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CASE NOTE

TURTLE POWER: THE NINTH CIRCUIT AVOIDS A TRAGEDY ON THE HIGH SEAS

*Turtle Island Restoration Network v. National Marine Fisheries Service*¹

I. INTRODUCTION

[[I]t is in the best interest of mankind to minimize the losses of genetic variation. The reason is simple. They are keys to puzzles we cannot solve, and may provide answers to questions which we have not yet learned to ask.²

Sea turtles were once abundant off the shores of the United States.³ Today all six species of sea turtle are listed as either endangered or threatened under the Endangered Species Act.⁴ Longline fishing has been linked to the incidental catch and capture, or "take," of sea turtles, adding to the decline of the species.⁵ The decline in sea turtles has caused international recognition of the need for preservation and conservation of the species.⁶

The Ninth Circuit has taken a significant step forward in protecting the remaining fragile populations of sea turtles. The instant case requires the National Marine Fisheries Service to engage in the consultation process required by the Endangered Species Act to determine if issuing longline fishing permits will likely jeopardize the survival of sea turtles.⁷

II. FACTS AND HOLDING

The Center for Biological Diversity and the Turtle Island Restoration Network, ("Center") brought suit against the National Marine Fisheries Service ("Fisheries Service") alleging that the Fisheries Service was in violation of Sections 7 and 9 of the Endangered Species Act ("ESA").⁸ This case arose out of practices of United States flagship vessels that engage in longline fishing in international waters and "land their catch" in

¹ 340 F.3d 969 (9th Cir. 2003).

² 133 CONG. REC. H11248 (daily ed. Dec. 11, 1987) (statement of Rep. Thomas).

³ Press Release, Conservation International, Pacific Leatherback Turtle Could Go Extinct in 10 Years (Feb. 26, 2004) (*available at* http://www.conservation.org/xp/news/press_releases/2004_022604.xml).

⁴ 50 C.F.R. § 17.11 (2004).

⁵ The Humane Society of the U.S., *Longline Fishing Threatens Sea Birds and Other Marine Life Species*, at <http://www.hsus.org/ace/15050> (last visited Oct. 18, 2004).

⁶ See discussion *infra* Part III.A.2.

⁷ *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 972 (9th Cir. 2003).

⁸ *Id.* at 972. Section 7 of the ESA states in part that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, [unless an exemption applies.]" 16 U.S.C. § 1536(a)(2) (2000). Regulations promulgated regarding the implementation of the ESA state that Section 7 of the ESA only applies to discretionary federal actions or control. 50 C.F.R. § 402.03 (2004). Section 9 of the ESA imposes liability for the "taking" of protected species. 16 U.S.C. § 1538.

California.⁹ Until recently, the industry operated primarily in Hawaii.¹⁰ The industry moved to California after an injunction in Hawaii banned the practice. The injunction followed a biological opinion, which found the industry's continued operation in Hawaii would jeopardize the survival of several protected species of sea turtle.¹¹

Pursuant to the High Seas Fishing Compliance Act ("Compliance Act"), the Fisheries Service permitted the vessels to engage in longline fishing activities.¹² The Fisheries Service issued the permits without initiating the Section 7 consultation process of the ESA.¹³ The Fisheries Service believed that under the Compliance Act, they did not retain sufficient discretion in issuing permits to trigger the consultation process of Section 7.¹⁴

The Center contended that issuing permits violated Section 7 of the ESA, because the Fisheries Service failed to engage in the consultation process to investigate the effects of longline fishing on protected marine species.¹⁵ In this case, the sea turtles were both endangered and threatened species.¹⁶ Further, the Center charged the Fisheries Service with being in violation of section 9 of the ESA by allowing the fishing vessels to engage in activity that results in the "taking" of the protected species.¹⁷ In particular, the Center alleged that the Fisheries Service was liable when, under its authority, a private party took a protected species.¹⁸ In July of 2000, the Center notified the Secretary of Commerce of its intent to sue via letter.

The Fisheries Service responded that under its interpretation of the Compliance Act, the Agency did not have discretion to impose restrictions on permits.¹⁹ In the absence of agency discretion Section 7 of the ESA was not applicable.²⁰ Moreover, the Fisheries Service stated that they were in the process of preparing a management plan for migratory species of the high seas, during which, an ESA consultation would be prepared.²¹ In response to the final allegation of "takings," the Fisheries Service indicated that it would investigate the taking of any protected species by those engaged in the high seas fishing industry.²² Subsequently, the Center brought suit against the Fisheries Service through the citizen suit provision of the ESA.²³

The case was resolved in the district court on cross motions for summary judgment.²⁴ The district court found for the Fisheries Service.²⁵ Although the district court noted that the Fisheries Service had some discretion in issuing high sea permits, it found this discretion to be insufficient for the Agency to condition the

⁹ *Turtle Island Restoration Network*, 340 F.3d at 971. Longline fishing involves stretching a line over several miles anchored at specific depths with baited hooks numbering in the thousands on the length of the line. Longline fishers are interested mainly in swordfish but also fishes such as tuna and shark. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 972.

¹⁵ *Id.* at 971. The High Seas Compliance Act states in pertinent part that U.S. vessels are obligated to acquire a permit that authorizes the vessels to fish on the high seas. 16 U.S.C. §§ 5504-5506 (2000). In addition, the Compliance Act places certain conditions and proscriptions on the issuance of permits. *Id.* § 5503.

¹⁶ 16 U.S.C. § 1533. The affected species include the leatherback, loggerhead, olive ridley and green sea turtles as well as the short-tailed albatross. 50 C.F.R. §17.11 (2004). See also *Turtle Island Restoration Network*, 340 F.3d at 971-72 n.4-8. All are either threatened or endangered. *Turtle Island Restoration Network*, 340 F.3d at 971-72.

¹⁷ *Turtle Island Restoration Network*, 340 F.3d at 972.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 970.

²⁴ *Id.* at 972.

²⁵ *Id.*

permits to inure to the benefit of the sea turtles.²⁶ Based on this reasoning, the district court held the Fisheries Service was not in violation of Section 7 of the ESA.²⁷ According to the court, because the Fisheries Service did not have discretion, they could not be liable for the taking of protected species by private fishing vessels under Section 9 of the ESA.²⁸

The Center appealed to the Court of Appeals for the Ninth Circuit.²⁹ The question on appeal was whether issuing longline fishing permits invoked the Section 7 consultation process of the ESA.³⁰ The Ninth Circuit Court of Appeals found that there was sufficient agency discretion, as indicated by the plain language of the Compliance Act, to trigger the consultation process of the ESA.³¹ The Fisheries Service was required to comply with the consultation process of the ESA, because the Agency retained sufficient discretion in issuing permits under the Compliance Act.³² The Ninth Circuit reversed the district court, concluding that the Fisheries Service was required to conduct the consultation process under Section 7 of the ESA.³³ Finally, the case was remanded for the district court to determine the claims brought under Section 9 of the ESA.³⁴

III. LEGAL BACKGROUND

A. *International Conservation Measures for Marine Resources*

The United States is party to a number of agreements that provide for the protection and use of high seas marine resources. Many of the agreements are designed to protect marine species that are threatened or endangered, and most require restrictions on high seas fishing. For example, the Inter-American Convention for the Protection and Conservation of Sea Turtles ("Convention") seeks to protect, and trigger the recovery of, sea turtles.³⁵ The Convention seeks to achieve this goal through requiring the signatory countries to take the necessary measures to stop the capturing and killing of sea turtles.³⁶

In an attempt to avoid such restrictions, existing fishing vessels began to re-flag their ships in countries who were not parties to these agreements.³⁷ Additionally, new fishing vessels chose to flag in countries that did not place restrictions on fishing vessels.³⁸ In response to these concerns, the United Nations Food and Agriculture Organization negotiated the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("Agreement").³⁹

²⁶ *Id.* at 975.

²⁷ *Id.* at 972.

²⁸ *Id.*

²⁹ *Id.* at 970.

³⁰ *Id.*

³¹ *Id.* at 975.

³² *Id.* at 977.

³³ *Id.*

³⁴ *Id.*

³⁵ Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, art. II, S. TREATY DOC. NO. 105-48 (1998), available at <http://www.seaturtle.org/iac/convention.shtml> [hereinafter Convention].

³⁶ Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case*, 10 COL. J. INT'L ENVTL. L. & POL'Y 345, 362 (1999). See also Convention, *supra* note 35, art. IV.

³⁷ *Turtle Restoration Network*, 340 F. 3d at 973.

³⁸ Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 90 AM. J. INT'L L. 267, 268 (1996).

³⁹ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, S. TREATY DOC. NO. 103-24, available at <http://www.fao.org/DOCREP/MEETING/003/X3130m X3130E00.HTM#Contents> [hereinafter Agreement].

1. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

The Agreement requires the signatory countries to impose restrictions on fishing vessels,⁴⁰ to protect certain marine species.⁴¹ The Agreement seeks to promote compliance with international conservation measures and ensure transparency in high seas fishing.⁴² The Agreement imposes responsibilities on the signatory countries.⁴³ These responsibilities include prohibiting fishing vessels registered in signatory countries from fishing on the high seas without proper authorization.⁴⁴ The Agreement requires each party take precautions to ensure that vessels flagged by its country do not engage in activities which may “undermine the effectiveness of the international conservation and management measures” of the Agreement.⁴⁵

2. Inter-American Convention for the Protection and Conservation of Sea Turtles

In 1990, Congress called for a multi-national initiative to address the plight of sea turtles.⁴⁶ This initiated a lengthy negotiation with Latin American nations to address international conservation and protection of sea turtles.⁴⁷ Ultimately in 1996, the Inter-American Convention for the Protection and Conservation of Sea Turtles (“Convention”) was drafted and signed. The Convention is the only international agreement devoted to sea turtles.⁴⁸

The objective of the Convention is to protect, conserve, and recover sea turtles and their habitats.⁴⁹ To achieve this objective, the Convention requires that signatory parties reduce incidental capture, injury, and death caused by commercial fisheries.⁵⁰ The Convention states that the reduction should be through “appropriate regulation of such activities [commercial fishing].”⁵¹ The Convention calls for measures that will, to the extent practicable, limit human activity which interferes with the survival of the sea turtles, particularly during reproduction.⁵² On May 22, 1998, President Clinton sent the treaty to the Senate for its advice and consent.⁵³ The treaty was subsequently ratified, and President Clinton signed it on October 12, 2000.⁵⁴

⁴⁰ *Id.* at art. III.

⁴¹ *See id.* at Preamble.

⁴² Nash, *supra* note 38, at 268.

⁴³ *See* Agreement, *supra* note 39, at art. III.

⁴⁴ *Id.* “No [p]arty shall allow any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that [p]arty. A fishing vessel so authorizes shall fish in accordance with the conditions on the authorization.” *Id.*

⁴⁵ *Id.*

⁴⁶ Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT’L. L. 734, 742 (1998).

⁴⁷ *Id.*

⁴⁸ Convention, *supra* note 35, at Introductory Remarks, available at <http://www.seaturtle.org/iac/intro.shtml> (last updated May 6, 2003).

⁴⁹ Convention, *supra* note 35, art. II.

⁵⁰ Nash, *supra* note 46 at 742.

⁵¹ Convention, *supra* note 35, art. IV.

⁵² *Id.*

⁵³ Karla J. Black & Greg Domareki, Recent Development, *A Review of Developments in Ocean and Coastal Law 2000*, 6 Ocean & Coastal L.J. 233, 251 (2001).

⁵⁴ *Id.*

B. Species Conservation Measures In the United States

1. The High Seas Fishing Compliance Act

In the spring of 1994, President Clinton sent the Agreement to the Senate for advice and consent.⁵⁵ The following year, President Clinton signed the Fisheries Act of 1995, which included the High Seas Fishing Compliance Act ("Compliance Act").⁵⁶ By enacting the Compliance Act, the United States became a party to, and implemented, the Agreement. The Compliance Act had two purposes: (1) to implement the Agreement and; (2) to establish a system for regulating and issuing permits to high seas fishing vessels.⁵⁷

The permit system defines eligibility, describes the application process and states that the Secretary of Commerce may impose conditions on the permits "as are necessary and appropriate to carry out the obligations of the United States under the Agreement . . ."⁵⁸ In addition to creating a permit system for high seas vessels, the Compliance Act prohibits certain activities and creates an enforcement mechanism for violations.⁵⁹ Further, the Secretary of Commerce is empowered to promulgate regulations for implementing the Compliance Act.⁶⁰

2. The Endangered Species Act

The Endangered Species Act of 1973 ("ESA") has been called the "broadest and most powerful law" with the purpose of protecting species whose continued existence is threatened.⁶¹ Concern over the extinction of various species as a result of economic development sparked the enactment of the ESA of 1973.⁶² Passage of the ESA represented a culmination of a number of previous conservation and preservation acts aimed at wildlife management.⁶³

The ESA provides "a program for the conservation of such endangered species and threatened species . . ." and sets forth the policy that the federal government "shall seek to conserve" those species.⁶⁴ The Act's goals are achieved through a number of procedures, which are overseen by the Secretaries of Interior and Commerce.⁶⁵ The Secretary of Interior must keep a list of endangered species, designate critical habitats for those species, assess the effects of agency action on those species, prepare restoration plans for the species, and enforce the law against harming protected species.⁶⁶ The Secretaries have authorized the Fisheries Service to oversee the conservation and protection efforts with for marine species, and the Fish and Wildlife Service for terrestrial species.⁶⁷

As mentioned above, the ESA requires that the Secretary of Interior assess the effects of agency action on protected species. This is achieved through the consultation process in Section 7 of the ESA.⁶⁸ In essence,

⁵⁵ Nash, *supra* note 38, at 267.

⁵⁶ *Id.*

⁵⁷ 16 U.S.C. § 5501 (2000).

⁵⁸ *Id.* § 5503.

⁵⁹ *Id.* § 5504-5506.

⁶⁰ *Id.* § 5504(d).

⁶¹ THE STANFORD ENVIRONMENTAL LAW SOCIETY, THE ENDANGERED SPECIES ACT, 10 (Stanford University Press 2001) [hereinafter STANFORD].

⁶² *Id.* at 14.

⁶³ *Id.*

⁶⁴ 16 U.S.C. § 1531(b).

⁶⁵ *Id.*

⁶⁶ *Id.* § 1533.

⁶⁷ 50 C.F.R. § 402.01 (2004).

⁶⁸ 16 U.S.C. § 1536.

section 7(a)(2) is a procedural requirement that all federal agencies consult with either the Fisheries Service or the Fish and Wildlife Service prior to discretionary agency action.⁶⁹ The purpose of the consultation process is to ensure federal actions do not jeopardize the survival of protected species or result in harm to the species' habitat.⁷⁰ According to the Supreme Court, this section indicates that Congress intended "agencies to afford the first priority to the declared national policy of saving endangered species."⁷¹ In *Tennessee Valley Authority v. Hill*, the Court upheld an injunction of a nearly complete dam in the Tennessee Valley for the benefit and protection of the snail darter, an endangered species of perch, because there was an "irreconcilable conflict between operation [of the dam] and the explicit provisions of § 7 of the Endangered Species Act"⁷²

The Ninth Circuit test to determine if an agency action requires consultation is whether the agency has the ability to implement measures that "inure to the benefit of protected species."⁷³ Other courts have determined that there must be sufficient agency discretion to benefit protected species for the requirements of section 7(a)(2) to apply.⁷⁴ Absent the ability to impose conditions or restrictions on the agency action the consultation process would be useless.⁷⁵

If the consultation process is triggered because an agency action is "likely to affect" a protected species, the Agency must complete a biological assessment of the proposed action.⁷⁶ The biological assessment will determine if the action may jeopardize the survival or critical habitat of the species.⁷⁷ If the Agency determines that, in fact, the action puts at risk the protected species the *formal* process of consultation must begin, otherwise the Agency can proceed with informal consultation with either the Fisheries Service or the Fish and Wildlife Service depending on the species involved.⁷⁸ If, after formal consultation with the appropriate "expert agency", it is determined that no harm will come to the protected species, the proposed agency action is allowed to proceed as planned.⁷⁹ Alternatively, if it is determined that the proposed action will jeopardize the protected species, the "expert agency" will identify reasonable alternatives that would avoid violating the ESA.⁸⁰ If there are no reasonable alternatives, the action will be prohibited.⁸¹

Generally, once it is determined that an agency action may affect a protected species, the action should not be undertaken until the consultation process is initiated.⁸² In order to avoid irreversible and irretrievable commitment, the bar on action continues until the consultation process is completed.⁸³

⁶⁹ 16 U.S.C. § 1536(a)(2). See also 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.").

⁷⁰ STANFORD, *supra* note 61, at 83.

⁷¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

⁷² *Id.* at 192-193.

⁷³ *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995); see also *Nat'l Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (stating that "where there is no agency discretion to act, the ESA does not apply").

⁷⁴ *Strahan v. Linnon*, 967 F.Supp. 581, 607-08 (D. Mass. 1997).

⁷⁵ *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (citing *Babbitt*, 65 F.3d at 1509).

⁷⁶ STANFORD, *supra* note 61, at 84.

⁷⁷ 50 C.F.R. § 402.12(a) (2004).

⁷⁸ *Id.*

⁷⁹ STANFORD, *supra* note 61, at 84. See also 16 U.S.C. § 1536(b)(3)(A) (2000).

⁸⁰ STANFORD, *supra* note 61, at 84.

⁸¹ See generally *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193-94 (1978).

⁸² *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (1988).

⁸³ 50 C.F.R. § 402.09 (2004).

D. Judicial Review

Judicial review of administrative decisions under the ESA is governed by Section 706 of the Administrative Procedure Act.⁸⁴ Under this section, an agency determination may only be set aside if the action is “arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law.”⁸⁵ The court of appeals reviews summary judgments *de novo*.⁸⁶ The appellate court reviews cases concerning administrative decisions from the point of view of the district court.⁸⁷

In *Chevron*, the Supreme Court promulgated a two step test to determine if an Agency’s construction of a statute is entitled to deference by the court.⁸⁸ First, the reviewing court must determine if Congress has clearly and explicitly spoken to the issue at hand, and if so, Congress’s intent must be given effect.⁸⁹ If the agency’s interpretation of the statute is contrary to the unambiguous intent of Congress the court must reject the interpretation.⁹⁰ The Supreme Court directs reviewing courts to use traditional tools of statutory construction to determine if Congress had intent on the particular issue at bar.⁹¹ However, if the intent of Congress is unclear, the court must determine if the agency’s interpretation is reasonable.⁹² If the interpretation is a permissible construction of the statute the interpretation is granted deference.⁹³

IV. INSTANT DECISION

The question on appeal to the Ninth Circuit Court of Appeals was whether issuing fishing permits, as required by the Compliance Act, requires the consultation process of the ESA.⁹⁴ The court began its analysis by answering the question of whether issuing fishing permits was an agency action that would implicate the ESA.⁹⁵ The court cited the Code of Federal Regulations, which lists examples of agency action, including granting permits.⁹⁶ Agency action is interpreted broadly, and essentially encompasses any agency action funded in full or in part by the United States.⁹⁷ Relying on the broad interpretation agency action has been given, the court found issuing fishing permits was an agency action that could trigger the ESA.⁹⁸

After it decided the threshold question of agency action, the court had to determine if there was sufficient discretion vested in Fisheries Service to trigger Section 7 of the ESA.⁹⁹ The test used by the court was whether the Agency had the ability to “inure to the benefit of [the] protected species.”¹⁰⁰ The district court found that although Fisheries Service retained some discretion in the issuance of fishing permits, they did not

⁸⁴ 5 U.S.C. § 706 (2000).

⁸⁵ *Id.*

⁸⁶ *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995).

⁸⁷ *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993).

⁸⁸ *Chevron U.S.A. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁸⁹ *Id.*

⁹⁰ *Id.* at 843 n.9.

⁹¹ *Id.*

⁹² *Id.* at 843.

⁹³ *Id.*

⁹⁴ *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 970 (9th Cir. 2003).

⁹⁵ *Id.* at 974.

⁹⁶ *Id.* See also 50 C.F.R. § 402.02 (2004).

⁹⁷ *Turtle Island Restoration Network*, 340 F.3d at 974.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *Env’tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir.2001) (internal quotations omitted)).

¹⁰⁰ *Id.*

retain sufficient discretion to impose restrictions that would inure to the benefit of the sea turtles.¹⁰¹ The court of appeals disagreed.¹⁰²

The Ninth Circuit relied on a combination of traditional statutory construction doctrines to come to this conclusion.¹⁰³ The court noted that “every clause and word of the statute” should be given effect and that the text should be viewed in light of the whole structure and scheme of the statute.¹⁰⁴ The Compliance Act states that the Fisheries Service may condition the issuance of fishing permits, and lists two types of conditions that may be used.¹⁰⁵ Noting that traditionally the language “including but not limited to” indicated a non-exclusive list, the court found that the language clearly indicated Congress’ intent to instill in Fisheries Service the ability to condition fishing permits for reasons other than those listed.¹⁰⁶ Here, Congress’s intent was clear, and in order to give effect to that intent, the court found the Fisheries Service’s interpretation was not entitled to *Chevron* deference.¹⁰⁷

The appellate court distinguished the two Ninth Circuit cases relied on by both the district court and the Fisheries Service.¹⁰⁸ The court stated that although each of these cases dealt with agency discretion that triggered Section 7 consultation, neither case was factually similar to the instant case.¹⁰⁹ The Fisheries Service first relied on *Sierra Club v. Babbitt*.¹¹⁰ *Sierra Club* held that the Bureau of Land Management (“BLM”) did not have to engage in the Section 7 consultation process, because it did not have the ability to influence the construction of a roadway to the benefit of the spotted owl.¹¹¹ The BLM could only object to the program in three limited situations, not related to the protection of species.¹¹² The second case relied on by the Fisheries Service and the district court was *Environmental Protection Information Center v. Simpson Timber Co.*¹¹³ *Simpson Timber* asked whether the Fish and Wildlife Service retained sufficient discretion over “incidental take permits” to trigger a reinitiating of consultation.¹¹⁴ In the *Simpson* case, the Ninth Circuit held that the Fish and Wildlife Service did not retain enough discretion over the private company’s actions to impose new requirements to protect species that may be listed as endangered.¹¹⁵ The Ninth Circuit distinguished these cases by pointing out that, unlike in the instant case, the agency action involved was completed and there was “no ongoing agency activity.”¹¹⁶ The court found that continually issuing permits constitutes continued agency activity that has a long-term effect, and may jeopardize the sea turtles survival.¹¹⁷

The court held that under the plain language of the Compliance Act, the Fisheries Service had sufficient discretion to inure to the benefit of sea turtles.¹¹⁸ Additionally, the court held that because the Fisheries Service

¹⁰¹ *Id.* at 975.

¹⁰² *Id.*

¹⁰³ *See id.* at 975-77.

¹⁰⁴ *Id.* at 975 (quoting *Bennett v. Spear*, 520 U.S. 154, 173 (1997)).

¹⁰⁵ *Id.* at 975-76 (citing 16 U.S.C. § 5503(d) (2000)). The two conditions the Compliance Act specified were “the markings of the boat and reporting requirements.” 16 U.S.C. § 5503(d).

¹⁰⁶ *Id.* at 975 (quoting 16 U.S.C. § 5503(d)).

¹⁰⁷ *Id.* at 976.

¹⁰⁸ *Id.* at 976-77.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 976. *See also supra* Part III.C.1.

¹¹¹ *Turtle Island Restoration Network*, 340 F.3d at 976 (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)).

¹¹² *Id.*

¹¹³ *Id.* at 976-77. *See Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir.2001).

¹¹⁴ *Turtle Island Restoration Network*, 340 F.3d at 976 (citing *Simpson Timber*, 255 F.3d at 1081).

¹¹⁵ *Id.* at 977 (citing *Simpson Timber*, 255 F.3d at 1081).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

had discretion, they were required to engage in the consultation process to investigate the potential effects of the permits on the protected species.¹¹⁹

V. COMMENT

Generally, the ESA requires that each federal agency consult with the secretary to “insure that any action authorized, funded or carried out by such agency” will not jeopardize the survival of protected species.¹²⁰ However, it is well established that if an agency’s action is ministerial in nature the agency is not required to engage in the consultation process.¹²¹ The Ninth Circuit’s test for the agency’s ability to “inure to the benefit of protected species,” is a test of discretion, and intuitively makes sense. If the agency has no power to alter or condition its course of action to benefit protected species, then requiring it to determine if the action would jeopardize protected species would be futile. In essence, the agency would consult with the expert agency, prepare an assessment of the action, and proceed with the unavoidable course of action regardless of whether the action jeopardized a protected species. Undoubtedly, this would be a waste of time, money and effort for both the action agency and the expert agency.

At issue in this case is whether the Fisheries Service retains sufficient discretion in issuing fishing permits under the High Seas Fishing Act to subject the action to consultation under the ESA. The implications of the answer significantly affect the long-line fishing industry. The Act grants the Secretary the authority to issue permits and the ability to condition the permits as necessary to carry out the obligations of the United States under the Agreement.¹²² Specifically, the statute says: “The Secretary shall establish such conditions and restrictions on each permit issued under this section as are necessary and appropriate to carry out the obligations of the United States under the Agreement, *including but not limited to the following . . .*”¹²³ The court relied partially on a canon of construction that the statute must be read in context and viewed in light of the whole statutory plan, and partially on the Supreme Court’s statement in *Bennett v. Spears*,¹²⁴ that every word and clause within a statute ought to be given meaning if possible.¹²⁵

Viewing the High Seas Fishing Act in its entirety requires us to look back to the Agreement that the Act was designed to implement. The Act is intended to codify the Agreement, as is indicated by the purpose statement.¹²⁶ The Agreement was negotiated and entered into in response to the re-flagging of fishing vessels in order to avoid compliance with international conservation measures. The Agreement expressly recognizes that signatory state’s are responsible for taking “such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas[.]”¹²⁷ As the implementing measure of the Agreement, the High Seas Fishing Compliance Act also requires fishing vessels permitted by the United States to comply with international conservation measures. In fact, the Act defines international conservation measures as: “[M]easures to conserve or manage one or more species of living marine resources that are

¹¹⁹ *Id.*

¹²⁰ 16 U.S.C. § 1536 (2000). *See also supra* Part III.C.1.

¹²¹ *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

¹²² 16 U.S.C. § 5503(d) (2000).

¹²³ *Id.* (emphasis added).

¹²⁴ *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

¹²⁵ *Turtle Island Restoration Network*, 340 F.3d at 975.

¹²⁶ 16 U.S.C. § 5501 (the purpose of the High Seas Fishing Act is to “implement the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted by the Conference of the Food and Agriculture Organization of the United Nations on November 24, 1993”)

¹²⁷ Agreement, *supra* note 39, at Preamble.

adopted and applied in accordance with the relevant rules of international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, and that are recognized by the United States”¹²⁸

Specifically, the High Seas Fishing Compliance Act states that the permits may be conditioned and restricted “as [is] necessary and appropriate to carry out the *obligations of the United States under the Agreement*”¹²⁹ Congress explicitly authorized the Secretary to place conditions on the fishing permits to fulfill the responsibilities of the United States under the Agreement.¹³⁰ Substantively, the Agreement requires party nations to both develop a permitting system and comply with international conservation and protection measures for marine resources.¹³¹

The Inter-American Convention for the Protection and Conservation of Sea Turtles (“Convention”) is an example of an international conservation measure which the United States is a signatory member.¹³² In fact the United States was a primary proponent of the Convention. The purpose of the Convention was to develop standards for the protection and conservation of sea turtles.¹³³ As a signatory member, the United States must regulate the activities of commercial fishing in such a way that protects and preserves endangered sea turtles.¹³⁴ The consultation process of Section 7 of the ESA is meant to identify actions that may jeopardize the survival of protected species and to identify alternatives to those actions: an objective that is in accordance with the purpose and obligations of the United States under the Convention.

Viewing the Act, as a whole, in light of the intent to codify the Agreement, the court correctly determined that it was not Congress’s intent to create an exhaustive list of conditions. Not only does the language “including but not limited to the following”¹³⁵ indicate this, but the statute states that conditions may be placed that fulfill the obligations of the United States under the Agreement. One such obligation of the United States under the Agreement is to comply with international conservation measures such as the Inter-American Convention for the Protection and Conservation of Sea Turtles. It is clear that the Secretary could impose conditions sufficient to satisfy the Ninth’s Circuit test of discretionary agency action under Section 7 of the ESA (“inure to the benefit of the protected species”).

With Congress’s intent determined, the court’s interpretation of the statute stops: the court must yield to the clear intent of Congress.¹³⁶ The Agency’s interpretation is rightly not given deference, because the Fisheries Service’s interpretation of its ability to condition permits to inure to the benefit of protected species is contrary to the unambiguous language of the statute. *Chevron* plainly establishes that when Congress’s intent is clear, it is the end of the matter.¹³⁷

The instant court was careful to establish that it was *not* holding that the Fisheries Service must condition the permits. Instead the court held that Fisheries Service must engage in the consultation process required by the ESA to determine if the issuance of permits may jeopardize the survival of the protected turtles.

The determination that Fisheries Service is obliged to conduct the consultation process could destroy the longline fishing industry based in California. Until the process of consultation is completed, the Secretary may not engage in activity that may jeopardize the turtles, including issuing fishing permits. The economic impact of this case on the longline fishing industry surely will be harsh. The industry has already been banned in Hawaii. If the Fisheries Service determines, as Hawaii has, that longline fishing jeopardizes the critical habitat

¹²⁸ 16 USC § 5502(5).

¹²⁹ *Id.* § 5503 (emphasis added).

¹³⁰ *See supra* Part III.A.1.

¹³¹ *Id.*

¹³² *See generally* Convention, *supra* note 35 (signed by the United States; ratified by the Senate on September 21, 2000).

¹³³ *See discussion supra* Part III.A.2.

¹³⁴ *Id.*

¹³⁵ *See* 16 U.S.C. § 5503(d) (2000).

¹³⁶ *Chevron U.S.A. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹³⁷ *Id.* at 842.

or survival of any of the six species of sea the industry will likely not be able to continue the process of longline fishing in the area, unless reasonable alternatives can be found. As indicated by the Supreme Court decision in *TVA v. Hill*, however, Congress intended to afford the highest priority to endangered species with the passage of the ESA, regardless of the cost.¹³⁸

VI. CONCLUSION

The concerns surrounding longline fishing and the industry's effect on sea turtles have prompted action to protect the turtles. This case has been seen as a small victory for sea turtles. On the heels of this decision, the National Marine Fisheries Service issued a new rule banning longline fishing for swordfish off the shores the West Coast.¹³⁹ This ban is similar to the one in Hawaii that caused numerous longline fishermen to move their operation from Hawaii to California.¹⁴⁰ With the ban in place, the court's requirement that the Fisheries Service engage in the consultation process is moot, but the message is still clear: the protection of endangered species is a national priority, even at significant costs to industry.

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¹³⁸ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

¹³⁹ 50 C.F.R. § 223 (2004), available at http://swr.nmfs.noaa.gov/news/shallowsets_prohibition.pdf.

¹⁴⁰ See *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 971 (9th Cir. 2003).