practices” as long as these adjustments were consistent with the IDCP. 153 The court’s analysis conflicts with both statutory analysis and case law because the Secretary did not rely on section 1413(a)(2)(C) when promulgating the Interim-Final Rule. 154 According to Chenery, an administrative order cannot be sustained unless the grounds the court used to sustain the action were the same grounds upon which the agency relied. 155 Here, the Secretary did not rely on section 1413(a)(2)(C) to promulgate the Interim-Final Rule. 156 Consequently, under Chenery, the court can-

147. Defenders, 330 F.3d at 1366-67 (noting that Act clearly required one-half hour before sunset time limit).

148. See id. at 1375 (Newman, J., dissenting) (arguing court’s holding is violation of administrative and statutory law).

149. See id. at 1374-75 (Newman, J., dissenting) (noting that after court correctly concluded that Secretary erred, court then affirmed Secretary’s action on alternative grounds).

150. See id. at 1367 (recognizing that Act clearly required fishermen to complete backdown procedure one-half hour before sunset).

151. See Chevron, 467 U.S. at 842-43 (holding that if congressional intent is unambiguous, court must give effect to that intent).

152. See Conn. Nat. Bank, 503 U.S. at 254 (holding that once court determines statute uses unambiguous terms, court’s inquiry is complete).


154. See Taking of Marine Mammals, supra note 34, at *39 (indicating Secretary relied on theory that provision in Act requiring backdown procedures to be completed one-half hour before sunset was drafting error).

155. SEC v. Chenery Corp., 318 U.S. 80, 95 (1942). “[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its power were those upon which its action can be sustained.” Id.

156. See id. at 94 (holding it is not for court to independently determine what agency did not determine).
not utilize section 1413(a)(2)(C) to uphold the Secretary's alteration and allow the Interim-Final Rule to contradict the Act. 157

In addition, the court's denial of Defenders' Chenery claim was flawed for three reasons. 158 First, the Secretary believed that the use of the word "before" in the Act was a drafting error and relied on the IDCP to support his use of the word "after" in the Interim-Final Rule. 159 The court, however, held that Congress did not make a drafting mistake in the Act, so the court could not examine the Secretary's reasoning for promulgating the Interim-Final Rule. 160 Therefore, the ground upon which the Secretary acted in promulgating the Interim-Final Rule (that Congress made a mistake in using the word "before") is not one upon which the Secretary's action can be sustained. 161

Second, the court relied on Fleshman to distinguish Chenery because in both Fleshman and the present case the court was not required to make additional factual findings like the court in Chenery. 162 Although the court here was not required to make additional factual findings, it did make a decision which Congress placed solely within the Secretary's discretion. 163 In particular, the court made a decision regarding the definition of "fishing prac-

157. See id. at 95 (holding that administrative action can only be measured by what agency did, not by what agency might have done).

158. See Defenders, 330 F.3d at 1376 (Newman, J., dissenting) (acknowledging that court recognized it could not affirm agency action unless agency relied on those grounds).

159. See Taking of Marine Mammals, supra note 34, at *39 (noting additionally that previous amendments to MMPA, La Jolla Agreement, and IDCP all used word "after").

160. See Defenders, 330 F.3d at 1376 (Newman, J., dissenting) (pointing out Secretary was only allowed to make adjustments that were appropriate, therefore "[s]ince the court agrees that 'before sundown' was not a mistake, it cannot be 'appropriate' or an 'adjustment' to change it.").

161. See Taking of Marine Mammals, supra note 34, at *39 (noting that Secretary should seek to amend statute).

162. See Fleshman v. West, 138 F.3d 1429, 1433 (Fed. Cir. 1998). "[T]he doctrine does not prohibit a reviewing court from affirming an agency decision on a ground different from the one used by the agency if the new ground is not one that calls for 'a determination or judgment which an administrative agency alone is authorized to make.'" Id. (quoting Koyo Seiko Co. v. United States, 95 F.3d 1094, 1101 (Fed. Cir. 1996)).

163. See 16 U.S.C. § 1413(a)(2)(C) (2000) (allowing Secretary to make appropriate adjustments to subparagraph (B), which included permissible time for backdown procedures, that pertain to fishing practices); see also SEC v. Chenery Corp., 332 U.S. 194, 196 (1946) (noting that when court is dealing with judgment which Congress has entrusted solely to administrative agency, court cannot affirm inadequate or improper grounds by substituting its own judgment because "[i]f we do so it would propel the court into the domain which Congress has set aside exclusively for the administrative agency.").
"rice" under section 1413 (a)(2)(C). The court held that the timing of backdown procedures was a "fishing practice" under section 1413 (a)(2)(C). By doing so, the court entered into the domain that Congress had entrusted to the Secretary; therefore, the court violated the Chenery doctrine.

Third, as in Fleshman, the court held that if the Secretary had considered section 1413 (a)(2)(C), he or she would have reached the same conclusion as the court. Fleshman, however, is distinguishable from the present case because the facts here do not indicate that the Secretary "exercised [his or her] discretion" in determining what constitutes a "fishing practice." As a consequence of the Secretary's failure to define "fishing practices," the court could not determine that the Secretary would have reached the same conclusion had he or she considered whether backdown procedures were "fishing practices." Accordingly, the court’s conclusion that section 1413(a) (2)(C) permitted the Secretary to use the word "after" in the Interim-Final Rule is contrary to existing case law.

In summary, the court's decision that the Secretary could not ignore the word "before," when promulgating the Interim-Final Rule, is consistent with both statutory analysis and case law. Nonetheless, the court’s conclusion that the Secretary had the authority under section 1413(a) (2)(C) to change the word "before" is inconsistent with statutory and case law.

164. See Defenders 330 F.3d at 1367 (noting that § 1413(a)(2)(C) authorized Secretary to draft Interim-Final Rule in accordance with IDCP).
165. Id. (noting that "[t]he period for permissible sundown sets is a fishing practice subject to section 1413(a)(2)(C)."
166. See Chenery, 318 U.S. at 94-95 (noting that by not allowing court to substitute its own judgment, agency is free to exercise its administrative discretion).
167. See Fleshman, 138 F.3d at 1433 (noting that the [Chenery] doctrine does not require a remand to the agency if it is clear that 'the agency would have reached the same ultimate result' had it considered the new ground.”) (quoting Ward v. Merit Sys. Protection Bd., 981 F.2d 521, 528 (Fed. Cir. 1992)).
168. See id. (noting that Board’s underlying findings show that Board had already “exercised its discretion” in determining alternative ground upon which court relied).
169. See generally Chenery, 318 U.S. at 94-95 (noting that court should not enter province which belongs to agency).
170. See Defenders, 330 F.3d at 1376 (Newman, J., dissenting) (noting that Congress only gave Secretary authority to adjust, but not significantly alter, provisions of 16 U.S.C. § 1413(a)(2)(B)).
171. See generally id. at 1365-68 (setting out court’s decision).
172. See generally id. (setting out court’s decision).
VI. Impact

"Sundown sets" occur when the backdown procedure is completed after the sun sets.\textsuperscript{173} Although technology has increased the successfulness of backdown procedures, they are still complicated procedures and "sundown sets" add to that complexity.\textsuperscript{174} "Sundown sets" result in higher dolphin mortality rates than sets completed during daylight for two reasons.\textsuperscript{175} First, fishermen have reduced visibility at night.\textsuperscript{176} Second, many dolphins rely on visual sensitivity; as a result, they tend to become more confused and agitated at night.\textsuperscript{177} Studies indicate that up to four times as many dolphins die during "sundown sets" as compared to sets performed in daylight.\textsuperscript{178} Consequently, the Federal Circuit's holding that fishermen do not have to perform backdown procedures until one-half hour after sunset has the potential to increase dolphin mortality rates.\textsuperscript{179}

Additionally, one of the Act's original goals was to reduce dolphin mortality rates.\textsuperscript{180} Therefore, the court's holding, that the Secretary could change Congress' mandate that backdown procedures be completed one-half hour before sunset, hinders congr-
sional intent. 181 Although the time difference between one-half hour before sundown and one-half hour after sundown might seem insignificant, congressional intent to reduce the dolphin mortality rate combined with the after sundown requirement's potential to increase the dolphin mortality rate, makes the difference extremely significant. 182

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181. See Defenders, 330 F.3d at 1376 (noting that time limit less favorable to dolphins is contained in IDCP, but this does not allow NMFS to override Congress’ mandate in Act).

182. See generally id. at 1375-76 (Newman, J., dissenting) (noting reasons why court cannot ignore congressional intent); DOLPHINS AND THE TUNA INDUSTRY, supra note 173, at 62 (pointing out how “sundown sets” can increase dolphin mortality rates).