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# Prosecuting Wildlife Traffickers: Important Cases, Many Tools, Good Results

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"Between \$10 billion and \$20 billion in plants and animals were traded illegally around the world last year, with the United States leading the list of buyers, at about \$3 billion."

Donovan Webster, *The Looting and Smuggling and Fencing and Hoarding of Impossibly Precious, Feathered and Scaly Wild Things*, New York Times Magazine, Feb. 16, 1997, at 28.

## I. Introduction

International wildlife traffickers today face a spectrum of prospective federal charges, from century-old Title 16 conservation offenses, to today's "white collar" offenses. But to understand what charging options lie ahead, federal prosecutors must be willing to sift through the entire text of conservation statutes to find the applicable criminal provisions scattered there. New federal prosecutors will soon learn, however, what their more experienced colleagues already know. The effort is worthwhile; flagrant wildlife offenders can and do receive stiff sentences under the Sentencing Guidelines. Wildlife and Marine Resources Section prosecutors who specialize in wildlife trafficking violations can lighten your burden along the way to conviction.

The diversity of wildlife trafficking is co-extensive with the diversity of the earth's fauna. Live animals—exotic birds (parrots and macaws), mammals, reptiles, and fish—are hidden in secret

compartments, in shipping containers, under clothing, or in luggage, and smuggled across international borders, or are openly declared at the border, but accompanied by false paperwork to make their importation appear legal. Wildlife parts too numerous to list (or even imagine) are smuggled at one time or another for commercial or personal use: big game trophy animals, animal skins, ivory, complete tiger carcasses, bear gall bladders and bile salts, rhinoceros horns, whole or ground (a reputed aphrodisiac and one of the world's most valuable commodities), fresh sea turtle eggs, and mounted butterflies (whose species worldwide number in the tens of thousands). This trade in live animals and their parts feeds a voracious market of exotic medicine users, collectors, wildlife dealers, clothiers, leather craftsmen, and pet fanciers.

Though often overshadowed by the publicized problem of habitat loss and degradation, illegal wildlife trade deserves serious attention from federal prosecutors. First, this trade contributes directly to the loss of global biodiversity. Poaching drives species such as the tiger, rhinoceros, and Asian bear closer to extinction. Second, live animals inhumanely transported in cramped or concealed compartments frequently die before reaching the market. Third, this trade spreads disease, and introduces injurious pests and exotic species that crowd out native species, permanently damaging or altering natural ecosystems. Fourth, organized crime is making an aggressive entry into the international wildlife marketplace.

The export of our native wildlife is also a serious problem, and poaching of domestic wildlife has reached epidemic proportions. More than one hundred native species, including twelve listed as "endangered" or "threatened" under the Endangered Species Act of 1973, are routinely killed within our national parks.

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Today, traffickers face stiff federal criminal penalties from:

1. Traditional fish and wildlife trafficking statutes usually found in Title 16, such as the Lacey Act Amendments of 1981 (commonly called the Lacey Act), 16 U.S.C. §§ 3371-78;

2. More vigorous application of Title 18 offenses—such as money laundering, smuggling, and tax and currency transaction violations—once reserved for drug and white collar offenders. Traffickers confront a gauntlet of wildlife and white collar charges, with maximum penalties of twenty years' imprisonment, \$500,000 fines, and other Title 16 conservation sanctions, such as forfeiture (wildlife and other property), civil penalty assessment, injunctive relief, and permit revocation.

AUSAs are authorized to prosecute violations of Federal wildlife laws. See USAM 5-10.310, 5-10.312. In the Department's Wildlife and Marine Resources Section of the Environment and Natural Resources Division, a team of six wildlife prosecutors provides information and support to local federal prosecutors conducting federal wildlife prosecutions, and can and does assume the lead role in prosecuting complex, multi-district, or novel cases anywhere in the United States. The Wildlife Section has sample charging language, jury instructions, and a variety of subject matter outlines. The Division also has an experienced staff in the Appellate Section to handle criminal appeals. Please notify the Appellate and Wildlife Sections of any fish and wildlife criminal appeals. See USAM 2-2.000, 2-2.111, 2-3.220, and USAM 5-8.300.

## **II. Regulation of the International Wildlife Trade**

### **A. The Lacey Act**

The Lacey Act, enacted in 1900, is the United States' oldest national wildlife protection statute. After 100 years and many revisions, the Lacey Act is now an anti-trafficking statute protecting a broad range of wildlife. The Lacey Act applies to all "wild" (i.e., not domesticated) animals, alive or dead, and to any part, product, egg, or offspring. 16 U.S.C. § 3371(a). The Act's

prohibitions have two prongs: wildlife trafficking, both domestic and international, and false labeling (the wildlife equivalent of an 18 U.S.C. § 1001 offense).

The Lacey Act attacks wildlife trafficking by making it unlawful to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife already taken (i.e., captured, killed, or collected), possessed, transported, or sold in violation of state, federal, American Indian tribal, or foreign laws, or regulations that are fish or wildlife-related (the so-called "underlying law" or "predicate offense"). 16 U.S.C. § 3372 (a). Together, these are referred to as the "two steps" necessary for an offense. *United States v. Carpenter*, 933 F.2d 748 (9th Cir. 1991). An interstate or foreign commerce nexus is required when the "underlying law" violated is state or foreign, but none when it is federal or tribal law. 16 U.S.C. § 3372(a)(1)-(2). A two-tiered penalty scheme exists, creating both misdemeanor and felony offenses, distinguished by the defendant's knowledge of the underlying law violations. 16 U.S.C. § 3373(d)(1) and (2). For a felony, the defendant must "know" about, or be generally aware of, the illegal nature of the wildlife, but not necessarily the specific law violated. *United States v. Todd*, 735 F.2d 146 (5th Cir. 1984). A misdemeanor merely requires that the defendant, "in the exercise of due care," should know the facts constituting the underlying law violation. "Due care is that degree of care which a reasonably prudent person would exercise under the same or similar circumstances." 9th Cir. Crim. Jury Instr. 9.8.3 (1997); S. Rep. No. 97-123, at 10-12 (1981); 1981 U.S.C.C.A.N. 1758-59. This is a lesser-included offense of a felony violation. *United States v. Hansen-Sturm*, 44 F.3d 793 (9th Cir. 1995). Felony violations, in addition to a "knowing" scienter or *mens rea* requirement, require either proof that the defendant "knowingly" imported or exported wildlife, or "knowingly" engaged in conduct during the offense that involves the sale, purchase, offer, or intent to sell, purchase, or offer wildlife for over \$350. Felony violations can result in up to five years imprisonment, a \$250,000 fine (\$500,000 for organizations), and forfeiture of equipment involved in the offense,

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while the maximum Class A misdemeanor penalty is one year imprisonment and a \$100,000 fine (\$200,000 for organizations). 16 U.S.C. §§ 3373(d), 3374(b), and 18 U.S.C. § 3571. Strict liability forfeiture exists for wildlife contraband without the need to first obtain a criminal conviction. 16 U.S.C. § 3374 (a); *United States v. One Afgan Urial Ovis Blanfordii Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992). Violations can be aggregated for charging purposes; the government need not charge the defendant with the smallest "unit of prosecution" available. *United States v. Tempotech Indus., Inc.*, Nos. 95-1097(L), 95-1113, 95-1433, 1996 WL 14056 (2d Cir. Jan. 12, 1996) (one count for each year's aggregate offenses).

The Act also requires that contents of shipments of fish and wildlife traveling in interstate or foreign commerce be accurately marked and labeled on the shipping containers. Failure to mark or label a shipment properly is a civil penalty violation punishable by a fine. 16 U.S.C. §§ 3372(b) and 3373(a)(2). But making or submitting any false record, account, label for, or identification of any wildlife transported or intended to be transported in interstate or foreign commerce may be prosecuted as either a misdemeanor or felony, depending on what additional specific conduct occurs. This parallels trafficking offenses. 16 U.S.C. §§ 3372(d), 3373(d)(3). No "underlying law" or "predicate offense" is required for these false labeling offenses. *United States v. McDougall*, 25 F. Supp. 2d 85 (N.D.N.Y. 1998).

One unique feature of the Lacey Act is its ability to incorporate foreign laws as an underlying law or predicate offense to "trigger" a Lacey Act violation. This is best illustrated in the prosecution of Taiwanese nationals for attempting to import 500 metric tons of salmon taken in violation of a Taiwanese law that they themselves had not violated. *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991). In another case, a California defendant was charged with selling tarantulas collected in violation of Mexican law. At trial, the relevant Mexican law was admitted to serve as the underlying violation for a felony conviction. *United States v. Cook*, No. 94-50607, 1996 WL

144224 (9th Cir. Mar. 29, 1996). A person who imports wildlife into the United States taken, possessed, transported, or sold in violation of a foreign law or regulation of general applicability (local, provincial, or national laws all included) can be prosecuted in the United States for a Lacey Act offense built upon a violation of that foreign country's laws. Of course, the defendant need not be the one who violated the foreign law; the wildlife itself becomes "tainted" even if someone else commits the foreign law violation, but the defendant must know or should know, in the exercise of due care, about its illegal nature.

The Lacey Act occupies a central place within the framework of federal wildlife laws for several additional reasons. First, the Lacey Act applies to a wider array of wildlife than any other single protection law, including the Endangered Species Act. Second, it has the stiffest potential penalties. It can "bootstrap" some federal misdemeanor offenses into felonies, and use as underlying laws prohibitions found in statutes with no criminal penalties. *United States v. Cameron*, 888 F.2d 1279 (9th Cir. 1989). Third, its prohibitions have a greater reach. Lacey Act offenses are subject to a federal five year statute of limitations, not a shorter one applicable to the underlying law. *United States v. Borden*, 10 F.3d 1058 (4th Cir. 1993). The current utility of the Lacey Act is best reflected by the Ninth Circuit Court of Appeals publication of model Lacey Act jury instructions in the *Manual of Model Criminal Jury Instructions*. 9th Cir. Crim. Jury Instr. 9.8.1- 8.4 (1997). For a more detailed Lacey Act explanation, see Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trading*, 16 Pub. Land. L. Rev. 29 (1995).

## **B. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**

In 1973, 21 countries signed a document called the Convention on International Trade in Endangered Species of Wild Fauna and Flora. 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. Frequently called "CITES," and sometimes "the Washington Convention" (it was signed in Washington, D.C.), this treaty became effective in 1975. It now boasts more than 140

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member nations. CITES seeks to regulate the international wildlife trade (i.e., the import, export and re-export of live and dead animals, fish and plants, and their parts and derivatives) by placing species in three "Appendices," based on the degree of threatened extinction by international trade. Willem Winjestekers, *The Evolution of CITES*, 4th ed. (1995); CITES Art. II. CITES regulates trade between countries, imposing the greatest restrictions on species found in Appendix I and the least on those in Appendix III. This is implemented through a program of permits or certificates, issued by both member and non-member countries, that must accompany lawful shipments.

The type of permit or certificate required, and the restrictions placed on the CITES shipment, depend on the particular appendix in which a species is listed: either Appendix I, II, or III. CITES Arts. III, IV, V. Appendix I is the most restrictive and bans wildlife trade between countries for commercial purposes. Appendix II permits some commercial trade under permit for species not yet considered in danger of imminent extinction. Appendix III contains species which are of special concern only to a country where they exist and are even less rigorously regulated. CITES Art. V.

CITES is not a self-executing treaty. It contains no internal implementation or enforcement mechanism which automatically establishes enforcement infrastructures, management authorities, or penalties within the countries acceding to the treaty. Thus, CITES can only be effective to the extent that member countries enact and enforce the specific provisions. The United States has done so through the Endangered Species Act. 16 U.S.C. §§ 1537a; 1538(c)(1).

### **C. Other Federal Laws Penalizing Illegal Wildlife Trafficking**

1. *The Endangered Species Act.* The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-43, enacted in 1973, is one of the country's most significant wildlife laws. ESA authorizes a listing of wildlife species considered by the Federal Government to be in imminent danger or threat of extinction, and requires government action to restore populations of those species. Both exotic

and domestic species are listed, matching many of those listed by CITES. 50 C.F.R. § 17.11, 17.12.

The ESA also helps interdict wildlife traffickers. First, the statute and implementing regulations make it illegal for any person subject to the jurisdiction of the United States to import, export, offer, or sell in interstate or foreign commerce, or to receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, any endangered or threatened species. *See* 16 U.S.C. § 1538(a)(1); 50 C.F.R. 17.31. Lists of endangered and threatened species appear in regulations published by the Department of the Interior. 50 C.F.R. §17.11. The ESA also makes it unlawful to "take" (defined by 16 U.S.C. § 1532(19) as "to harass, harm, pursue, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct") any endangered or threatened species within the United States or its territorial seas or upon the high seas. 16 U.S.C. §§ 1538(a)(1)(B)-(C).

Second, the ESA also carries out our CITES obligations, designates the United States Fish and Wildlife Service to carry out its functions, and prescribes penalties for anyone caught importing, exporting, or possessing CITES-listed specimens traded in violation of the treaty. 16 U.S.C. §§1537a, 1538(c)(1), 1540(b)(1). *See United States v. Winnie*, 97 F.3d 975 (7th Cir. 1996) (possession of cheetah imported in violation of CITES illegal).

Third, the ESA makes it unlawful to import or export wildlife at any customs port of entry other than those designated by the Department of the Interior, fail to declare wildlife to either U.S. Customs or Fish and Wildlife Service officers upon importation or exportation, or engage in business as an importer or exporter of wildlife without a license from the United States Fish and Wildlife Service. *See generally* 50 C.F.R. Part 14. A criminal violation of ESA only requires general intent. It can occur without the defendant knowing that the wildlife is protected, and without intending to violate the law. *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998).

Most criminal violations of the ESA are Class A misdemeanors with penalties ranging from one year imprisonment and fine; \$100,000 for

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individuals and \$200,000 for organizations. 16 U.S.C. § 1540(b)(1). A few violations, generally those involving threatened species, are Class B misdemeanors with maximum penalties of six months imprisonment and \$25,000 fine. *Id.* Though the maximum fine is \$25,000, it nonetheless is treated as a petty offense. *United States v. Clavette*, 135 F.3d 1308 (9th Cir.), *cert. denied*, 119 U.S. 151 (1998).

Fish and wildlife trafficked, sold, or received in violation of law are subject to forfeiture on a strict liability basis (without regard to fault and without a so-called "innocent owner" defense). *United States v. One Handbag of Crocodilius Species*, 856 F. Supp. 128 (E.D. N.Y. 1994). Equipment, vehicles, vessels, aircraft and other means of transportation used to aid the commission of an offense where the government obtains a criminal conviction are subject to forfeiture, too. 16 U.S.C. § 1540(b)(4).

*2. Customs, Smuggling and Other General Criminal Laws Used in Wildlife Trafficking Cases.* Some Title 18 offenses are particularly well suited for prosecuting wildlife traffickers' conduct. The smuggling statute, 18 U.S.C. § 545, a Class D felony, is a charging option whenever wildlife is illegally imported into the country. Concealing contraband upon importation is one obvious smuggling violation, but the statute has a much broader reach. For example, all wildlife entering the United States must be cleared, and all persons entering the United States must accurately declare any wildlife in their possession. 50 C.F.R. § 14.61; 19 C.F.R. § 148.11. Violation of any of these requirements may trigger a smuggling charge.

The second paragraph of the smuggling statute, 18 U.S.C. § 545, sets forth two types of smuggling offenses commonly used in wildlife cases:

*a.* One offense is to import knowingly, or bring into the United States, merchandise (i.e., wildlife) contrary to law. The crime is complete if the defendant knowingly imports merchandise contrary to another United States law. *United States v. Davis*, 597 F.2d 1237 (9th Cir. 1979). "Contrary to law" means contrary to any U.S. law or regulation of general applicability, *United States v.*

*Mitchell*, 39 F.3d 465 (4th Cir. 1994). Even if it is only a misdemeanor or merely an agency regulation, it still supports a felony charge under § 545. *Id.*; *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958); *Steiner v. United States*, 229 F.2d 745 (9th Cir. 1956). False statements made in Customs entry documents have been considered contrary to the Customs laws which require the submission of accurate information to import merchandise, e.g., the importation was "contrary to 19 U.S.C. §§ 1481, 1484, or 1485." *United States v. Cox*, 696 F.2d 1294 (11th Cir. 1983). The underlying law may be a CITES violation. *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991).

*b.* The other offense under that paragraph is knowingly to receive, conceal, buy, sell, or facilitate the transportation, concealment, or sale of merchandise, knowing the merchandise was imported or brought into the United States contrary to law. *Id.* This, of course, allows prosecutors to follow the stream of smuggled merchandise to find culpable downstream parties. Proof of the defendant's knowledge of the law violated upon importation is required.

The first paragraph of the smuggling statute, containing additional smuggling prohibitions, includes the phrase "intent to defraud," which some courts have found troublesome. Courts have given it two interpretations, one helpful to wildlife prosecutions and another harmful, if not ruinous, to them. Many circuit courts have concluded that the phrase means nothing more than an "intent to avoid and defeat the United States Customs laws." *United States v. Robinson*, 147 F.3d 851 (9th Cir. 1998); *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970); *United States v. McKee*, 220 F.2d 266 (2nd Cir. 1955). This interpretation supports wildlife prosecutions. The Third Circuit, however, has concluded that the phrase means to deprive the government of revenue. *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994). This is an interpretation that is probably fatal to most wildlife cases: duties are usually not owed on imported wildlife.

In cases involving the unlawful importation of fish or wildlife where the defendant violated both a foreign law and another U.S. law or regulation

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upon importation, a choice exists between prosecuting a defendant under 18 U.S.C. § 545 or the Lacey Act. Generally, the smuggling statute is preferable. Where the government charges smuggling, instead of Lacey Act, the law requires no specific proof of the applicable foreign law. Fed. R. Crim. P. 26; *see, e.g., Mitchell*, 39 F.3d 465; *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992). A smuggling charge can support a money laundering charge. The money laundering statute defines "specified unlawful activity" to include smuggling offenses under 18 U.S.C. § 545, including those where "merchandise" (i.e., fish or wildlife) is brought into the United States "contrary to law." *See Lee*, 937 F.2d 1388. Consequently, the government can charge money laundering, when appropriate, where smuggled wildlife comes into the United States. Money laundering charges arise most frequently in international trafficking cases where someone transfers, transports, or transmits funds from the United States to another country (or vice-versa), with the intent to promote wildlife smuggling. 18 U.S.C. § 1956(a)(2)(A). The maximum penalty is 20 years imprisonment and/or a \$500,000 fine. *Id.*

3. *Other Title 18 Offenses.* Of course, many other Title 18 offenses can apply. Lying on any declaration form or to government inspectors would also constitute a felony "false statement" offense. 18 U.S.C. § 1001. Conspiracies not only to commit substantive offenses, but also to defraud the United States, often arise. 18 U.S.C. § 371. Where applicable, the government may bring tax violations against the wildlife smuggler who fails to report or otherwise conceals income derived from wildlife trafficking. *See* 26 U.S.C. § 7201 *et seq.* Today, wildlife traffickers can expect to have the book thrown at them. *See, e.g., United States v. Kloe et al.*, No. 96-131-CR-ORL-22 (M.D. Fla., Jan. 10, 1997) (defendant convicted of conspiracy, Lacey Act, Endangered Species Act, smuggling, and money laundering offenses connected with his illegal import of Malagasy reptiles, taken illegally in that country, and transported to the United States through Germany and Canada for pet sale; sentenced to 46 months imprisonment and fined \$10,000); *United States v.*

*Silva*, 122 F.3d 412 (7th Cir. 1997) (defendant convicted of conspiring to smuggle exotic birds into the U.S., and failing to report taxable income, sentenced to 82 months' imprisonment and fined \$100,000; co-defendant convicted of tax charges alone and sentenced to 27 months in jail); *United States v. Wegner et al.*, Nos. 96-50015, 96-50022, 1997 WL 367901 (9th Cir. July 2, 1997) (defendant convicted of conspiracy and tax violations, after failing to report accurately illegal gains from the sale of smuggled cockatoos, sentenced to 5 years' imprisonment and fined \$10,000); *United States v. Lee*, 937 F.2d 1388 (ring leader of conspiracy to smuggle 500 metric tons of salmon into the U.S. convicted of conspiracy, Lacey Act, and money laundering charges, and sentenced to 70 months' imprisonment).

### III. Sentencing of Wildlife Trafficking Cases - Section 2Q2.1 of the Sentencing Guidelines

All types of federal wildlife and wildlife-related crimes committed by an individual, Class A misdemeanors or felonies, including conspiracy to violate wildlife laws (18 U.S.C. § 371) and smuggling violations involving wildlife (18 U.S.C. § 545), have a base offense level of 6, pursuant to U.S.S.G. Section 2Q2.1. Three groups of specific offense characteristics enhance the offense level:

1. Offenses committed for a pecuniary gain or involving a commercial purpose;
2. Offenses involving wildlife not quarantined as required by law or creating a significant risk of infestation or disease transmission potentially harmful to humans or wildlife; and
3. Offenses where either:
  - the wildlife's market value (i.e., fair market retail price) exceeds \$2,000 (resulting in an offense-level increase according to the table in Section 2F1.1 Fraud and Deceit Guideline); or
  - a depleted marine mammal population, or a species listed as endangered or threatened by the ESA or on Appendix I to CITES was involved, in which case a minimum four-level enhancement ensues. U.S.S.G. § 2Q2.2(b)(1),(2), (3).

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**Points to remember.** The Application Notes for Section 2Q2.1 define guideline terms expansively and tend to result in more offense levels than the language of the guideline alone. *See United States v. Eyoum*, 84 F.3d 1004 (7th Cir.1996). Do a rough guideline calculation using Section 2Q2.1 and Chapter Three adjustments soon after a case referral. Rank the wildlife referral against the others received. The results may surprise you.

Another surprise awaits for organizational defendants: organizational fines are not calculated using the steps in Sections 8C2.2 through 8C2.9. They instead jump directly to Section 8C2.10. U.S.S.G. §§ 8C2.1 comment. (backg'd); 8C10. A complete description of the Sentencing Guidelines application to federal wildlife cases is too complex for presentation here, though the sentences described for cases and noted in this article illustrate that wildlife traffickers in the United States do receive lengthy terms of incarceration and stiff fines, especially when long-term commercial activity increases the overall market value (using both offense and relevant conduct). Market value is the single guideline factor most likely to increase the total offense level computation.

#### **IV. Conclusion**

The United States now has a framework of laws, penalties, and dedicated investigators and prosecutors in place, with all the necessary tools to interdict illegal wildlife and punish wildlife traffickers, both domestic and international. But how aggressively will we apply our interdiction tools? To say that our Earth's wildlife bounty is at stake is not hyperbole. Shipment by shipment, some species move ever closer to the most dire consequence: extinction. That may be the true cost of failure.

## **National Initiatives Developed to Combat Widespread Environmental Crimes**