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Robert S. Anderson [FN1]

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I. Introduction**A. The Illegal Wildlife Trade**

1. International Trade
2. Wildlife Trade in the United States

B. Investigation and Enforcement of Federal Wildlife Laws

1. Federal Wildlife Statutes
2. The Lacey Act

II. History and Development of the Lacey Act

- A. Original Passage in 1900
- B. Early Litigation
- C. The Black Bass Act of 1926
- D. Amendments to the Lacey and Black Bass Acts: 1930-1952

- E. 1969 Amendments to the Lacey and Black Bass Acts**
- F. 1981 Combination of the Lacey and Black Bass Acts**
- G. 1988 Amendments to the Lacey Act**

III. The Lacey Act In Its Present Form

A. General Features

- 1. Conduct Prohibited by the Act and Its Overall Structure**
- 2. Coverage of Fish, Wildlife, and Plants**

B. Lacey Act Prohibitions

1. Marking Offenses

- a. Failure to Plainly Mark or Label Containers of Fish or Wildlife
- b. Preparing False Documents for Shipments of Wildlife, Fish, or Plants

2. Trafficking Offenses

- a. In General
- b. The Two-Step Violation Scheme
- c. The Defendant's Connection to the 'Taint'

C. Other Notable Features of the Lacey Act

- 1. Disclaimer Provision**
- 2. Transshipment Exception**
- 3. Significant Terms and Definitions**

- a. Taken
- b. Transport
- c. Sale
- d. Attempt
- e. Import

D. Elements of Felony and Misdemeanor Violations

- 1. Elements of Import/Export Felony Trafficking Violations**
- 2. Elements of Other Felony Trafficking Violations**
- 3. Elements of Misdemeanor Trafficking Violations**

E. Penalties Provided By The Lacey Act

- 1. Civil Fines**
- 2. Criminal Sanctions**
- 3. Permit Revocation**
- 4. Forfeiture**

- a. Of Wildlife Involved in a Violation
- b. Of Vessels, Vehicles, Aircraft, and Equipment Involved in a Violation
- c. Procedural Issues

IV. Common Issues In Litigation

A. Predicate Law Requirements

1. Wildlife Relatedness 2. Constitutional Issues

- a. Constitutionality of the Predicate Law
- b. Constitutionality of the Lacey Act

3. The Lacey Act and Native American Rights

- a. Predicate Violation of Tribal Law
- b. Predicate Violation of Federal Law by Indians Claiming a Treaty Right
- c. Predicate Violation of State Law by a Tribal Member

4. Other Issues

- a. Predicate Law/Regulation May Be Civil
- b. Foreign Regulations May Be Valid Predicate
- c. Predicate Law's Statute Of Limitations Does Not Control

B. Wildlife Market Value

V. Conclusion

I. INTRODUCTION

In Montana, a professional hunting guide instructs his non-resident client to kill a deer for which the client has no hunting license; in Ohio, a reptile dealer unpacks a bag containing smuggled pythons illegally removed from the New Guinea rainforest; in Los Angeles, a commercial bird importer prepares to sell hundreds of grey parrots into the pet trade, which were imported under documents concealing their true country of origin; in the Pacific Northwest, a commercial fishing vessel attempts to import a shipment of salmon harvested in violation of a Taiwanese fishing regulation; in Seattle, a seafood company buys caviar that it should know has been taken contrary to state law; in the Sonoran desert of Arizona, a man illegally removes a saguaro cactus from the desert under cover of darkness for sale to a commercial landscaping company.

In each of these cases, a federal statute, the [Lacey Act](#), [FN2] has been violated. [FN3] Although not widely known even ninety-five years after its enactment, the [Lacey Act](#) is this country's oldest national wildlife protection statute, [FN4] and remains today a potent weapon in the fight against widespread and highly profitable illegal wildlife trafficking.

In its original form, the [Lacey Act](#) addressed problems such as the introduction of harmful exotic avian species, the growing scarcity of many domestic birds, international trade in bird feathers, and interstate commerce in illegally killed and transported wildlife. [FN5] Its original language authorized limits on avian importation, initiated programs aimed at protecting native bird species, and targeted illegal wildlife trade by strengthening state laws and requiring accurate labeling of wildlife shipments.

Nearly 100 years and many revisions later, the [Lacey Act's](#) focus is the prohibition of interstate and international trafficking in protected wildlife. [FN6] Used frequently by federal prosecutors, the Lacey Act reinforces federal, state, tribal, and foreign wildlife protection laws by requiring accurate labeling of wildlife shipments and criminalizing most types of trafficking in fish, wildlife, and plants that have been taken, possessed, transported, or sold in violation of a state, federal, tribal, or (except in the case of plants) foreign law. [FN7] The [Lacey Act](#) violator can face civil fines, forfeiture of wildlife and equipment, and criminal penalties, including fines and incarceration. [FN8]

Part I of this article discusses the scope of the illegal wildlife trade and the various federal statutes addressing that problem. It concludes that the [Lacey Act](#) provides the most comprehensive coverage of all federal statutes related to wildlife trafficking, as well as the greatest potential for substantial penalties. Part II discusses the legislative history of the [Lacey Act](#) and its companion statute, the Black Bass Act, including their ultimate combination into one law in 1981 and the [Lacey Act's](#) latest amendments in 1988. Part III discusses the elements necessary to prove a [Lacey Act](#) trafficking violation, analyzes judicial interpretations of the Act's statutory language, and considers available sanctions. Part IV discusses issues that may arise in [Lacey Act](#) litigation, including specific requirements of the underlying "predicate" law.

A. The Illegal Wildlife Trade

The [Lacey Act's](#) importance is illustrated by the size of the global and domestic trade in illegal wildlife it is used to combat. [FN9] Trafficking in illegal wildlife occurs both internationally and domestically, resulting in the depredation

of myriad wildlife species.

1. International Trade

According to the World Wildlife Fund, more than \$10 billion in declared wildlife shipments is traded each year on the international wildlife market. [FN10] These shipments include approximately 25,000-30,000 live primates, 2-5 million live birds, 5-6 million live reptiles, 10-15 million reptile skins, 500-600 million live fish; 1,000-2,000 tons of raw coral, and many other types of wildlife and wildlife products. [FN11] The illegal component of this trade, though difficult to quantify because many shipments are successfully concealed from authorities, is estimated to account for \$5 billion in annual profits worldwide. [FN12] The global trade in illegal wildlife generates more profits than illegal arms sales, [FN13] and constitutes a worldwide black market second in size only to the drug trade. [FN14]

Illegal international wildlife trafficking takes many forms. Shipments of illegally taken commercial fish are often landed on U.S. shores under a variety of fraudulent schemes. [FN15] Live specimens of protected wildlife, such as exotic birds, primates, mammals, fish, and reptiles, frequently enter the United States in intentionally mismarked or concealed shipments. [FN16] Wildlife parts such as elephant ivory, [FN17] the skins of endangered reptiles, tiger [FN18] and rhinoceros parts, [FN19] and sea turtle eggs, are smuggled both in commercial shipments and by individuals. These wildlife specimens and products feed a voracious market that runs from the traditional pet and hobbyist trade to more commercial outlets such as collectors, wildlife dealers, and manufacturers of clothing, handbags, boots, and medicinal preparations. [FN20] The illegal wildlife trade contributes to the decline of worldwide biodiversity, [FN21] is characterized by high mortality rates for live specimens, [FN22] and may foster the transmission of disease and the introduction of injurious pest species. [FN23]

2. Wildlife Trade in the United States

The United States is the largest player in this global marketplace, annually importing wildlife shipments worth an average of \$773 million and exporting wildlife worth an average of \$256 million since 1989. [FN24] These figures reflect only declared shipments; the General Accounting Office estimates that between \$100 million and \$250 million in illegal wildlife crosses U.S. borders each year in smuggled or fraudulently mismarked shipments. [FN25]

Recently, organized crime has made an aggressive entry into the illegal wildlife marketplace by using wildlife shipments to smuggle drugs. [FN26] Perhaps realizing that only seventy-four federal wildlife inspectors at eleven designated ports are specifically assigned to examine wildlife shipments, and that only about twenty-three percent of approximately 77,000 yearly wildlife shipments are actually inspected, [FN27] drug smugglers have increasingly used wildlife shipments bound for the U.S. to conceal their cargo. [FN28] For example, the Fish and Wildlife Service reports that more than one-third of all cocaine seized in the United States in 1993 was connected with wildlife importations. [FN29]

Cross-border trafficking, together with poaching, places wildlife indigenous to the United States at great risk. The gall bladders of American black bears, which are used in Asian medicine, [FN30] and reptiles prized by foreign collectors [FN31] are often shipped unlawfully from state to state, or exported to foreign markets. [FN32] The poaching and interstate sale of our nation's wildlife has reached epidemic proportions within many areas of the United States. [FN33] More than one hundred native species, including twelve listed as endangered or threatened, are routinely killed illegally within our national parks. [FN34] Professional guides sometimes assist in big-game poaching. [FN35] Wildlife in the United States is also commonly poached for commercial resale. [FN36]

B. Investigation and Enforcement of Federal Wildlife Laws

Various U.S. agencies investigate violations of federal wildlife laws, including the Fish and Wildlife Service, the Park Service, the National Marine Fisheries Service, the Bureau of Land Management, the Forest Service, and the Animal and Plant Health Inspection Service. [FN37] State wildlife officers also investigate violations of state wildlife laws, which sometimes develop into federal cases. [FN38] Alleged criminal violations of federal wildlife laws are referred by investigators to United States attorneys' offices for prosecution in federal courts. Partly because of the increasing number and complexity of such cases, the Wildlife and Marine Resources Section was created within the Department of Justice's Environment and Natural Resources Division in 1979. Prosecutors from the section consult with federal investigators and assistant U.S. attorneys who are involved in criminal wildlife investigations or litigation, and sometimes take the lead prosecutorial role in complex or unusual cases.

1. Federal Wildlife Statutes

In addition to the [Lacey Act](#), several federal statutes prohibit trade in protected wildlife and wildlife parts. The Endangered Species Act (ESA), for example, provides misdemeanor penalties for unlawfully taking or trading in species listed as endangered or threatened under federal law. [FN39] The ESA also implements the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), [FN40] the principal international treaty pertaining to wildlife trade, by prohibiting improper trade in species protected under that treaty. [FN41] The Migratory Bird Treaty Act (MBTA) [FN42] imposes a felony penalty on persons who buy, sell, or barter any specimen on the list of migratory bird species, [FN43] as well as a misdemeanor penalty for unlawfully killing any of those birds. [FN44] The [Marine Mammal Protection Act](#) prohibits the sale or purchase of marine mammals or their unworked parts. [FN45] The African Elephant Conservation Act prohibits the export of raw ivory from the United States and the import of raw or worked ivory in most circumstances. [FN46] The [Bald and Golden Eagle Protection Act](#) prohibits the killing, sale, or purchase of those raptors, providing a misdemeanor penalty for a first violation and felony penalty for subsequent violations. [FN47]

The most recently enacted wildlife trade statute is the Wild Bird Conservation Act. [FN48] This law acknowledges the habitat loss and high mortality rates associated with the capture and transport of wild exotic birds for the U.S. pet trade. [FN49] It establishes a temporary moratorium on the import of nearly all exotic birds and a scheme for certification of facilities through which captive-reared exotic birds may be imported. [FN50] Importing exotic birds in violation of the Wild Bird Conservation Act may result in misdemeanor or felony penalties. [FN51]

In addition to charges arising from violations of these wildlife laws, prosecutors may also file smuggling, conspiracy, tax, and even money laundering charges against those who traffic illegally in wildlife. [FN52]

2. The Lacey Act

The [Lacey Act](#) occupies a central position within this legal framework for three reasons. First, it applies to a wider array of wildlife, fish, and plants than does any other single wildlife protection law. Second, it provides for a longer potential term of incarceration than do most other wildlife laws containing felony provisions. Third, the scope of the acts it prohibits is broader than most other wildlife laws.

As a result, the [Lacey Act](#) is frequently used: More than 700 [Lacey Act](#) criminal counts were filed in U.S. federal courts during fiscal years 1993 and 1994. [FN53] These charges resulted in approximately 315 months of incarceration and the imposition of criminal fines and costs amounting to more than \$1 million, along with many civil fines and forfeitures of property and wildlife. [FN54]

II. HISTORY AND DEVELOPMENT OF THE LACEY ACT

A. Original Passage in 1900

Iowa Congressman John Lacey first introduced the Lacey Act to the House of Representatives in the spring of 1900. [FN55] He intended the law to "enlarge the powers of the Department of Agriculture," [FN56] and gave it three primary purposes: (1) to authorize the introduction and preservation of game, song, and insectivorous wild birds, (2) to prevent the "unwise" introduction of foreign birds and animals, and (3) to supplement state laws for the protection of game and birds. [FN57] Although its coverage extended to animals, the Lacey Act was essentially a bird preservation and restoration measure designed to enhance and protect agriculture. Its language reflected Rep. Lacey's personal passion for the preservation of agriculturally beneficial birds and the eradication of harmful exotic species.

In comments on the House floor, Congressman Lacey told his colleagues about the agricultural damage that had accompanied the decline in bird populations. [FN58] He cited numerous examples of wildlife problems of the time: the extinction of the carrier pigeon, the serious depletion of grouse, prairie chicken, and buffalo populations, and the problems created by foreign species such as the English sparrow and the French pink flower. [FN59] Lacey listed the primary threats to bird populations as excessive hunting of game birds by market hunters, the introduction of harmful exotic species that displaced native populations, and the millinery industry, which at that time consumed millions of birds each year for the production of ladies' hats. [FN60]

Lacey's law authorized the Department of Agriculture to assist with the reintroduction of game birds and other wild birds where they had become locally scarce or extinct. [FN61] It prohibited the importation of the mongoose, fruit bat (then also known as "flying foxes"), English sparrow, starling, and any other animal designated "injurious" by the Department of Agriculture, [FN62] and required permits for most other wildlife imports. [FN63]

The original Lacey Act also addressed game poaching and wildlife "laundering," which had been fostered by limitations on state control over merchandise traveling in interstate commerce. Lacey illustrated these problems by describing two common scenarios to his colleagues in Congress. [FN64] First, it was common at that time for large numbers of game to be killed by poachers (known as market hunters or "pothunters" [FN65]) in one state, fraudulently mismarked to avoid detection, and shipped to another state for sale to the public. Once the pothunter had removed the game from its state of origin, that state lacked the jurisdiction necessary to prosecute him. When the unlawfully killed game entered a second state, the laws of that state were often unable to prohibit its sale, as all power to regulate interstate commerce was vested in the federal government. [FN66]

A second common problem involved local game killed during a state's closed season and sold under the guise of having been brought into the state from elsewhere. Lacey spoke of game sellers in New York who would hang a few verifiably imported Scottish grouse in their store windows and use them as a "fence" for the sale of illegally taken local grouse, which were apparently indistinguishable from the Scottish specimens. [FN67] Restrictions on state control over items traveling in interstate commerce frequently prevented a state from simply prohibiting the sale of all game during its closed season. [FN68]

The inability of state laws to address these scenarios stemmed from two legal doctrines considered valid at the time. Under the state ownership doctrine, states were considered to own the wildlife found within their borders and had the exclusive power to restrict the export of such wildlife. This doctrine, which began to percolate through Supreme Court case law in 1842, [FN69] was enunciated in the 1896 holding of *Geer v. Connecticut*. [FN70] The *Geer* Court was asked to determine the extent of a state's ability to control the transport of game killed lawfully within its borders. In its holding, the Court proclaimed that each state owns the wildlife within its borders in trust for the state's citizens, and has the right to control the taking and disposition of game in order to ensure conservation of a valuable food supply so long as such control has only an incidental effect on interstate commerce. [FN71]

Steady erosion of the state ownership doctrine finally resulted in the Supreme Court's complete rejection of the

concept eighty-one years after *Geer* in *Hughes v. Oklahoma*. [FN72] *Hughes* was factually similar to *Geer* in that the Court was asked to consider whether Oklahoma's prohibitions on the export of native wild-caught minnows was permissible. Characterizing the idea of absolute state control over wildlife within its borders as a "19th century legal fiction," [FN73] the Court declared that constitutional challenges to state wildlife control laws henceforth would be analyzed according to the same general rules that applied to state regulation of other resources. [FN74]

The second doctrine that prevented direct state regulation of imported wildlife prior to the Lacey Act arose from a series of judicial decisions strictly construing the Commerce Clause to preclude state control over virtually any item that traveled in interstate commerce. [FN75] In 1897, for example, the Supreme Court declared that because liquor was a lawful item of interstate commerce, states could not control its importation or sale within their borders. [FN76] In another case of that period, the Court ruled that, despite a state's undisputed power to protect the health of its citizens, a state law placing restrictions on imported oleomargarine was invalid because it restricted interstate commerce. [FN77]

In 1900, with the state ownership doctrine still firmly in place, Lacey could not have proposed legislation placing the country's wildlife directly under the control of a federal agency. As Lacey explained to opponents on the House floor, his bill was not intended to be a "national game law, which, I think, would be unconstitutional," [FN78] but was intended only to augment state laws. He noted that "the authority of the National Government begins where the State authority ends." [FN79]

Lacey's law addressed the problems of market hunting, concealed interstate shipments, and game laundering in three ways. First, the Act criminalized both the delivery for shipment and the shipment of parts or bodies of "wild animals or birds" killed in violation of state law. [FN80] Second, relying on the Commerce Clause power, the Act required all interstate shipments of wildlife to be clearly marked and labeled. [FN81] Violation of these sections was a strict liability offense for the shipper of the game, while the "consignee" and "carrier" had to know the shipment was mismarked for criminal penalties against them to ensue. [FN82] If convicted, the maximum penalty for the shipper, the consignee, and the carrier was a \$200 fine. [FN83] Third, rather than attempting to place "state-owned" wildlife under direct federal control, the Act removed federal restrictions on the states' ability to regulate the sale of wildlife within their borders by subjecting all game animals and birds entering a state to the state's laws. [FN84] The language of this section was borrowed from an earlier federal statute that allowed "dry" states to regulate the possession and sale of liquor entering or passing through their jurisdictions. [FN85]

B. Early Litigation

The initial impact of the [Lacey Act](#) on state regulation of imported wildlife was somewhat mixed. In some early cases, prior interpretations of state law were held to withstand the apparently broadening power of the Lacey Act. In [People v. Bootman](#), [FN86] for example, the state of New York had initially sought penalties exceeding \$1 million against a defendant who possessed more than 47,000 imported game birds during New York's closed season. [FN87] At that time, a state law prohibited possession of game birds during the closed season regardless of their origin. [FN88] The defendant claimed that the relevant provisions of the state law, enacted prior to the [Lacey Act](#), did not apply to wildlife killed in another state and transported into New York. [FN89] The New York court reluctantly agreed, stating that the recently enacted [Lacey Act](#) could have no effect on the interpretation of a pre-existing state law. [FN90] It added, however, that subsequent enlargement of the state law's provisions to explicitly prohibit possession of imported game during the closed season would likely require a different result in future cases. [FN91]

In other cases the [Lacey Act](#) was acknowledged, but was not relied upon. For example, in *State v. Shattuck*, [FN92] diners at a Minneapolis restaurant in December 1904 ordered and were served ruffed grouse. [FN93] The grouse had been killed in Wisconsin and imported to Minnesota, which prohibited the sale of ruffed grouse regardless of its origin. [FN94] The defendant restaurateur argued against application of the law to his grouse, claiming both a due process violation (the taking of his personal property) and an unconstitutional infringement on interstate commerce. [FN95] Reasoning that the exclusion of non-native game would be necessary to prevent fraudulent evasion of the state law (echoing Lacey's arguments on the floor of the House), and concluding that all wildlife within a state is property of the state, the Shattuck court held that the police power of the state allows regulation of wildlife without running afoul of constitutional issues. [FN96] Almost as an aside, the court noted that the newly enacted Lacey Act "eliminates all questions" regarding improper infringements on interstate commerce. [FN97]

In similar fashion, the Supreme Court addressed the authority of state laws over imported wildlife in a 1908 case that merely referred to the [Lacey Act](#). [FN98] In *New York ex rel. Silz v. Hesterberg*, amendments to New York's game law, prohibiting the possession of imported game during the state's closed season, were challenged as unconstitutional takings of private property without due process and improper infringements of federal control over interstate commerce. [FN99] The Supreme Court rejected these arguments, approving the state law as a valid exercise of police power over state property with only an incidental effect on interstate commerce, and as necessary for the preservation of the game supply which, "in spite of laws passed for its protection, is rapidly disappearing from many portions of the country." [FN100] Having decided the issues on these grounds, the Court deemed it unnecessary to examine the [Lacey Act's](#) provisions. [FN101]

Other early courts relied directly on the [Lacey Act](#) in situations involving interstate shipments of wildlife. For example, in *Cohen v. Gould*, [FN102] 680 muskrat skins were shipped to Minnesota from Wisconsin, in violation of a Minnesota law prohibiting the possession of wildlife killed in violation of another state's laws. [FN103] The defendant argued that the Minnesota law interfered with interstate commerce. The state supreme court considered this issue only briefly, stating only that "it seems to be disposed of by an act of Congress the purpose of which is to prevent interstate commerce in furs which will aid the violation of state law for the conservation of wild life." [FN104] In *People v. Fargo*, [FN105] the question was whether the Lacey Act authorized state regulation of wildlife entering a state in the possession of a common carrier prior to its receipt by a consignee. [FN106] In *Fargo*, the president of the American Express Company was charged with violating a New York law prohibiting the transport of deer carcasses within the state during certain times of the year. [FN107] The carrier argued that the state law should not apply until

the deer were delivered to a consignee. [FN108] The court agreed, noting that the [Lacey Act](#) gave effect to state laws "upon arrival" of the wildlife within the state, and that this language had been construed in analogous Wilson Act cases to restrict state regulation of liquor shipments that had not yet been transferred from a common carrier to a consignee within the state. [FN109]

The first direct interpretation of the Lacey Act came in 1910, when the Eighth Circuit was asked to consider procedural and constitutional challenges to four Lacey Act convictions of [Paris Rupert](#), who attempted to ship dead quail in interstate commerce. [FN110] The Oklahoma territorial law at issue allowed the killing of quail between certain dates, but prohibited the export of quail from the territory at any time. [FN111] Although Rupert's quail were apparently killed during the open season, [FN112] Rupert was charged and convicted on two Lacey Act counts alleging the quail [FN113] had been killed illegally because they were killed "with the intent and for the purpose of being shipped and transported out of the territory" in violation of the territorial law. [FN114] Rupert was also convicted of two additional Lacey Act charges alleging his failure to clearly mark the boxes containing the quail. [FN115]

The Eighth Circuit first analyzed the language of the indictments to determine if they properly charged [Lacey Act](#) violations. The court reasoned (without resort to authority) that because territorial law prohibited the export of quail at all times, the killing of quail for the purpose of export constituted an unlawful killing, regardless of whether it occurred during the open season. [FN116] Thus, the court said, the [Lacey Act's](#) application to the transport of unlawfully killed game was properly triggered. [FN117]

Next, the court addressed the constitutionality of the territorial law's restriction on the export of game. Relying on the state ownership doctrine and the state's police power, the court concluded that game remains state property after it is killed and is subject to some state control even after it enters interstate commerce. [FN118] Finally, analogizing to a decision upholding the Wilson Act's application of state laws to liquor shipments, the court said: "(I)t surely follows that a congressional enactment like the Lacey act, which makes it a crime to carry out of the state that which can be and is lawfully prohibited by local or state laws, must be upheld." [FN119]

Decisions such as Cohen and Rupert illustrate that by the second decade of this century, both state power to regulate wildlife moving in interstate commerce and the Lacey Act's ability to supplement state wildlife laws were becoming well established, setting the stage for enactment of the Lacey Act's sister statute, the Black Bass Act.

C. The Black Bass Act of 1926

The original [Lacey Act](#) did not apply to fish. In 1926, Congress turned its attention to the overfishing of smallmouth and largemouth bass then occurring throughout the country. [FN120] Anglers prized these fish for their fighting ability, [FN121] but the cost of artificial propagation was prohibitive. [FN122] Bag limits set by each state had failed to prevent excessive catches, and commercial restrictions proved ineffective in preventing the illegal interstate transport of mismarked or concealed fish. [FN123] Congress was convinced that federal action was necessary to prevent the extinction of these species. [FN124]

The Black Bass Act [FN125] was fashioned after the Lacey Act in that it aimed to augment state laws by regulating and prohibiting certain interstate shipments of bass. It expanded the [Lacey Act's](#) provisions by prohibiting the transport of fish that had been sold, purchased, or possessed in violation of state or territorial law, [FN126] as well as those killed illegally. [FN127] Like the [Lacey Act](#), it provided a \$200 fine for violators, but added a maximum term of three months incarceration to the penalty scheme. [FN128] The Black Bass Act also applied to the acts of companies, partnerships, corporations, associations, and common carriers, rather than just individuals. [FN129]

D. Amendments to the Lacey and Black Bass Acts: 1930-1952

In 1930, the Black Bass Act was expanded to: 1) prohibit not only the transportation, but also the receipt for transportation of illegal bass; 2) include bass that had been "caught, killed, taken, sold, purchased, possessed, or transported" contrary to state law; 3) require accurate labeling of bass shipments; and 4) make all bass within a state subject to the state's laws, regardless of original packaging. [FN130] The new statute assigned enforcement of the Black Bass Act to designated employees of the Department of the Interior's Bureau of Sport Fisheries, [FN131] who were authorized to make arrests for violations committed in their presence, execute search warrants, and seize illegal bass, which could be forfeited following conviction. [FN132]

Amendments to the [Lacey Act](#) in 1935 mimicked many of the Black Bass Act's new provisions. [FN133] For example, the new Lacey Act applied to any "person, firm, corporation or association" that violated its provisions; targeted interstate shipments "by any means whatsoever," rather than only those shipments by common carrier; covered animals or birds "captured, killed, taken, shipped, transported, carried, purchased, sold or possessed" in violation of an underlying law; expanded predicate laws to include federal and foreign laws; penalized fraudulent marking of wildlife shipments, in addition to simple failures to mark; and raised the maximum penalty to \$1,000 and imprisonment for six months. [FN134] Marking requirements were maintained in the new Act. [FN135] Enforcement of the [Lacey Act](#) was assigned to Department of Agriculture agents who, like agents enforcing the Black Bass Act, could make arrests for violations committed in their presence and could execute warrants for the seizure of illegal wildlife, [FN136] which was subject to forfeiture after conviction. [FN137]

In 1947, the Black Bass Act was expanded to cover all "game fish," as that term was defined in state laws. [FN138] During congressional hearings, an undersecretary of the Department of the Interior suggested that the Act be expanded to cover game fish taken illegally on lands under federal jurisdiction, such as national parks and Indian reservations. [FN139] Based on this request, [FN140] the statute was amended to cover game fish taken, transported, purchased, or sold contrary to state or "other applicable law." [FN141] In 1949, a provision was added to

the [Lacey Act](#) prohibiting the importation of "wild animals or birds" under "inhumane or unhealthful conditions." [FN142] In 1952, the Black Bass Act was amended again to cover all fish, rather than just game fish. [FN143]

E. 1969 Amendments to the Lacey and Black Bass Acts

In 1969, reflecting America's growing awareness of environmental issues, Congress passed a bill that contained amendments to the Lacey and Black Bass Acts, as well as the nation's second version of an Endangered Species Act. [FN144] The new law worked a wholesale revision of the [Lacey Act](#). [FN145] Coverage was expanded to include amphibians, reptiles, mollusks, and crustaceans; [FN146] the maximum penalty was increased to \$10,000 and imprisonment for one year; the mental state required for a criminal violation was increased to "knowingly and willfully;" and civil penalties were expanded to apply to negligent violations, henceforth affecting those who knowingly violated "or in the exercise of due care should" have known they were violating the law. [FN147] Finally, birds covered under the Migratory Bird Treaty Act (MBTA) were removed from the [Lacey Act](#) because of concerns about duplication of, and confusion with, the MBTA's prohibitions on the import or export of those species. [FN148] The Black Bass Act was also amended to apply to interstate and foreign commerce and to penalize violators who know or should know of the illegal nature of the fish at issue. [FN149]

F. 1981 Combination of the Lacey and Black Bass Acts

In 1981, Congress again addressed the Lacey and Black Bass Acts, prompted by indications of a "massive illegal trade in fish and wildlife" perpetrated by "well organized large volume" criminal operations which generated substantial profits and "grim environmental consequences." [FN150] Noting that these statutes needed to keep pace with a fast-growing global trade in illegal wildlife, Congress recited the deficiencies in these laws and acted to correct them. [FN151] The Black Bass Act was repealed in its entirety, as were Sections 5, 43, and 44 of the 1969 [Lacey Act](#), and the two laws were combined within Title 16 in a new statute called the Lacey Act Amendments of 1981. [FN152] The word "willful" in the 1969 [Lacey Act](#) had hampered enforcement after being interpreted as requiring proof that a defendant knew not only of the illegal nature of the wildlife, but also that his conduct violated the [Lacey Act](#) itself. [FN153] The new law discarded this "double intent" requirement, prescribing a criminal penalty for those who knowingly committed an act prohibited by the law and knew, or in the exercise of due care should have known, of the illegal nature of the wildlife at issue. [FN154]

The amendment restored coverage of migratory birds after Congress concluded that their elimination from the Act in 1969 had left many aspects of interstate commerce in these species unaddressed. [FN155] Coverage of indigenous plants was added as a result of concerns that illegal collecting activity was a threat to the survival of certain species. [FN156] The marking requirements of previous enactments were relaxed, in recognition of the hardships they had imposed on fur and fish shippers. [FN157] Strict liability forfeitures of illegal fish, wildlife, and plants were authorized, whereas forfeiture of equipment and vehicles used in the commission of an offense were authorized only after a felony conviction and if the owner was privy to the violation. [FN158] The maximum civil fine was raised to \$10,000. [FN159] A bifurcated felony/misdemeanor criminal scheme was created, dividing the classification of offenses based on factors such as import/export activity, the mental state of the violator, commercial conduct, and the market value of the wildlife involved in the violation. [FN160] The maximum felony penalty was set at \$20,000 and/or five years, while misdemeanor violations were punishable by \$10,000 and/or one year. [FN161] The [Lacey Act's](#) enforcement provisions were also expanded, allowing federal wildlife agents to carry firearms, make warrantless arrests for felony violations, and execute search and arrest warrants. [FN162]

These changes were not unopposed. The National Rifle Association and Safari Club International, claiming to represent the interests of ordinary hunters, argued against inclusion of a felony penalty, elimination of the double intent requirement and the increased arrest and investigatory powers granted to Fish and Wildlife Service agents. [FN163] They warned that a stronger, more easily enforced [Lacey Act](#) would result in abusive investigations by the Fish and Wildlife Service and unfair convictions of law-abiding sportsmen. [FN164]

Proponents of a stronger [Lacey Act](#) included the National Wildlife Federation, International Primate Protection League, TRAFFIC, [FN165] Society for Animal Protective Legislation, International Association of Fish and Wildlife Agencies, and the Wildlife Management Institute. [FN166] In their testimony, these groups described the increasing pressures on global wildlife populations and the increasing volume of the illegal wildlife trade. [FN167] The very nature of these proponents indicated that the Lacey Act had shifted in importance from a domestic antipoaching statute to one that would address the problems of international trade. The TRAFFIC representative, for example, testified that a Uruguayan delegate to a recent CITES [FN168] convention noted the obligation of "rich nations to check the illegal trade at their end because relatively poor countries, like Uruguay, should not be expected to control their long and remote borders." [FN169] Supportive testimony also came from the Fish and Wildlife Service, the National Marine Fisheries Service, and the Department of Justice. [FN170] These agencies favored enhanced penalties because of their perception that prior sentences had not created a sufficient deterrent to wildlife traffickers whose profits and sophistication were continually growing. [FN171]

G. 1988 Amendments to the Lacey Act

Several changes were made to the Act in 1988. First, the language of subsection 3372(a)(1) was brought into conformity with that of subsections (a)(2) and (a)(3). [FN172] Prior to 1988, only the taking or possession of wildlife in violation of federal or tribal law had grounded a violation of subsection (a)(1), whereas (a)(2) and (a)(3) had applied to wildlife "taken, possessed, transported or sold" in violation of state or foreign law. [FN173] Congress amended subsection (a)(1) so that the language pertaining to the types of sufficient underlying violations mirrored that of the companion sections. [FN174]

Second, Congress added a subsection explicitly defining a sale of wildlife to include the provision or purchase of

guiding or outfitting services for the illegal acquisition of wildlife. [FN175] This amendment followed several court decisions in which the 1981 legislative history was found to be insufficient to support a broad interpretation of the word "sale." [FN176]

The third change involved falsification of documents related to shipments of fish, wildlife, or plants. Prior to 1988, the section outlining this offense had applied only to shipments that were actually imported, exported, or transported; in contrast, the 1988 version applied to documents related to wildlife, fish, or plants intended for import, export or transport. [FN177] Further, the penalty section was revised to require that a felony violation of the false document provision be "knowing" and that it involve either 1) the import or export of fish, wildlife, or plants, or 2) the sale or purchase of fish, wildlife, or plants with a market value greater than \$350. [FN178]

Other amendments to the [Lacey Act](#) authorized federal wildlife enforcement officers to make warrantless arrests for any federal offense committed in their presence and for any felony based upon reasonable belief that a felony has been or is being committed. [FN179] Prior to 1988, federal wildlife officers could make warrantless arrests only for violations of the [Lacey Act](#). The amendment was sought because, according to testimony before Congress, undercover wildlife agents who encountered criminal activity unrelated to wildlife (such as drug offenses) lacked authority to make arrests, and were thus subject to personal danger and possible civil tort liability if they made unauthorized arrests. [FN180] The 1988 language also authorized wildlife officers to make warrantless searches and seizures. [FN181]

III. THE LACEY ACT IN ITS PRESENT FORM

A. General Features

1. Conduct Prohibited by the Act and Its Overall Structure

The [Lacey Act](#) prohibits two general types of activity. First, it prohibits the failure to mark, as well as the falsification of documents for, most wildlife shipments, providing a civil and criminal penalty, respectively, for these violations. [FN182] Second, it prohibits trade in wildlife, fish, or plants that have been illegally taken, possessed, transported, or sold. [FN183] Both types of prohibited conduct are discussed in more detail below.

Certain specific terms used in the Act are defined in section 3371. Language describing the conduct the Act prohibits is found in section 3372. Civil and criminal penalties for marking and trafficking violations are found in section 3373, as are substantive elements needed to prove certain trafficking and marking violations discussed below. Section 3374 outlines the Act's forfeiture scheme. Sections 3375-3378 pertain to enforcement powers, administration, and exceptions to the Act's coverage.

The [Lacey Act](#) is administered by the Departments of the Interior, Commerce, and Agriculture through their respective agencies. These include the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Animal and Plant Health Inspection Service. [FN184]

2. Coverage of Fish, Wildlife, and Plants

The first step in analyzing a potential [Lacey Act](#) violation is to determine whether the wildlife, fish, or plant at issue is covered by the Act. The Act defines the terms "fish or wildlife" broadly:

(A)ny wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg or offspring thereof. [FN185]

This language encompasses virtually any wild animal, fish, or invertebrate, dead or alive, from any part of the world, and any part of, or product made from, such a specimen. Given the breadth of the definition, courts have not frequently been called upon to interpret it. [FN186] However, litigants have not yet argued to what extent the term "wild animal" applies to animals within species normally considered wild but raised on game farms, such as elk, deer, and bison.

The [Lacey Act's](#) much more restrictive definition of plants reads as follows:

(A)ny wild member of the plant kingdom, including roots, seeds, and other parts thereof (but excluding common food crops and cultivars) which is indigenous to any State and which is either (A) listed on an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or (B) listed pursuant to any State law that provides for the conservation of species threatened with extinction. [FN187]

Thus, the Act's coverage of plants is severely restrictive compared to its global application to wildlife and fish. Not only must the plant in question be a wild species native to the United States, [FN188] it must also be specifically protected by a state law [FN189] or by a CITES listing. [FN190] For example, Lacey Act prohibitions apply to unlawful trade in saguaro cactus because that species is indigenous to the United States and protected by Arizona plant protection laws. [FN191] However, the Act would not apply to a plant species native only to a foreign country.

The disparity between the [Lacey Act's](#) application to wildlife and its application to plants becomes most apparent when considering the types of importation activity the Act addresses. For example, the importation of cockatoo eggs,

bear parts, a tiger skeleton, salmon, or live snakes in violation of customs laws is an automatic felony violation of the Lacey Act. [FN192] However, the Act cannot be used to prosecute the importation of an equally endangered orchid or pitcher plant species taken from a foreign rain forest. This is a serious deficiency in the current [Lacey Act](#).

B. Lacey Act Prohibitions

1. Marking Offenses

The [Lacey Act](#) requires wildlife shipments traveling in interstate or foreign commerce to be accurately marked, but it addresses this issue in two separate subsections, [FN193] whose coverage is inconsistent and whose penalties are substantially different.

a. Failure to Plainly Mark or Label Containers of Fish or Wildlife

Section 3372(b) [FN194] prohibits the import, export, or transport in interstate commerce of any container of wildlife or fish that is not plainly marked, labeled, or tagged as required by the applicable regulations. [FN195] This section is notable for two reasons. First, violators of section 3372(b) are subject only to a civil fine of up to \$250; no criminal sanction is prescribed. [FN196] Second, this section applies only to containers of fish and wildlife; neither the statute nor the applicable regulations contain any requirement that containers of plants be plainly marked, tagged, or labeled. [FN197]

b. Preparing False Documents for Shipments of Wildlife, Fish, or Plants

Section 3372(d) also addresses the documents that must accompany wildlife shipments, [FN198] but it differs from section 3372(b) in four ways. First, it does not use the word "container," instead penalizing the making or submitting of any false record, account, label, or identification of a wildlife shipment. [FN199] Second, it applies to shipments of plants as well as to shipments of wildlife and fish. [FN200] Third, it applies to shipments that are intended for travel in foreign or interstate commerce as well as those that are actually shipped. [FN201] This allows agents to intercept fraudulent shipments prior to their departure from a country or particular state, as well as fraudulent shipments traveling through the United States from one foreign country to another. Finally, violation of this section carries either a misdemeanor or felony penalty, depending on certain factors. It is a felony if the document was made or submitted knowingly [FN202] and the shipment involved a sale or purchase of wildlife, fish, or plants worth more than \$350. [FN203] A felony sanction also applies if the shipment of fish, wildlife, or plants is imported or exported, regardless of the shipment's value or the occurrence of a sale or purchase. [FN204] For example, a hunter who kills an elk in Montana and ships it to Wyoming using a false label would ordinarily be subject to a misdemeanor penalty. Commercial activity (such as the use of a professional guide during the hunt) and market value exceeding \$350 would elevate the marking violation to a felony. However, if the knowingly mismarked elk is exported to Canada, the hunter would be subject to felony prosecution regardless of the elk's value or the hunter's involvement in any purchase or sale of the elk.

Only one appellate decision has addressed this recent addition to the [Lacey Act](#). In [United States v. Allemand](#), [FN205] Canadian hunters killed deer illegally in Wyoming and shipped them to a taxidermist in Minnesota. [FN206] The taxidermist prepared the deer for shipment to Canada and filled out export documents containing false information. These documents and the deer were seized from the taxidermist prior to export and several defendants were convicted of conspiring to violate section 3372(d). [FN207] On appeal, the defendants argued that they should not be found guilty of violating section 3372(d) because they had no duty to file the export documents. [FN208] The Tenth Circuit disagreed, noting that "making or submitting false records is illegal regardless of whether one has a duty to submit those records." [FN209]

2. Trafficking Offenses

a. In General

The [Lacey Act's](#) most commonly used provisions are those outlining trafficking offenses, set forth in sections 3372(a)(1) and (a)(2). [FN210] These sections are most easily understood if one thinks of them as prohibiting trade in "tainted wildlife." [FN211] In other words, these sections generally prohibit certain acts involving wildlife, fish, or plants that have been taken, possessed, transported, or sold in violation of a federal, state, tribal, or foreign law or regulation. [FN212] When read together with the "attempt" provision of section 3372(a)(4), sections 3372(a)(1) and (a)(2) generally make it unlawful to:

- import, export, transport, sell, receive, acquire, or purchase
- wildlife, fish, or plants that have been
- taken, possessed, transported, or sold in violation of a
- state, federal, foreign, or tribal law or regulation.

Thus, a [Lacey Act](#) trafficking charge requires proof of both an underlying or "predicate" violation of some law, as well as proof of an "overlying" violation of the [Lacey Act's](#) list of prohibited acts. The underlying violation occurs when someone illegally takes, possesses, transports, or sells the wildlife, fish, or plant. The [Lacey Act](#) violation does not

occur until the defendant commits or attempts to commit an import, export, transport, sale, receipt, acquisition, or purchase of the tainted animal or plant.

Section 3372(a)(2) applies two caveats to this general framework. First, if the underlying violation is of a state or foreign law, the [Lacey Act](#) violation must involve interstate or foreign commerce. [FN213] Second, a [Lacey Act](#) trafficking offense involving plants may not be predicated on an underlying violation of a foreign law. [FN214]

The penalty provision of section 3373 imposes a second set of elements that must be analyzed in determining whether a felony or misdemeanor violation can be proved. For instance, to establish a felony [Lacey Act](#) trafficking violation the government must prove the defendant knew that the wildlife was tainted. [FN215] In some cases, the government must also prove market value and commercial activity. [FN216] For misdemeanor trafficking violations, the government must prove that the defendant, in the exercise of due care, should have known of the wildlife's underlying taint. [FN217]

This combined statutory scheme requires any potential [Lacey Act](#) trafficking violation to be analyzed using these preliminary questions:

1. Is the wildlife, fish, or plant at issue covered by the [Lacey Act](#)? [FN218]
2. If so, can the government prove that the wildlife, fish, or plant was taken, possessed, transported, or sold in violation of a wildlife-related [FN219] state, federal, tribal, or foreign law or regulation? [FN220]
3. If so, can the government prove that the defendant imported, exported, transported, received, acquired, or purchased the illegal wildlife, fish, or plant, or attempted to do so? [FN221]
- 3a. If the underlying law was a state or foreign law, did the accused import, export, transport, receive, acquire, or purchase the wildlife, fish, or plant in interstate or foreign commerce? [FN222]
4. If so, are the additional elements necessary for proof of a misdemeanor or felony violation present, such as commercial conduct, market value, and knowledge of the wildlife's illegality?

b. The Two-Step Violation Scheme

A primary feature of any [Lacey Act](#) criminal trafficking violation is that two separate steps must be proved with regard to the wildlife at issue. First, it must have been taken, possessed, transported, or sold in violation of an underlying law. Second, it must have been imported, exported, transported, received, acquired, or purchased in a manner prohibited by the [Lacey Act](#). [FN223]

This two-step requirement was discussed recently by the Ninth Circuit in [United States v. Carpenter](#), [FN224] a case involving a farmer charged under section 3372(a)(1) with killing migratory birds and burying their carcasses on his property. The [Lacey Act](#) charge alleged, in essence, that the farmer had taken the birds in violation of the Migratory Bird Treaty Act, and that in doing so he also acquired the birds in violation of the [Lacey Act](#). [FN225] Thus, the charge divided a single act (killing the birds) into an underlying violation of the MBTA and a [Lacey Act](#) acquisition of the tainted birds. The Ninth Circuit rejected this approach, saying:

The government's position collapses the two steps required by the statute into a single step--the very act of knowingly taking the bird in violation of laws is, in the government's view, the act of acquiring the bird. That is not the meaning of the statute. The bird must be taken before acquiring it violates the [Lacey Act](#). [FN226]

Thus, the holding in [Carpenter](#) illustrates that a single act may not constitute both the underlying violation and the [Lacey Act](#) violation.

Although most cases involve wildlife that was taken, possessed, transported, or sold in violation of an underlying law prior to being imported, exported, etc., there is no requirement that the "taint" attach prior to the commission of the prohibited act. In [United States v. Sylvester](#), [FN227] for example, the defendant was convicted of a [Lacey Act](#) felony [FN228] after arranging to transport the hides and skulls of three Alaskan brown bears to New Mexico. [FN229] The sale agreement and partial payment were made in Alaska, and final payment was made in New Mexico. [FN230] The [Lacey Act](#) charge alleged, in essence, that the defendant had transported in interstate commerce bears that had been sold in violation of Alaskan state law. [FN231] On appeal, the defendant argued that he did not complete the sale of the wildlife until after it had been transported. Thus, he argued, there was no sale in Alaska, and no violation of the Alaska regulation. [FN232] In essence, he was arguing that no "taint" had attached to the wildlife prior to his commission of an act (transport) prohibited by the [Lacey Act](#). The Ninth Circuit disagreed, noting that the sale had originated and been partially completed in Alaska, and further holding that it is irrelevant whether completion of the sale precedes or follows the interstate transportation of the animals, so long as the transportation is related to the sale. [FN233]

Similarly, it is not necessary that the [Lacey Act](#) violation occur in the same location as the underlying violation. [FN234] For example, in [United States v. Gay-Lord](#), [FN235] rockfish taken in violation of Virginia law were sold by a defendant in North Carolina to a seafood company, which then sold the fish in other states; the [Lacey Act](#) charge alleged an underlying violation of the Virginia regulation. [FN236] The defendant argued that because his sale of the fish occurred in North Carolina, his [Lacey Act](#) prosecution there could not be grounded on an underlying violation that occurred in another state. The court disagreed, holding that the predicate state law does not have to be violated

in the state where the [Lacey Act](#) charge is filed. [FN237]

c. The Defendant's Connection to the "Taint"

The [Lacey Act](#) violator need not be the same person who took, possessed, transported, or sold the wildlife in violation of the underlying law. [FN238] Culpability attaches to anyone who imports, exports, transports, receives, acquires, or purchases the wildlife, [FN239] and who knows, or in exercise of due care should know, [FN240] that it was illegally taken, possessed, transported, or sold. The degree of the accused's knowledge regarding the status of the tainted wildlife is one of the factors that distinguishes a felony from a misdemeanor violation. [FN241]

In [United States v. Mitchell](#), [FN242] for example, the Fourth Circuit upheld the Lacey Act conviction of a United States citizen who imported wildlife illegally killed in Pakistan on the basis that he knew someone else had taken the wildlife in violation of Pakistani law. [FN243] This issue was also raised in [United States v. Lee](#), [FN244] a Ninth Circuit case involving imported salmon that had been taken in violation of a Taiwanese regulation. [FN245] Five of the six convicted fishermen argued that because they, as non-captains, did not personally violate the Taiwanese regulation prohibiting capture of the salmon, their [Lacey Act](#) convictions were invalid. The Ninth Circuit rejected this argument, noting:

(I)t is irrelevant whether the fishermen would be liable at all under the regulation. The Act's criminal penalty provision does not require that the fishermen violated the regulation, but only that they took part in importing the salmon when they knew, or should have known, that the salmon had been taken in violation of the regulation. 16 U.S.C. S 3373(d) (1)-(2). Thus, all six fishermen, whether or not they occupied the position of captain on the ship are equally subject to the Act's criminal penalties. [FN246]

Similarly, the government is not required to prove that the defendant knows which underlying law was violated or the nature of the violation. [FN247] Neither must the government prove that the defendant knew of the [Lacey Act](#) or knew that he violated it. [FN248] The government need only prove that the defendant knew the wildlife was, in some fashion, taken, possessed, transported, or sold illegally. [FN249]

C. Other Notable Features of the Lacey Act

1. Disclaimer Provision

The [Lacey Act](#) expressly provides that it does not repeal, modify, or supersede Indian treaty rights or federal laws (except certain earlier provisions of the [Lacey Act](#) that were specifically repealed by the 1988 amendments), nor change state or tribal power to regulate the activities of persons on Indian reservations. [FN250] Defendants sometimes use this disclaimer section to argue that the [Lacey Act](#), if applied to their situation, would modify or supersede an underlying law or abrogate Indian treaty rights. [FN251] In [United States v. Cameron](#), [FN252] for example, an Alaskan commercial fisherman who violated the catch limits set by federal Halibut Act [FN253] regulations argued that the [Lacey Act](#) criminalized conduct that is civilly regulated by the Halibut Act, thereby superseding or modifying a federal statute. [FN254] The court disagreed, relying on a prior case for the proposition that two statutes can govern the same conduct without running afoul of the [Lacey Act's](#) disclaimer provision, so long as the underlying law does not reserve exclusive control over the conduct at issue, which the Halibut Act does not. [FN255] The court found this interpretation consistent with congressional intent that the [Lacey Act](#) should strengthen and support existing wildlife laws. [FN256] The court said:

(T)he Act must be applied to conduct that is also regulated by an existing treaty, state or federal law, regulation or tribal law. The grand purpose of fish, wildlife, and plant protection by the federal government would be severely dissipated by an exaggerated reading of the disclaimer provision. [FN257]

2. Transshipment Exception

The [Lacey Act](#) does not apply to legally taken wildlife that is shipped through a state that prohibits the possession of the wildlife, as long as the wildlife is destined for a location where its possession is legal. [FN258] This exception is narrow and does not, for example, provide a defense where the wildlife has been unlawfully killed in one state and shipped to a second state that does not prohibit its possession. [FN259]

3. Significant Terms and Definitions

a. Taken

The term "taken" is defined to include capture, killing, or collection, [FN260] a more restrictive definition than that found in most other wildlife laws. For example, the [Marine Mammal Protection Act](#) defines "take" to include "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill." [FN261] The ESA definition of "take" includes "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." [FN262] Theoretically, the [Lacey Act's](#) restrictive definition of "taken" might limit the types of underlying violations that could trigger a [Lacey Act](#) charge. For example, if the operator of an aerial sightseeing service guided tourists on trips that "harassed" or "pursued" endangered wildlife, this action would be considered a "taking" under the ESA. [FN263] However, such an ESA violation could not be used to trigger a [Lacey Act](#) charge, because the wildlife would not have been taken under the [Lacey Act's](#) definition. [FN264] The [Lacey Act's](#) restrictive definition of "taken" probably does not reduce the number of potential cases charged, however, because it is difficult to see how wildlife could be imported, exported, bought, sold, etc., as prohibited by the Act, unless it has been actually captured,

killed, or collected.

b. Transport

The [Lacey Act](#) broadly defines "transport" to mean "move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment." [FN265] Interstate transport of wildlife has been found to include the mere placement of wildlife into the stream of interstate commerce, even if the wildlife never actually crosses a border. In [United States v. Gay-Lord](#), [FN266] for example, a North Carolina defendant purchased from undercover agents fish that had been taken in Virginia in violation of Virginia law. [FN267] The defendant intended to market the fish to restaurants in New York and Maryland, and he sold the fish to a local seafood company that he knew would transport the fish from his state to those markets. On appeal, the defendant argued that the undercover agents had improperly supplied the interstate commerce element themselves by bringing the fish from Virginia to North Carolina. [FN268] The Fourth Circuit disagreed, holding that the defendant's own actions satisfied the interstate commerce element because when he sold the fish to the seafood company he "knew that the rockfish would be transported in interstate commerce and took the steps that began their travel to interstate markets." [FN269] Thus the defendant was found to have transported the fish in interstate commerce merely by delivering them to a company that subsequently shipped them to another state. [FN270]

Similarly, the Ninth Circuit held in [United States v. Atkinson](#) [FN271] that by arranging to ship deer carcasses to hunters' home states, the defendant "transported" the wildlife in interstate commerce. [FN272] These cases imply that the transport of wildlife in interstate commerce may be accomplished by such preliminary steps as checking wildlife on an airplane or delivering the wildlife to an individual or business for shipment to another state.

c. Sale

The terms "sale" and "purchase" were not defined in the [Lacey Act](#) until 1988. As a result, courts disagreed as to whether the purchase or provision of professional guiding services on hunts where hunters violated bag limits or used illegal licenses amounted to a sale of wildlife. The Senate stated in 1981 that the term "sale" should be construed to include the provision of guiding services for an illegal wildlife hunt. [FN273] The Fifth Circuit adopted this interpretation four years later in [United States v. Todd](#), [FN274] affirming the [Lacey Act](#) convictions of two men who had guided illegal airborne hunts and holding that their provision of guiding services constituted a sale of wildlife. [FN275] Two years after [Todd](#), however, in [United States v. Stenberg](#), [FN276] the Ninth Circuit disagreed. Noting that criminal statutes must be construed strictly, and deciding that an ordinary person would not interpret the word "sale" to include the provision of guiding services, the Ninth Circuit refused to apply that definition to the term, notwithstanding the Senate's 1981 comments. [FN277] Three years after [Stenberg](#), the Tenth Circuit also refused to find that the provision of guiding services was a sale of wildlife. [FN278]

Congress ended the confusion by amending the statute to make the provision or acquisition of guiding services and illegal hunting licenses a sale or purchase of wildlife. [FN279] The Department of Justice and the U.S. Fish and Wildlife Service both supported this amendment, noting in testimony that "guiding, outfitting, and transportation services related to hunting have become a substantial commercial enterprise." [FN280]

d. Attempt

Subsection (4) provides that a mere attempt to import, export, transport, sell, receive, acquire, or purchase illegal wildlife is a completed offense. [FN281] "Attempt" is not defined in the Act, but is subject to interpretation by using its usual definition within the context of a criminal charge. [FN282]

e. Import

The [Lacey Act](#) defines the term "import" to include any landing of wildlife in the United States "whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States." [FN283] Congress made this distinction to permit the seizure and forfeiture of illegal wildlife being shipped through the United States, as well as to allow for seizures at the time of entry, rather than waiting until wildlife quarantined or held under bond is released and thus "imported" according to customs law. [FN284]

D. Elements of Felony and Misdemeanor Violations

Except in cases where tainted wildlife has been imported or exported, the language of subsections 3373(d)(1) and (d)(2) must be read in conjunction with the language of section 3372 in order to adduce all the elements necessary to prove a [Lacey Act](#) violation, and to determine whether a misdemeanor or felony violation has occurred. [FN285] Subsections 3373(d)(1) and (d)(2) incorporate the prohibited trafficking acts of section 3372, except for the marking and labeling requirements found in subsections 3372(b) and (d). A violation of the marking and labeling subsections results in penalties discrete from those for trafficking crimes. The elements of two types of felony violations, which can be loosely described as import/export felonies and other trafficking felonies, are described in subsection 3373(d)(1). The elements of misdemeanor trafficking violations are described in subsection 3373(d)(2).

1. Elements of Import/Export Felony Trafficking Violations

Subsection 3373(d)(1)(A) provides that any import or export of wildlife in violation of section 3372 is a felony if the accused knows that the wildlife was taken, possessed, transported, or sold in violation of some underlying law. [FN286] Thus, the government must establish the following elements beyond a reasonable doubt to prove a felony

trafficking violation involving the import or export of wildlife: [FN287]

1. The wildlife was taken, possessed, transported, or sold in violation of some valid underlying law or regulation;
2. The defendant knew the wildlife was taken, possessed, transported, or sold in violation of some law or regulation; and
3. The defendant knowingly imported or exported the wildlife, or attempted to do so. [FN288]

Thus, for example, if a person attempts to enter the United States with a specimen of wildlife he knowingly obtained in violation of a foreign law, he would be guilty of a [Lacey Act](#) felony regardless of the wildlife's market value and without the need to prove any sale or purchase of the wildlife.

2. Elements of Other Felony Trafficking Violations

Cases that do not involve import or export are covered by section 3373(d)(1)(B). This subsection requires the government to prove the following elements beyond a reasonable doubt in order to obtain a conviction:

1. The wildlife was taken, possessed, transported, or sold in violation of a valid underlying law or regulation;
2. The defendant knew the wildlife was taken, possessed, transported, or sold in violation of some law or regulation;
3. The defendant was engaged in conduct involving the sale or purchase, attempt to sell or purchase, offer to sell or purchase, or intent to sell or purchase the wildlife;
4. The defendant knowingly [FN289] committed or attempted to commit [FN290] a transport, sale, receipt, acquisition, or purchase of the wildlife, fish, or plant; and
5. The wildlife had a market value in excess of \$350.

Subsection 3373(d)(1)(B) thus adds two elements needed for proof of a felony violation not found in import/export cases. First, the prohibited conduct in subsection 3372(a) must be committed in the context of commercial activity. Second, the market value of the wildlife must exceed \$350. If one of these two factors is not present, the violation is a misdemeanor. [FN291] Thus, in the hypothetical case of a person who kills an elk in violation of Montana law without the use of a paid guide and transports the animal to another state, no felony violation has occurred absent proof of some commercial activity and wildlife market value in excess of \$350. However, if the same hunter pays \$500 for the services of a guide, both the commercial conduct element and wildlife market value element are satisfied, and a felony has been committed.

3. Elements of Misdemeanor Trafficking Violations

Subsection 3373(d)(1)(B) provides a misdemeanor sanction for any negligent violation of the Act. [FN292] Like import/export felony violations, it requires neither sale/purchase activity nor a threshold wildlife market value. The elements of a [Lacey Act](#) misdemeanor trafficking violation are:

1. The wildlife was taken, possessed, transported, or sold in violation of a valid underlying law or regulation;
2. In the exercise of due care, [FN293] the defendant should have known the wildlife was taken, possessed, transported, or sold in violation of some law or regulation; and
3. The defendant knowingly committed or attempted to commit [FN294] an import, export, transport, sale, receipt, acquisition, or purchase.

A misdemeanor trafficking violation may be considered a lesser-included offense of a felony violation. In [United States v. Hansen-Sturm](#), [FN295] the defendant was charged with a felony [Lacey Act](#) violation but convicted of a misdemeanor after the jury was instructed that the "due care" violation was a lesser-included offense of the felony. The defendant appealed, arguing that a negligent act could not be a lesser-included offense of an intentional act. [FN296] The Ninth Circuit disagreed, stating, "Whatever the merits of the abstract argument, it is established in the criminal law of this country that a negligent state of mind does qualify as a lesser element of an intentional state of mind." [FN297] The court held further that a negligent state of mind is sufficient to uphold a charge of conspiracy to violate the [Lacey Act](#). [FN298]

E. Penalties Provided By The Lacey Act

1. Civil Fines

A civil fine of up to \$10,000 may be imposed for a negligent violation of the trafficking prohibitions of 3372(a) or a knowing violation of the fraudulent marking prohibitions of subsection 3372(d). [FN299] However, if the wildlife is worth less than \$350 and the offense involves only the transportation, acquisition, or receipt of the tainted fish,

wildlife, or plants (i.e., no import/export or commercial activity), the fine may not exceed \$10,000 or the maximum fine provided by the underlying law, whichever is less. [FN300] Violation of the marking requirements set forth in subsection 3372(b) can result in a civil fine of up to \$250. [FN301]

2. Criminal Sanctions

Congress recently reclassified all federal criminal violations and increased their fines. [FN302] As a result, the maximum prison terms provided for in the [Lacey Act](#) are accurate, but the maximum fines have been increased, and are found in a different section of the U.S. Code. [Lacey Act](#) violations under subsections invoking the one-year maximum penalty are now classified as Class A misdemeanors, carrying a maximum penalty of one year incarceration and maximum fines of \$100,000 for individual violators and \$200,000 for organizational violators. [FN303] [Lacey Act](#) violations under subsections invoking the five-year maximum penalty are now considered Class E felonies, [FN304] punishable by a maximum penalty of five years incarceration [FN305] and maximum fines of \$250,000 for individual violators and \$500,000 for organizational violators. [FN306]

3. Permit Revocation

The Departments of the Interior, Commerce, and Agriculture, through their representative agencies, issue permits for hunting, fishing, and the import and export of wildlife, fish, and plants, as well as permits for the operation of wildlife quarantine facilities, rescue centers, and other similar facilities. [FN307] The [Lacey Act](#) empowers these departments to revoke any permit, license, or stamp (except a permit issued pursuant to the Magnuson Fishery Conservation and Management Act [FN308]) possessed by anyone who has been convicted of a felony or misdemeanor [Lacey Act](#) violation. [FN309]

4. Forfeiture

a. Of Wildlife Involved in a Violation

The [Lacey Act](#) authorizes the forfeiture of fish, wildlife, or plants that are imported, exported, transported, sold, received, acquired, or purchased contrary to the trafficking or fraudulent marking provisions of section 3372, or any regulation issued pursuant to those parts of the statute. [FN310] These forfeitures are authorized on a strict liability basis; the additional culpability elements for a civil or criminal violation need not be proved. [FN311] This means that elements such as market value, commercial conduct, or the mental state of an accused do not have to be proved to obtain wildlife forfeiture. No "innocent owner" defense can defeat a wildlife forfeiture, and no other civil or criminal action need be filed in conjunction with the forfeiture action. [FN312]

However, wildlife involved in a violation of the marking requirements of subsection 3372(b) is not subject to forfeiture. [FN313] Thus, a wildlife shipment that has not been marked or labeled would not be subject to forfeiture, whereas a wildlife shipment for which false documents have been made or submitted may be forfeited. [FN314]

b. Of Vessels, Vehicles, Aircraft, and Equipment Involved in a Violation

Vessels, vehicles, aircraft, and other equipment used to aid in the unlawful import, export, transport, sale, receipt, acquisition, or purchase of fish, wildlife, or plants may also be forfeited in certain circumstances. [FN315] First, forfeiture may occur only after a felony conviction involving the actual or intended sale or purchase of fish, wildlife, or plants. [FN316] Second, the "innocent owner" defense can be invoked; to accomplish forfeiture, the government must prove the owner of the item knew or should have known it would be used to aid in the violation at the time of its use in the violation. [FN317]

c. Procedural Issues

The [Lacey Act](#) incorporates the forfeiture provisions and procedures of the U.S. customs laws. [FN318] Once the government establishes probable cause that wildlife has been involved in a violation of the [Lacey Act](#), the burden of proof shifts to the claimant to prove a defense to the forfeiture. [FN319] Incorporation of these customs provisions, also accomplished in other wildlife statutes, [FN320] limits administrative forfeitures to property valued at \$10,000 or less, and allows property owners to employ standard remission and mitigation procedures in response to forfeiture proceedings. [FN321] Investigating agents are empowered to seize and hold forfeitable wildlife or other property pending the institution of a forfeiture action. [FN322] Wildlife or property subject to forfeiture may also be allowed to remain with the owner if an appropriate bond is posted promising it will not be disposed of prior to resolution of the forfeiture action. [FN323]

IV. COMMON ISSUES IN LITIGATION

A. Predicate Law Requirements

As noted above, the [Lacey Act](#) prohibits certain actions involving wildlife that has been taken, possessed, transported, or sold in violation of a state, federal, foreign, or Indian tribal law or regulation. Litigants occasionally contest the underlying law or regulation, arguing that it is unconstitutional or insufficiently wildlife-related to support a [Lacey Act](#) charge.

1. Wildlife Relatedness

The [Lacey Act](#) defines its predicate laws, i.e., any "law, treaty, regulation and Indian tribal law," as "laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation or sale of fish or wildlife or plants." [FN324] But how focused on wildlife regulation must the predicate law be to satisfy this definition? The question of whether the underlying law has a sufficient nexus to wildlife protection is one of law, to be decided by the court. [FN325] The government bears the burden of establishing that wildlife protection is one of the purposes of the underlying law. [FN326]

In *United States v. Molt*, [FN327] the Third Circuit considered a case in which reptiles were smuggled into the United States after having been transported in violation of Fijian customs laws and certain New Guinea regulations. [FN328] The defendant argued that the Fijian and New Guinea statutes were not sufficiently wildlife-related to support a [Lacey Act](#) charge. The court found that the Fijian customs statute was "merely a revenue law" and rejected the [Lacey Act](#) charges based on its violation. [FN329] But it found that the New Guinea law, which made specific reference to "fauna," contemplated protection "for wildlife other than the conventional products of commercial agriculture and fisheries," and held that the law was sufficiently wildlife-related to ground the [Lacey Act](#) counts based on it. [FN330]

In the 1981 amendments to the [Lacey Act](#), the Senate stated that while the term "any law . . . or regulation" is not intended to include laws that have no relation to wildlife, the *Molt* interpretation was too restrictive. [FN331] Citing hunting laws as an example of statutes that have both revenue and wildlife protection purposes, the Senate stated that a predicate law, treaty, regulation or tribal law that has wildlife protection as one of several purposes is sufficient to ground a [Lacey Act](#) charge.

A few federal fisheries laws are specifically precluded from use as predicate laws in [Lacey Act](#) cases [FN333] due to a desire by Congress to avoid duplication of those laws' regulatory schemes. [FN334]

2. Constitutional Issues

Litigants frequently seek dismissal of [Lacey Act](#) charges on constitutional grounds. Such arguments generally take one of two forms: challenges to the constitutionality of a predicate law used to ground the [Lacey Act](#) charge, or to the constitutionality of the [Lacey Act](#) itself.

a. Constitutionality of the Predicate Law

Because the [Lacey Act](#) incorporates the substantive elements of the predicate laws used to ground its violations, constitutional attacks on those predicate laws and regulations are occasionally used and occasionally succeed. For example, in *Hughes v. Oklahoma*, [FN335] a defendant was convicted of [Lacey Act](#) charges after exporting minnows in violation of an Oklahoma law. He argued successfully that the predicate Oklahoma statute violated the Commerce Clause of the U.S. Constitution because the state had not attempted to use less discriminatory means to achieve the conservation purposes of the statute. [FN336] But in *United States v. Doyle*, [FN337] a defendant convicted of [Lacey Act](#) charges after acquiring illegally wild-caught falcons unsuccessfully argued that the underlying Montana law prohibiting capture was impermissibly vague. [FN338]

Similarly, in *Maine v. Taylor*, [FN339] the defendant was convicted of violating the [Lacey Act](#) by transporting 158,000 "golden shiners" into Maine in violation of that state's law. [FN340] He argued that the Maine law prohibiting such trade violated the Commerce Clause by impermissibly regulating the flow of interstate commerce in baitfish. [FN341] The state argued that even if the law were unconstitutional, Congress had consented, through the language of the [Lacey Act](#), to the use of flawed predicate laws in [Lacey Act](#) prosecutions. [FN342] After examining the statutory language and legislative history of the [Lacey Act](#), the Court found no "unmistakably clear" intent on the part of Congress to remove state wildlife laws and regulations from the reach of the Commerce Clause. [FN343] The Court then analyzed the purpose of the law, its discriminatory effect, and available alternatives, ultimately concluding that the law was constitutionally valid. [FN344]

The decisions in *Hughes*, *Doyle*, and *Taylor* [FN345] illustrate that [Lacey Act](#) charges are only as valid as the state laws or regulations that support them. Those laws must stand on their own when attacked on constitutional grounds.

b. Constitutionality of the Lacey Act

Constitutional attacks on the [Lacey Act](#) itself have relied primarily on delegation and vagueness arguments. Several litigants have suggested, for example, that by incorporating state, tribal, or foreign laws, the Act unconstitutionally delegates to other legislative bodies Congress's power to enact federal law. [FN346] In *United States v. Lee*, several defendants were convicted of [Lacey Act](#) violations after importing salmon taken in violation of a Taiwanese regulation. [FN347] They argued that by making the provisions of a foreign law an essential element of a federal violation, Congress had delegated its legislative powers to a foreign government in violation of the U.S. Constitution. [FN348] The Ninth Circuit rejected this argument, as had four other circuits, distinguishing the assimilation of a foreign law from the use of a foreign law as a trigger for the [Lacey Act](#). [FN349] In prosecutions under the [Lacey Act](#), the government does not assimilate foreign law, the court said, but merely looks to see if the foreign law has been violated and, if so, applies the [Lacey Act](#), not the procedures or penalties of the foreign law. Considered in this manner, the [Lacey Act](#) does not delegate power to foreign governments, and therefore does not violate Article I of the Constitution. [FN350]

The *Lee* defendants also argued that the [Lacey Act](#) is impermissibly vague because, by failing to list the specific foreign laws that may be used as predicates, it does not provide reasonable notice of what conduct is prohibited. The Ninth Circuit had rejected this argument in a [Lacey Act](#) civil forfeiture case three years earlier, [FN351] but the *Lee*

appellants argued that the greater penalties associated with a criminal violation warranted stricter analysis of the vagueness issue. [FN352] The court responded by pointing out that, in contrast to the [Lacey Act's](#) forfeiture provisions, criminal violations required the government to prove intent, i.e., that the defendant knew or should have known that an underlying law had been violated. [FN353] It cited legislative history indicating that these scienter requirements were added by Congress specifically to avoid the possibility that a reasonable person unaware of the predicate law would be convicted of a criminal violation. [FN354] Rejecting the vagueness argument, the Ninth Circuit concluded that the intent element prevents the Act from trapping the unwary innocent. [FN355]

3. The Lacey Act and Native American Rights

Three types of cases involving tribal laws and treaty rights have arisen in which litigants dispute the appropriate reach of the [Lacey Act](#). These are cases in which the offense underlying a [Lacey Act](#) charge is: (a) a violation of tribal law; (b) a violation of a federal law by a tribal member claiming treaty abrogation; or (c) a violation of a state law by a tribal member claiming a superseding treaty right. Each is discussed in turn below.

a. Predicate Violation of Tribal Law

The [Lacey Act](#) includes Indian tribal laws within the list of predicate violations that may be used to trigger application of the federal penalty. [FN356] It defines "Indian tribal law" to include only those tribal regulations or rules enforceable within "Indian country," as that term is defined in the federal code. [FN357] In using this language, the Senate indicated its purpose was to recognize the "resource management responsibilities of Indian tribes" by including their laws within [Lacey Act](#) coverage, except such laws that might "apply to off-reservation areas, or to reservation areas that are not recognized as such." [FN358]

The tension between tribal sovereignty and [Lacey Act](#) application to violations of tribal law has been litigated in several cases. In *United States v. Sohappy*, [FN359] thirteen Native American defendants were convicted of selling fish taken in violation of tribal and state regulations. They argued that application of the [Lacey Act](#) to their conduct would abrogate their treaty reserved fishing rights in violation of the Act's disclaimer provision. [FN360] The Ninth Circuit began its analysis by noting that the [Lacey Act](#) and other federal laws generally apply to Indian violations of tribal law unless the tribes retain exclusive jurisdiction over the activity. [FN361] Exclusivity, the court reasoned, is found where the crime is committed against another tribal member. [FN362] Here, the tribal violation was not characterized as a "purely intramural" matter because the Indian fishing right was shared with non-Indians and the "victim" of the tribal violation was not another Indian, but the "general public welfare." [FN363] The court also noted repeated expressions of congressional intent to apply the [Lacey Act](#) to Indian violations of tribal laws, [FN364] concluding that exempting Indians from [Lacey Act](#) violations of tribal laws was legally unsupported and would frustrate the Act's overall goal of wildlife preservation. [FN365]

The [Lacey Act's](#) application in cases where tribal law is violated in Indian country by nontribal members was addressed in *United States v. Big Eagle*. [FN366] In *Big Eagle*, the defendant was convicted of violating the [Lacey Act](#) after selling fish he had harvested in violation of Lower Brule tribal regulations. [FN367] The defendant was not a member of the Lower Brule Tribe, and argued that because the tribe lacked jurisdiction to prosecute him, he could not be found to have violated an Indian tribal law within the meaning of the [Lacey Act](#). [FN368] The Eighth Circuit disagreed, finding that Congress's purpose in the 1981 [Lacey Act](#) amendments was to provide "comprehensive enforcement of wildlife laws and regulations established by state and local entities." [FN369] Noting that the [Lacey Act's](#) definition of Indian tribal law includes all such laws or regulations within Indian country, the court stated, "Whether the Indian tribe maintains complete jurisdiction to enforce or not--so long as the land is within the Reservation--it is also within the jurisdiction of the United States Government." [FN370] Finding that the fish had been illegally harvested within the boundaries of the Lower Brule Reservation, the court upheld the [Lacey Act](#) conviction. [FN371]

b. Predicate Violation of Federal Law by Indians Claiming a Treaty Right

One year after *Sohappy*, the Ninth Circuit decided a case in which the predicate law was a federal regulation. [FN372] The defendants in *United States v. Eberhardt* [FN373] were Yurok Indians from the Hoopa Valley Reservation charged with violating a Department of the Interior moratorium on their rights to commercially harvest anadromous fish. [FN374] Unlike *Sohappy*, the underlying regulation in this case directly qualified Indian treaty rights. The Ninth Circuit upheld the convictions by finding that the regulation was promulgated to protect and manage the fisheries, not to extinguish fishing rights, and that the executive branch must have this power as trustee of Indian affairs. [FN375] In dicta, the court noted that states may not qualify Indian fishing rights, but may regulate them only for reasonable and necessary conservation purposes. [FN376]

c. Predicate Violation of State Law by a Tribal Member

The tension between state law and treaty rights was addressed in *United States v. Williams*, [FN377] which involved a Nez Perce tribal member convicted of violating the [Lacey Act](#) by selling moose that had been possessed and transported in violation of state and tribal laws. [FN378] Williams's appeal was based on the district court's finding that the state laws at issue were reasonably necessary for the conservation of wildlife and appropriately applied to a tribal member. [FN379] The Ninth Circuit cited a Supreme Court case establishing that state wildlife regulations that impinge on treaty rights are valid only insofar as they meet appropriate standards and do not discriminate against the Indians. [FN380] As noted in *Sohappy*, the "appropriate standards" requirement has been held to mean that "the State must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interest of conservation." [FN381] In *Williams*, the government argued that it need not have proved the conservation necessity of the state laws at issue, because the tribal members had waived personal hunting or fishing treaty rights by enacting their own regulations. [FN382] The court rejected this argument, but did hold that when tribal regulations mimic state provisions, no hearing need be held to establish the

conservation necessity of the state law at issue because a hearing in such cases would be "superfluous." [FN383]

4. Other Issues

a. Predicate Law/Regulation May Be Civil

The predicate wildlife-related law, treaty, or regulation may take any of a number of different forms. It may, for example, be a state fishing regulation. [FN384] It may be a state law which is criminal in nature but carries a lesser penalty than that provided by the [Lacey Act](#). [FN385] It may be a wildlife-related law or regulation that provides only a civil sanction. [FN386]

For instance, in [United States v. Lee](#), [FN387] the defendant argued that use of a Taiwanese regulation was improper because the regulation was purely civil in nature. [FN388] Echoing its earlier reasoning in [United States v. 594,464 Pounds of Salmon](#), [FN389] the Ninth Circuit declared that the legislative history of the Lacey Act reflects no intent to distinguish based on the type of sanction imposed by the predicate law. The court cited the language of section 3371(d), which broadly defines "law" to include any measure "which regulate(s) the taking, possession, importation, exportation, transportation or sale of fish or wildlife or plants." [FN390] The court also noted that criminal sanctions under the [Lacey Act](#) require scienter, an addition made by Congress to prevent possible abuses in charging a Lacey Act count triggered by a general intent or strict liability predicate violation. [FN391] The court said this indicated Congress foresaw the consequences of imposing criminal sanctions under the Act on those who would suffer only civil penalties for violation of the predicate law, and decided to mitigate these consequences by including the higher criminal culpability requirement. [FN392]

b. Foreign Regulations May Be Valid Predicate

In [594,464 Pounds of Salmon](#), [FN393] violation of a Taiwanese fishing regulation prohibiting the export of salmon without a permit triggered a [Lacey Act](#) forfeiture. [FN394] The defendants argued that while a prior version of the [Lacey Act](#) prohibited trade in wildlife taken in violation of "any law or regulation of any State or foreign country," [FN395] the 1981 amendments eliminated any reference to foreign "regulation." [FN396] The Ninth Circuit found this distinction unimportant, noting that the 1981 amendments were passed in response to frustration over inadequacy of the [Lacey Act](#), and that Congress intended to expand the Act's reach, not restrict it. [FN397] Use of the term "foreign law" in the newest version was, the court said, intended to encompass a wide range of laws passed by "the world's regimes that possess systems of law and governments that defy easy definition or categorization." [FN398]

c. Predicate Law's Statute Of Limitations Does Not Control

Because no statute of limitations is set forth in the [Lacey Act](#), some defendants have sought dismissal of Lacey Act charges filed after the statute of limitations for the underlying violation has expired. In [United States v. Borden](#), [FN399] the Fourth Circuit was asked to reverse a [Lacey Act](#) conviction in a case involving mussels that had been commercially harvested in violation of West Virginia law. The predicate law had a one-year statute of limitations, and the [Lacey Act](#) prosecution did not commence until after that period had expired. [FN400] After conviction, the defendant argued that the state statute of limitations should control, saying that a prosecutable violation of state law is necessary to support a [Lacey Act](#) charge. [FN401] Echoing prior decisions, [FN402] the Fourth Circuit disagreed, noting that the [Lacey Act](#) is a federal statute governed by federal procedure. Although the Act requires a showing that wildlife was taken in violation of state law, thereby incorporating the substantive elements of state law, "it is not designed to incorporate state procedural law." [FN403] The federal code provides a "catch-all" criminal statute of limitations, applicable to statutes like the [Lacey Act](#) that lack their own. [FN404] The federal statute states that a prosecution must commence within five years after commission of the offense. [FN405] The court held that because Lacey Act charges were filed within five years after the state violation was committed, they were timely, regardless of the state's shorter limitations period. [FN406]

[Borden](#) can be misleading however, as it seems to relate the five-year limitations period to the date on which the underlying predicate violation occurs. [FN407] Commission of a [Lacey Act](#) trafficking violation occurs not when the wildlife has been taken, possessed, transported, or sold in violation of a predicate law, but rather when it is imported, exported, transported, received, acquired, or purchased in violation of sections 3371(a) and 3373(d). Thus, the five-year statute of limitations begins to run when any of these acts are committed, whether they occur simultaneously with, or long after, the underlying violation.

B. Wildlife Market Value

Certain violations of the [Lacey Act](#) require proof that the wildlife, fish, or plants involved in the crime have a market value exceeding \$350. [FN408] The market value of wildlife in a [Lacey Act](#) case is decided by the finder of fact during trial, based on the evidence presented. [FN409] The term "market value" is not defined in the [Lacey Act](#), and most courts instruct juries that they may determine the market value by evidence of a price actually paid or offered, or evidence of the wildlife's value on the open market. [FN410]

Since all [Lacey Act](#) felonies containing a market value element also require proof of commercial activity, [FN411] market value of the wildlife is often proved at trial through witness testimony describing the price actually paid or offered for the wildlife. Most often, such prices relate to the actual transfer of wildlife specimens or parts. [FN412] In some cases, however, the price paid is not for an actual transfer of specimens, but for services such as guiding or outfitting. [FN413] In [United States v. Atkinson](#), [FN414] for example, a Montana hunting guide was convicted of twenty-one felony [Lacey Act](#) violations after guiding out-of-state hunters on several illegal big-game hunts. [FN415]

He was paid between \$1,500 and \$3,000 as a guiding fee for each hunt. [FN416] At trial, the jury was told it could determine whether the \$350 market value threshold had been reached by considering either the price the animals' parts would bring on the open market or the amount the defendant charged his clients to participate in the hunts. [FN417] On appeal, the Ninth Circuit approved this valuation method. [FN418] Noting the Act's recently added subsection making the provision of guiding services a sale of wildlife, [FN419] the court stated that in such circumstances, "the commodity being .sold' is the opportunity to hunt game with the assistance of a guide." [FN420] It cited its earlier decision in [United States v. Stenberg](#) [FN421] for the proposition that the sale of guiding services is the sale of an opportunity to kill wildlife, not an actual sale of the wildlife itself. [FN422] The Ninth Circuit's [Atkinson](#) decision also echoed the Fifth Circuit, which stated in an earlier big-game [Lacey Act](#) case that "(t)he best indication of the value of the game .sold' in this manner is the price of the hunt." [FN423]

V. CONCLUSION

Addressing his House colleagues in 1900, Congressman John Lacey said, "There is a compensation in the distribution of plants, birds, and animals by the God of nature. Man's attempt to change and interfere often leads to serious results." [FN424] He acted on these sentiments by introducing a brief statute that created little stir during its initial consideration and remains somewhat obscure, even among environmentalists, almost 100 years later. Though Lacey is rarely ranked with notable conservationists such as John Muir and Aldo Leopold, his legacy remains vibrant and effective today in the form of a law that is arguably our nation's most effective tool in the fight against an illegal wildlife trade whose size, profitability, and threat to global biodiversity Lacey could probably not have imagined.

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The author acknowledges the valuable editorial assistance of Beth Brennan and Michael Mills. The author is also indebted to colleague John Webb for his guidance and discussion on the issues herein during the past several years.

The views expressed in this article are solely those of the author and do not purport to reflect the views of the Department of Justice or any other federal agency.

[FN2]. Lacey Act Amendments of 1981, Pub. L. No. 97-79, SS 2-9, 95 Stat. 1073, 1073-80 (1981) (codified as amended at [16 U.S.C. SS 3371-3378](#) (1988 & Supp. V 1993)).

[FN3]. [United States v. Atkinson](#), 966 F.2d 1270 (9th Cir. 1992), cert. denied, 113 S.Ct. 1644 (1993); [United States v. Celebucki](#), No. 94-CR-177 (N.D. Ohio Feb. 24, 1995); [United States v. Furzer](#), No. CR-93-620 (C.D. Cal. Feb. 11, 1994); [United States v. Lee](#), 937 F.2d 1388 (9th Cir. 1991), cert. denied, 112 S. Ct. 977 (1992); [United States v. Hansen-Sturm](#), 44 F.3d 793, 793-94 (9th Cir. 1995); [United States v. Miller](#), 981 F.2d 439 (9th Cir. 1992), cert. denied, 113 S. Ct. 2945 (1993).

[FN4]. The Lacey Act is frequently referred to as the first example of the federal government using its power to preserve species. See, e.g., Davina Kari Kaile, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 *Geo. Int'l Envtl. L. Rev.* 441, 441 (1993); John L. Dentler, *Noah's Farce: The Regulation and Control of Exotic Fish and Wildlife*, 17 *U. Puget Sound L. Rev.* 191, 210 (1993). Other more limited federal wildlife laws preceded the Lacey Act, such as an 1868 statute that prohibited the killing of certain fur-bearing animals in Alaska, Act of July 27, 1868, ch. 273, 15 Stat. 240 (repealed 1944), and an 1894 statute that prohibited hunting in Yellowstone Park. Act of May 7, 1894, ch. 72, 28 Stat. 73.

[FN5]. 33 Cong. Rec. 4871-74 (1900) (comments of Rep. John Lacey).

[FN6]. The statute's trafficking prohibitions provide, in relevant part:

(a) Offenses other than marking offenses--

It is unlawful for any person--

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce--

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18)--

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State; (or)

(4) to attempt to commit any act described in paragraphs (1) through (3).

(b) Marking offenses -- It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title

(d) False labeling offenses -- It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife or plant which has been, or is intended to be --

(1) imported, exported, transported, sold, purchased, or received from any foreign country; or

(2) transported in interstate or foreign commerce.

[16 U.S.C. S 3372\(a\), \(b\), \(d\)](#) (1988 & Supp. V 1993).

[FN7]. [16 U.S.C. S 3372](#).

[FN8]. See, e.g., *United States v. Borden*, 10 F.3d 1058 (4th Cir. 1993) (trafficker in illegal mussels sentenced to 15 months imprisonment and ordered to pay \$100,000 restitution); *Atkinson*, 966 F.2d at 1271 (big game guide convicted of 21 Lacey Act violations, sentenced to 37 months incarceration); *Celebucki*, No. 94-CR-177 (reptile smuggler convicted of conspiracy and Lacey Act violations, sentenced to 15 months incarceration).

[FN9]. See, e.g., Constance Poter, *A Shameful Harvest*, *Nat'l Geographic*, Sept. 1991, at 110; Pete Engardio et al., *Wildlife Poachers and Smugglers: On the Endangered List*, *Business Week*, March 16, 1992, at 110D; Maria Cone, *Breaking Down the Barriers to Wildlife Protection*, *L.A. Times*, Nov. 13, 1992, at B1; Michael D. Lemonick, *Animal Genocide*, *Mob Style*, *Time*, Nov. 14, 1994, at 77.

[FN10]. *Traffic USA*, World Wildlife Fund, *World Trade in Wildlife 1* (1994).

[FN11]. *Id.*

[FN12]. *Endangered Species Project, Organized Crime and the Illegal Wildlife Trade 1* (1994) (citing Interpol statistics). See also Cone, *supra* note 8, at B2.

[FN13]. Lemonick, *supra* note 8, at 77 (citing Interpol statistics).

[FN14]. *Id.* at 77 (citing Interpol statistics); Linda Kanamine, *Animal-Trade Meeting Could Be a "Cat Fight," USA Today*, Nov. 14, 1994, at 3A.

[FN15]. See, e.g., *United States v. Lee*, 937 F.2d 1388, 1390 (9th Cir. 1991), cert. denied, 112 S. Ct. 977 (1992) (defendants attempted to smuggle 500 metric tons of illegally taken salmon into U.S. using false documents); *United States v. Cameron*, 888 F.2d 1279, 1281 (9th Cir. 1989) (defendant commercial fisherman convicted of Lacey Act violation after harvesting, retaining, and selling halibut in excess of legal limits); *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 825 (9th Cir. 1989) (civil forfeiture action involving salmon caught in violation of Taiwanese regulation and landed in United States).

[FN16]. See, e.g., *Endangered Species Project, supra* note 11, at 1-13; John Arundel, *Rare-Animal Smugglers Find Haven in Miami*, *Miami Herald*, March 26, 1992, at 16.

[FN17]. Ivory imports have been banned worldwide since 1990 in an effort to slow the killing of African elephants. See generally Raymond Bonner, *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993).

[FN18]. Every body part of a tiger can be sold in Asian pharmacies, making a whole tiger worth up to \$65,000. Binod Bhattarai, *Nepal-Environment: Fur Flies in Wildlife Trade*, *Inter Press Global Information Network* (Inter Press, Kathmandu) July 26, 1994, available in Westlaw, 1994 WL 2579756. Tiger bone is reputedly a pain reliever, and tiger penis a prized aphrodisiac. Rajiv Chandra, *China: Wildlife Trade Ban Offers Hope for Rhinos, Tigers*, *Inter Press Global Information Network* (Inter Press, Beijing) Sept. 27, 1993, available in Westlaw, 1993 WL 2535262.

[FN19]. Rhino parts, especially rhino horns, are a prized medicinal product. See, e.g., Debra Percival, *Environment: China, Taiwan Face Sanctions Over Rhino Horns*, *Inter Press Global Information Network* (Inter Press, Brussels, Sept. 6, 1993), available in Westlaw, 1993 WL 2535955; Chandra, *supra* note 17; Sheila Tefft, *Hong Kong is Smuggling Hub for Banned Animal Parts*, *Christian Sci. Monitor*, Nov. 30, 1993, at 11. Commercial trade in tiger and rhinoceros has been banned under international treaty since 1973. Tefft, *supra*, at 11; *Convention on International*

Trade in Endangered Species of Wild Fauna and Flora, opened for signature March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (hereinafter CITES).

[FN20]. A sample of cases recently prosecuted by the Department of Justice illustrates the scope of the problem:

United States v. Celebucki, No. 94-CR-177 (N.D. Ohio Feb. 24, 1995) (pythons smuggled into the U.S. from Papua, New Guinea, by a pet dealer for resale to collectors and other dealers);

United States v. Furzer, No. CR-93-620 (C.D. Cal. Feb. 11, 1994) ("laundered" grey parrots intended for the pet trade imported from Africa by commercial bird dealer using false CITES documents which concealed the fact that the birds originated in a country closed to their export);

United States v. Bonilla, No. CR-94-907 (C.D. Cal. May 3, 1995) (more than 3,700 sea turtle eggs smuggled in one trip by an El Salvadoran citizen into Los Angeles, who concealed the eggs in baggage);

United States v. An, No. 94-885 (C.D. Cal. May 22, 1995) (entire tiger skeleton and medicinal preparations made from rhinoceros horn and bear bile worth more than \$800,000 smuggled by a Chinese citizen into the U.S.);

United States v. Dawson, No. A93-116-01 (D. Alaska Dec. 10, 1993) (eggs of protected Alaskan sea ducks illegally removed from nests for sale to collectors);

United States v. Miller, 981 F.2d 439 (9th Cir. 1992), cert. denied, 113 S. Ct. 2945 (1993) (saguaro cactus illegally removed from Sonoran desert for transport and sale in California).

[FN21]. Endangered Species Project, supra note 11, at Introduction.

[FN22]. See, e.g., Reg Gratton, Wildlife Smugglers Employ Tricks of International Drug Traffickers, L.A. Times, March 8, 1992, at A14 (Australian customs officials estimate, unofficially, that 80% of illegally smuggled birds die from suffocation).

[FN23]. See, e.g., 9 C.F.R. S 92.106(c)(3)(ii) (1994) (quarantine requirements for imported birds intended to prevent introduction of Avian Exotic Newcastle Disease).

[FN24]. United States General Accounting Office, Wildlife Protection 10 (1994) (hereinafter GAO Report).

[FN25]. Id.

[FN26]. Endangered Species Project, supra note 11, at 1.

[FN27]. GAO Report, supra note 23, at 11, 20. See also Arundel, supra note 15, at 16 (discussing the understaffing at Miami airport).

[FN28]. Endangered Species Project, supra note 11, at 1-2.

[FN29]. Id.

[FN30]. Bear gallbladder is another prized Asian medicinal product. See Cone, supra note 8, at B2; Marla Cone, Man Arrested for Allegedly Trafficking in Bear Parts, L.A. Times, June 24, 1994, at B3; Lisa O'Neill, Arrest Spotlights Unlawful Trade in Bear Gallbladders, L.A. Times, July 14, 1994, at J6. Because few bears remain in Asia, American bears are being used to meet the demand. Id. In Korea, bear gallbladders sell for up to \$20,000. Id.

[FN31]. For example, Gila monsters sold for about \$1,200 apiece in 1992. Marla Cone, Countywide Probation Given for Reptile Possession, L.A. Times, July 2, 1992, at B3.

[FN32]. See, e.g. O'Neill, supra note 29; Cone, supra note 8.

[FN33]. See generally Ruth S. Musgrave et al., The Status of Poaching in the United States--Are We Protecting Our Wildlife?, 33 Nat. Resources J. 977 (1993); Poten, supra note 8; David S. Favre, Wildlife Law (1991); David Van Biema, The Killing Fields, Time, Aug. 22, 1994.

[FN34]. Howard Pankratz, America's Killing Fields: Poachers Stalk U.S. Parks in Epidemic Proportions, Denver Post, Dec. 19, 1993, at A-1. See also Van Biema, supra note 32, at 35-36.

[FN35]. See, e.g., [United States v. Atkinson](#), 966 F.2d 1270, 1271 (9th Cir. 1992), cert. denied, 113 S. Ct. 2945 (1993); [United States v. Thomas](#), 887 F.2d 1341, 1343 (9th Cir. 1989); [United States v. Stenberg](#), 803 F.2d 422, 428 (9th Cir. 1986); [United States v. Todd](#), 735 F.2d 146, 148 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

[FN36]. See, e.g., [United States v. Hansen-Sturm](#), 44 F.3d 793, 793-94 (9th Cir. 1995) (defendants convicted of

Lacey Act violations stemming from sale of caviar shipments illegally harvested from Columbia River sturgeon); *United States v. Borden*, 10 F.3d 1058, 1060-61 (4th Cir. 1993) (defendant repeatedly harvested mussels in violation of West Virginia state law for resale to commercial oyster producers); *United States v. Miller*, 981 F.2d 439, 440-41 (9th Cir. 1992) (defendants convicted of Lacey Act violations after illegally removing Arizona cactus for commercial resale), cert. denied, 113 S. Ct. 1644 (1993); *United States v. Miranda*, 835 F.2d 830, 831 (11th Cir. 1988) (Florida seafood company convicted of Lacey Act charges after selling illegally taken undersized lobsters).

[FN37]. See, e.g., [16 U.S.C. S 3371\(g\)](#) (1988) (vesting Lacey Act enforcement responsibilities in the Departments of the Interior, Commerce, and Agriculture).

[FN38]. There are an estimated 7,000 state wildlife agents in the United States. Musgrave, *supra* note 32, at 1003.

[FN39]. 16 U.S.C. SS 1538, 1540 (1988).

[FN40]. CITES establishes a permit system that seeks to regulate commerce in species whose existence is considered endangered by trade. CITES, *supra* note 18. Like the Lacey Act, CITES commerce restrictions also apply to living animals as well as to their readily recognizable parts and derivatives. 50 C.F.R. S 23.23(d); *United States v. Parker*, 991 F.2d 1493, 1497 (9th Cir. 1993), cert. denied, 114 S. Ct. 121 (1993).

[FN41]. 16 U.S.C. S 1538(c).

[FN42]. 16 U.S.C. SS 703-712 (1988).

[FN43]. 50 C.F.R. S 10.13 (1994).

[FN44]. 16 U.S.C. SS 703-712 (1988).

[FN45]. [16 U.S.C. SS 1361-1407](#) (1988 & Supp. V 1993). Examples include walrus ivory, sea otter pelts, and polar bear skins. 50 C.F.R. S 18.3 (1994).

[FN46]. 16 U.S.C. SS 4201-4245 (1988 & Supp. V 1993).

[FN47]. [16 U.S.C. S 668](#) (1988 & Supp. V 1993).

[FN48]. 16 U.S.C. SS 4901-4916 (Supp. V 1993).

[FN49]. 16 U.S.C. S 4901.

[FN50]. 16 U.S.C. SS 4904, 4905.

[FN51]. 16 U.S.C. S 4912.

[FN52]. See, e.g., *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994) (defendant convicted of smuggling gazelle and Pakistani sheep trophies into U.S.), cert. denied, 63 U.S.L.W. 3886, 63 U.S.L.W. 3890 (U.S. June 19, 1995) (No. 94-1605); *United States v. Stubbs*, 11 F.3d 632 (6th Cir. 1993) (defendants convicted of smuggling endangered crocodiles into the U.S.); *Lee*, 937 F.2d 1388 (defendants convicted of Lacey Act and money laundering violations); *United States v. Celebucki*, No. 94-CR-177 (N.D. Ohio Feb. 28, 1993) (judgment order) (defendant convicted of Lacey Act and conspiracy); *United States v. An*, No. 94-885-KN (C.D. Cal. April 4, 1995) (judgment order) (defendant convicted of smuggling wildlife); *United States v. Gehl*, 1995 WL 54401 (N.D.N.Y. Feb. 2, 1995) (commercial seafood processors convicted of conspiracy, Lacey Act, and illegal cash transaction offenses in connection with interstate commerce in contaminated caviar).

[FN53]. U.S. Fish & Wildlife Service, Annual Violations Reports (1993, 1994) (on file in Public Land Law Review office).

[FN54]. *Id.*

[FN55]. Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at [16 U.S.C. SS 3371-3378](#) (1988 & Supp. V 1993)).

[FN56]. *Id.* At that time, the Department of Agriculture contained the Bureau of Biological Survey, one of the predecessors of the U.S. Fish and Wildlife Service. The Fish & Wildlife Service, however, is within the Department of the Interior. Michael J. Bean, *The Evolution of National Wildlife Law* 65-66 (1983).

[FN57]. H.R. Rep. No. 474, 56th Cong., 1st Sess. 1-2 (1900).

[FN58]. 33 Cong. Rec. 4871 (1900) (statement of Rep. John Lacey). Lacey spoke of having recently discussed some worm-infested apples with a fellow House member. ".Well,' said I, .my friend, the killing of the birds causes this

condition - man kills the birds that killed the insect that laid the egg that hatched the worm that defiled the apple.' . . . The destruction of the insectivorous birds has resulted in the loss of our fruit." Id.

[FN59]. Id. at 4871-72. Lacey called the English sparrow "that rat of the air," that vermin of the atmosphere." Id. at 4871.

[FN60]. Id. at 4871-72. Lacey and others talked of the huge numbers of egrets and other neotropical bird species killed to satisfy the millinery industry, as well as recent commercial sales in which as many as 500,000 bird skins were disposed of. Id. at 4872.

[FN61]. H.R. Rep. No. 474 at 1; see Lacey Act, ch. 553, S 1, 31 Stat. at 188.

[FN62]. H.R. Rep. No. 474 at 1. Importing injurious species is still restricted by a vestigial section of the early Lacey Act. 18 U.S.C. S 42 (1988).

[FN63]. H.R. Rep. No. 474 at 1.

[FN64]. 33 Cong. Rec. 4871-74.

[FN65]. Lacey reviled the pothunter as "the relentless enemy of all animal life," suggesting that he should have no friend "on the Floor of this House or anywhere in the United States of America." 33 Cong. Rec. at 4872. Lacey described himself unapologetically as both a devout lover of birds and a bird hunter. Lacey distinguished the "game hog" from the law-abiding hunter, describing the latter as the truest friend and protector of wildlife. Id. at 4871.

[FN66]. See infra notes 74-76 and accompanying text.

[FN67]. 33 Cong. Rec. at 4873.

[FN68]. See, e.g., *People v. Buffalo Fish Co.*, 58 N.E. 34 (N.Y. 1900) (holding state's legitimate interest in regulating and preserving its wildlife insufficient to justify a law prohibiting the possession of all fish during a closed season because the law would have regulated items traveling in interstate commerce).

[FN69]. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

[FN70]. 161 U.S. 519 (1896).

[FN71]. *Geer*, 161 U.S. at 534-35.

[FN72]. 441 U.S. 322 (1979).

[FN73]. *Hughes*, 441 U.S. at 335.

[FN74]. Id. at 336. State statutes that impose only an incidental burden on interstate commerce violate the Commerce Clause only if the burden is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). State statutes that actually or facially discriminate against interstate transactions are upheld only if they serve a legitimate local purpose that could not be accomplished as well by available nondiscriminatory means. *Hughes*, 441 U.S. at 336.

[FN75]. See, e.g., *Bowman v. Chicago Railway Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890).

[FN76]. *Scott v. Donald*, 165 U.S. 58 (1897).

[FN77]. *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898).

[FN78]. 33 Cong. Rec. at 4873.

[FN79]. Id.

[FN80]. Section 3 of the Lacey Act read as follows:

That it shall be unlawful for any person or persons to deliver to any common carrier, or for any common carrier to transport from one State or Territory to another State or Territory, or from the District of Columbia or Alaska to any State or Territory, or from any State or Territory to the District of Columbia or Alaska, any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the State, Territory, or District in which the same were killed: Provided, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the State, Territory, or District in which the same are killed.

Ch. 553, S 3, 31 Stat. at 188. The Lacey Act of 1900 did not apply to fish or plants. See *id.*

[FN81]. Section 4 of the Lacey Act read, in part, as follows:

That all packages containing such dead animals, birds or parts thereof, when shipped by interstate commerce, as provided in section one of this Act, shall be plainly and clearly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages.

Ch. 553, S 4, 31 Stat. at 188.

[FN82]. See *id.*

[FN83]. *Id.* This penalty was much lower than the \$5,000 fine that was later imposed for illegally transporting obscene materials or mismarked liquor. Cf. *id.* with Act of March 4, 1909, ch. 321, SS 240, 245, 35 Stat. 1088, 1137-38.

[FN84]. Section 5 of the Lacey Act read in part as follows:

That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of having been introduced therein in original packages or otherwise.

Ch. 553, S 5, 31 Stat. at 188.

[FN85]. See H.R. Rep. No. 474, 56th Cong., 1st Sess. 3 (1900) (referring to the Wilson Original Package Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. S 121 (1988))).

[FN86]. 72 N.E. 505 (N.Y. 1904).

[FN87]. [Bootman](#), 72 N.E. at 506. The penalty was eventually reduced significantly. *Id.*

[FN88]. *Id.*

[FN89]. *Id.*

[FN90]. *Id.* at 507.

[FN91]. *Id.* (citing language in the state law providing that "wherever in this act the possession of fish or game, or the flesh of any animal, bird or fish, is prohibited, reference is had equally to such fish, game or flesh coming from without the state as to that taken within the state").

[FN92]. 104 N.W. 719 (Minn. 1905).

[FN93]. Shattuck, 104 N.W. at 719.

[FN94]. *Id.* at 719.

[FN95]. *Id.* at 719-20.

[FN96]. *Id.* at 720.

[FN97]. *Id.*

[FN98]. New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908).

[FN99]. *Id.* at 36.

[FN100]. *Id.* at 39-44.

[FN101]. *Id.* at 44.

[FN102]. 225 N.W. 435 (Minn. 1929).

[FN103]. Gould, 225 N.W. at 435.

[FN104]. Id. at 437.

[FN105]. 122 N.Y.S. 553 (N.Y. App. Div. 1910).

[FN106]. Id. at 555.

[FN107]. Id. at 554.

[FN108]. Id. at 555.

[FN109]. Id. at 555-556 (citing *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898); *Adams Express Co. v. Kentucky*, 214 U.S. 218, 222 (1909)).

[FN110]. [Rupert v. United States](#), 181 F. 87, 89 (8th Cir. 1910). Although the opinion does not set forth the precise contours of Rupert's arguments, he apparently challenged the constitutionality of Oklahoma's prohibition on the export of game killed during the open season. See id.

[FN111]. Id. at 89.

[FN112]. Id. at 91.

[FN113]. It is unclear how many quail Rupert attempted to ship, though one of the four counts described "139 boxes and packages containing the dead bodies of quail." Id. at 88. Rupert may thus have been a pothunter. See supra note 64.

[FN114]. [Rupert](#), 181 F. at 88 (reciting the facts of the indictment).

[FN115]. Id.

[FN116]. Id. at 89.

[FN117]. Id. Section 3 of the Lacey Act addressed the Rupert situation in a backhanded way by providing that "nothing herein shall prevent the transportation of dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by the law of the State, Territory, or District in which the same are killed." Lacey Act, ch. 553, 31 Stat. 187, 188 (1900) (codified as amended at [16 U.S.C. SS 3371- 3378](#) (1988 and Supp. V 1993)) (emphasis added).

[FN118]. Id. at 90.

[FN119]. Id. at 91.

[FN120]. S. Rep. No. 612, 69th Cong., 1st Sess. 3 (1926).

[FN121]. Congress described the bass affectionately, noting that although the fish are "(p)ugnacious and aggressive, they are none the less companionable mates, for both build the nest, the female lays the spawn, the male performs his part, and, as the family grows, the male defends the nest like our frontiersman did his cabin." Id. at 2.

[FN122]. Id.

[FN123]. Id. at 1.

[FN124]. Id.

[FN125]. Black Bass Act, ch. 346, 44 Stat. 576 (1926), repealed by Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1079 (1981).

[FN126]. The term "law" was not defined in the Act, but was held by the Supreme Court in 1957 to include regulations promulgated by the Florida Game Commission, based on explicit rule-making powers granted to the commission and clear congressional intent to include such regulations within the scope of the Black Bass Act. *United States v. Howard*, 352 U.S. 212, 218-19 (1957).

[FN127]. Section 2 of the original Black Bass Act read as follows:

It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier or

for any person knowingly to transport or carry, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any large-mouth black bass . . . or any small-mouth black bass . . . which has either been caught, sold, purchased, or possessed in violation of the law of the State, Territory, or the District of Columbia wherein the delivery of such black bass for transportation is made or the transaction or the carrying thereof begins.

Ch. 346, S 2, 44 Stat. at 576.

[FN128]. Section 3, 44 Stat. at 576.

[FN129]. Id.

[FN130]. Act of July 2, 1930, ch. 801, SS 2-4, 46 Stat. 845, 845-46.

[FN131]. The Bureau of Sport Fisheries was combined with the Bureau of Biological Survey in 1940 to form the U.S. Fish and Wildlife Service within the Department of the Interior. Bean, *supra* note 55, at 65.

[FN132]. Id.

[FN133]. H. Rep. No. 886, 74th Cong., 1st Sess. 2 (1935).

[FN134]. Section 242 read as follows:

It shall be unlawful for any person, firm, corporation, or association to deliver or knowingly receive for shipment, transportation, or carriage, or to ship, transport, or carry, by any means whatever, from any State, Territory, or the District of Columbia to, into, or through any other State, Territory, or the District of Columbia, or to a foreign country any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any foreign country contrary to any law of the United States, or captured, killed, taken, purchased, sold or possessed contrary to any such law, or captured, killed, taken, shipped, transported, carried, purchased, sold or possessed contrary to the law of any State, Territory, or the District of Columbia, or foreign country or State, Province, or other subdivision thereof in which it was captured, killed, taken, purchased, sold, or possessed, or in which it was delivered or knowingly received for shipment, transportation, or carriage, or from which it was shipped, transported, or carried; and it shall be unlawful for any person, firm, corporation, or association to transport, bring, or convey, by any means whatever, from any foreign country into the United States any wild animal or bird, or the dead body or part thereof, or the egg of any such bird captured, killed, taken, shipped, transported, or carried contrary to the law of the foreign country or State, Province, or other subdivision thereof in which it was captured, killed, taken, delivered or knowingly received for shipment, transportation, or carriage, or from which it was shipped, transported, or carried; and no person, firm, corporation, or association shall knowingly purchase or receive any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any foreign country or shipped, transported, carried, brought, or conveyed, in violation of this section; nor shall any person, firm, corporation or association purchasing or receiving any wild animal or bird, or the dead body or part thereof, or the egg of any such bird, imported from any foreign country, or shipped, transported, or carried in interstate commerce make any false record or render any account that is false in any respect in reference thereto.

Act of June 15, 1935, ch. 261, S 242, 49 Stat. 378, 380.

[FN135]. Id. S 243.

[FN136]. Id. S 202.

[FN137]. Id.

[FN138]. Act of July 30, 1947, ch. 348, 61 Stat. 517.

[FN139]. S. Rep. No. 288, 80th Cong., 1st Sess. 3 (1947) (statement of Oscar L. Chapman, Undersecretary of the Interior).

[FN140]. Id. at 2.

[FN141]. Section 2 of the Black Bass Act read as follows:

It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any black bass or other game fish, if (1) such transportation is contrary to the law of the State, Territory, or the District of Columbia from which such black bass or other game fish is or is to be transported, or is contrary to other applicable law, or (2) such black bass or other game fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State, Territory, or the District of Columbia in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported contrary to other applicable law; and no person shall knowingly purchase or receive any such black bass or other game fish which has been transported in violation of the provisions

of this Act; nor shall any person receiving any shipment of black bass or other game fish transported in interstate commerce make any false record or render a false account of the contents of such shipment.

Ch. 348, S 2, 61 Stat. at 517.

[FN142]. Act of May 24, 1949, ch. 139, S 2, 63 Stat. 89. This amendment survives today in a vestigial section of the old Lacey Act, authorizing the Secretary of the Interior to promulgate regulations and issue permits as needed to ensure healthful and humane wildlife shipment conditions. 18 U.S.C. S 42(c). See also 50 C.F.R. Part 14, subpart J (1994). The presence of a "substantial ratio" of dead, crippled, diseased, or starving animals is considered prima facie evidence of a violation. 18 U.S.C. S 42(c)(2). Violation of the shipping regulations is a class B misdemeanor carrying a maximum penalty of six months imprisonment and a maximum fine of \$5,000. 18 U.S.C. S 42(b). See also 18 U.S.C. SS 3359(a)(7), 3571(b)(6).

[FN143]. Act of July 16, 1952, ch. 911, 66 Stat. 736.

[FN144]. Id. The bill had three stated purposes: (1) to develop a list of endangered species and regulating trade in them in order to assist in global species preservation; (2) to strengthen the Lacey Act's provisions to provide more protection for domestically endangered species; and (3) to authorize the purchase of private land for wildlife conservation purposes. S. Rep. No. 526, 91st Cong., 1st Sess. 1, 2 (1969), reprinted in 1969 U.S.C.C.A.N. 1413-14.

[FN145]. The new Lacey Act was codified at 18 U.S.C. S 43, and read in part as follows:

(a) Any person who --

(1) delivers, carries, transports, or ships, by any means whatever, or causes to be delivered, carried, transported, or shipped for commercial or noncommercial purposes or sells or causes to be sold any wildlife taken, transported, or sold in any manner in violation of any Act of Congress or regulation issued thereunder, or

(2) delivers, carries, transports, or ships, by any means whatever, or causes to be delivered, carried, transported, or shipped by commercial or noncommercial purposes or sells or causes to be sold in interstate or foreign commerce any wildlife taken, transported, or sold in any manner in violation of any law or regulation of any State or foreign country; or

(b) Any person who --

(1) sells or causes to be sold any products manufactured, made or processed from any wildlife taken, transported, or sold in any manner in violation of any Act of Congress or regulation issued thereunder, or

(2) sells or causes to be sold in interstate or foreign commerce any products manufactured, made, or processed from any wildlife taken, transported or sold in any manner in violation of any law or regulation of a State or foreign country, or

(3) having purchased or received wildlife imported from any foreign country or shipped, transported, or carried in interstate commerce, makes or causes to be made any false record, account, label or identification thereof, or

(4) receives, acquires, or purchases for commercial or non-commercial purposes any wildlife--

(A) taken, transported or sold in violation of any law or regulation of any state or foreign country and delivered, carried, transported, or shipped by any means or method in interstate or foreign commerce, or

(B) taken, transported or sold in violation of any Act of Congress or regulation issued thereunder, or

(5) imports from Mexico to any State, or exports from any State to Mexico, any game mammal, dead or alive, or part of product thereof, except under permit or other authorization of the Secretary or, in accordance with any regulations prescribed by him, having due regard to the requirements of the Migratory Birds and Game Mammals Treaties with Mexico and the laws of the United States forbidding importation of certain live mammals injurious to agriculture and horticulture;

shall be subject to the penalties prescribed in subsections (c) and (d) of this section. . . .

(f) For the purpose of this section, the term-- . . .

(3) "wildlife" means any wild mammal, wild bird, amphibian, reptile, mollusk, or crustacean, or any part, egg, or offspring thereof, or the dead body or parts thereof, but does not include migratory birds for which protection is afforded under the Migratory Bird Treaty Act.

Act of Dec. 5, 1969, 83 Stat. 275, 279 (amended 1981).

[FN146]. S. Rep. No. 526 at 15, 1969 U.S.C.C.A.N. at 1427.

[FN147]. S. Rep. No. 526 at 12-14, 1969 U.S.C.C.A.N. at 1425-27.

[FN148]. S. Rep. No. 526 at 21, 1969 U.S.C.C.A.N. at 1434 (letter by Russell E. Train, Undersecretary of the Interior).

[FN149]. The Black Bass Act read in part:

It shall be unlawful for any person--

(1) to deliver or receive for transportation, or to transport, by any means whatsoever, in interstate or foreign commerce, any black bass and other fish, if such person knows or in the exercise of due care should know that (A) such delivery or transportation is contrary to the law of the State or any foreign country from which such black bass or other fish is found or transported, or is contrary to other applicable law, or (B) such black bass or other fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State or foreign country, in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported, or contrary to other applicable law;

(2) to purchase or receive any such black bass or other fish, if such person knows, or in the exercise of due care should know, that such bass or fish has been transported in violation of the provisions of this Act;

(3) receiving any shipment of black bass or other fish transported in interstate or foreign commerce to make any false record or render a false account of the contents of such shipment, if such person knows, or in the exercise of due care should know, that such record or account is false.

Black Bass Act, 83 Stat. at 282, 1969 U.S.C.C.A.N. at 308-09.

[FN150]. S. Rep. No. 123, 97th Cong., 1st Sess. 1 (1981), reprinted in 1981 U.S.C.C.A.N. 1748.

[FN151]. Id.

[FN152]. See H.R. Rep. No. 276, 97th Cong., 1st Sess. 1, 5 (1981).

[FN153]. S. Rep. No. 123 at 2, 11, reprinted in 1981 U.S.C.C.A.N. at 1749, 1758; H.R. Rep. No. 276 at 32 (letter of Donald Paul Hodel, Undersecretary of the Interior).

[FN154]. [16 U.S.C. SS 3372, 3373\(d\)](#) (1981).

[FN155]. H.R. Rep. No. 276 at 32 (letter of Donald Paul Hodel, Undersecretary of the Interior); S. Rep. No. 123 at 4, reprinted in 1981 U.S.C.C.A.N. at 1748, 1751.

[FN156]. S. Rep. No. 123 at 4, reprinted in 1981 U.S.C.C.A.N. at 1748, 1751.

[FN157]. Id. The Senate report notes the potential for theft occasioned by the imposition of strict marking requirements on fur shipments, and the difficulty of placing individual markings on tropical fish shipments that may contain hundreds of different species. Id.

[FN158]. [16 U.S.C. S 3374 \(1981\)](#) (amended 1988).

[FN159]. [16 U.S.C. S 3373\(a\) \(1981\)](#) (amended 1988).

[FN160]. [16 U.S.C. S 3373\(d\)](#) (1981) (amended 1988).

[FN161]. Id.

[FN162]. [16 U.S.C. S 3375\(b\)](#) (1981) (amended 1988).

[FN163]. The Lacey Act Amendments of 1981: Hearings on H. 1638 Before the Subcomm. of Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 213, 216 (hereinafter 1981 Hearings) (statement of Donald E. Santarelli, Counsel for Safari Club International). Id. at 228 (statement of Neal Knox, Executive Director, National Rifle Association).

[FN164]. Id. at 228.

[FN165]. TRAFFIC is funded in part by the World Wildlife Fund, which monitors the illegal wildlife trade for the International Union for the Conservation of Nature and Natural Resources (IUCN).

[FN166]. 1981 Hearings, *supra* note 162, at 259-87. Representatives of these organizations were members of a

panel before the subcommittee.

[FN167]. Id. at 259-60 (statement of Marguerite Perkins, National Wildlife Federation).

[FN168]. CITES, *supra* note 18.

[FN169]. 1981 Hearings, *supra* note 162, at 278 (statement of Nicole Duplaix, Director of TRAFFIC).

[FN170]. Id. at 287 (these agencies were members of a panel before the subcommittee).

[FN171]. Id. at 288 (statement by Eugene F. Hester, Acting Director of the U.S. Fish & Wildlife Service).

[FN172]. Section 3372 now provides:

(a) Offenses other than marking offenses

It is unlawful for any person-

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law. (2) to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce -

(A) any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of title 18)-

(A) to possess any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported or sold in violation of any law or regulation of any State;

(4) to attempt to commit any act described in paragraphs (1) through (4).

(b) Marking offenses

It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.

(c) Sale and purchase of guiding and outfitting services and invalid licenses and permits

(1) Sale: It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other consideration to offer or provide-

(A) guiding, outfitting or other services; or

(B) a hunting or fishing license or permit; for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(2) Purchase: It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration-

(A) guiding, outfitting or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting or possessing of fish or wildlife.

(d) False labeling offenses: It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be-

(1) imported, exported, transported, sold, purchased, or received from any foreign country; or

(2) transported in interstate or foreign commerce.

[16 U.S.C. S 3372.](#)

[FN173]. [16 U.S.C. S 3372\(a\)\(1\), \(a\)\(2\), \(a\)\(3\)](#) (1981) (amended 1988).

[FN174]. [16 U.S.C. S 3372\(a\)\(1\).](#)

[FN175]. [16 U.S.C. S 3372\(c\).](#)

[FN176]. See, e.g., [United States v. Stenberg](#), 803 F.2d 422, 437 (9th Cir. 1986).

[FN177]. [16 U.S.C. S 3372\(d\).](#)

[FN178]. [16 U.S.C. S 3373\(d\)\(3\).](#)

[FN179]. [16 U.S.C. S 3375\(b\).](#)

[FN180]. H.R. Rep. No. 732, 100th Cong., 2d Sess. 6, 12-13 (1988).

[FN181]. [16 U.S.C. S 3375\(b\).](#)

[FN182]. [16 U.S.C. SS 3372, 3373.](#)

[FN183]. Id.

[FN184]. At several places within its text, the Lacey Act authorizes "the Secretary" to take certain actions. "Secretary" is defined as the Secretary of the Interior, the Secretary of Commerce, and the Secretary of Agriculture. [16 U.S.C. S 3371\(g\).](#)

[FN185]. [16 U.S.C. S 3371\(a\)](#); see also 50 C.F.R. S 10.12 (1994) (defining some of the fish and wildlife terms listed in S 3371(a)).

[FN186]. But see, e.g., [United States v. Parker](#), 991 F.2d 1493, 1497 (9th Cir. 1993), cert. denied, 114 S. Ct. 121 (1993) (holding that cockatoo eggs are included within the Lacey Act's definition of wildlife).

[FN187]. [16 U.S.C. S 3371\(f\).](#)

[FN188]. These include the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Marianas Islands, American Samoa, and any other territory, commonwealth, or possession of the United States. [16 U.S.C. S 3371\(f\),\(h\).](#)

[FN189]. Id.

[FN190]. Id.; see also CITES, *supra* note 18.

[FN191]. See, e.g., [United States v. Miller](#), 981 F.2d 439, 442 (9th Cir. 1992), cert. denied, 113 S. Ct. 2945 (1993).

[FN192]. [16 U.S.C. SS 3372\(a\)\(1\), \(a\)\(2\)\(A\), 3373\(d\)\(1\)\(A\).](#)

[FN193]. [16 U.S.C. S 3372\(b\)](#) (marking offenses); [16 U.S.C S 3372\(d\)](#) (false labeling offenses).

[FN194]. The statute provides:

It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.

[16 U.S.C. S 3372\(b\).](#)

[FN195]. See 50 C.F.R. SS 14.81-14.82 (1994). Section 14.81 states:

Except as otherwise provided in this subpart, no person may import, export, or transport in interstate commerce any container or package containing any fish or wildlife (including shellfish) unless each container or package is conspicuously marked on the outside with both the name and address of the shipper and consignee and an accurate

list of its contents by species and number of each species.

Id. S 14.81. Section 14.82 provides specific methods to comply with the requirements of S 14.81.

[FN196]. [16 U.S.C. S 3373\(a\)\(2\)](#).

[FN197]. Nothing in the legislative history indicates why plants were not included. Plants were included in the false identification section, 95 Stat. 1074, but deleted in 1988. Act of Nov. 14, 1988, 102 Stat. 3825.

[FN198]. The statute provides:

It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be--

(1) imported, exported, transported, sold, purchased, or received from any foreign country; or

(2) transported in interstate or foreign commerce. [16 U.S.C. S 3372\(d\)](#).

[FN199]. Id.

[FN200]. Id.

[FN201]. Id. Cf. 18 U.S.C. S 1001 (1988) (prohibiting false statements to federal officers).

[FN202]. See infra note 288 regarding the term "knowing."

[FN203]. [16 U.S.C. S 3373\(d\)\(3\)\(A\)\(ii\)](#). See also infra notes 407-22 and accompanying text for a further discussion of market value determination.

[FN204]. [16 U.S.C. S 3373\(d\)\(3\)\(A\)\(i\)](#). This distinction is similar to that involving misdemeanor and felony violations of the trafficking prohibitions, which classify imports and exports of tainted wildlife as felonies without regard to market value or a showing of commercial activity. See infra notes 285-87 and accompanying text.

[FN205]. 34 F.3d 923 (10th Cir. 1994).

[FN206]. [Allemand](#), 34 F.3d at 926.

[FN207]. Id.

[FN208]. Id.

[FN209]. Id. at 926-27.

[FN210]. The Act prohibits the possession of tainted fish, wildlife, and plants within the "special maritime and territorial jurisdiction of the United States." [16 U.S.C. S 3372\(a\)\(3\)](#). This jurisdiction generally includes the high seas, territorial waters, federal property, and U.S. vessels. Though infrequently litigated, this subsection is the only part of the Lacey Act prohibiting the mere possession of tainted wildlife.

[FN211]. The term "tainted wildlife" does not appear in the Lacey Act, but is used here for ease of explanation and understanding.

[FN212]. [16 U.S.C. S 3372\(a\)](#).

[FN213]. [16 U.S.C S 3372\(a\)\(2\)](#).

[FN214]. Id.

[FN215]. [16 U.S.C. S 3373\(d\)\(1\)](#).

[FN216]. [16 U.S.C. S 3373](#).

[FN217]. [16 U.S.C. S 3373\(d\)\(2\)](#).

[FN218]. See supra notes 183-90 and accompanying text.

[FN219]. See *infra* notes 323-33 and accompanying text.

[FN220]. See *infra* Section IV-A for a more detailed discussion of this requirement.

[FN221]. See *infra* notes 280-81 and accompanying text for a discussion of the attempt subsection.

[FN222]. This requirement relates to constitutional restrictions on the federal government's jurisdiction. If the wildlife is "tainted" due to violation of federal or Indian law, federal jurisdiction attaches regardless of whether the wildlife was subsequently transported in interstate or foreign commerce. See U.S. Const. art. I, S 8, cl. 3. See also [16 U.S.C. S 3372\(a\)\(1\)](#). However, if the wildlife is "tainted" due to a violation of state law, it must be transported in interstate or foreign commerce for federal jurisdiction to arise. See [16 U.S.C. S 3372\(a\)\(2\)](#).

[FN223]. In most cases, this second step must have involved a sale or purchase. See *infra* notes 272- 79 and accompanying text.

[FN224]. [933 F.2d 748 \(9th Cir. 1991\)](#).

[FN225]. [Carpenter](#), 933 F.2d at 750.

[FN226]. *Id.*

[FN227]. 605 F.2d 474 (9th Cir. 1979).

[FN228]. The defendant was convicted of violating 18 U.S.C. S 43(a)(2), which prescribed penalties for anyone who:

delivers, carries, transports, or ships, by any means whatever, or causes to be delivered, carried, transported, or shipped for commercial or non-commercial purposes or sells or causes to be sold in interstate or foreign commerce any wildlife taken, transported, or sold in any manner in violation of any law or regulation of any State or foreign country.

18 U.S.C. S 43(a)(2) (1969), repealed by Lacey Act Amendments of 1981, Pub. L. No. 97-79, SS 2-9, 95 Stat. 1073, 1073-80 (1981) (codified as amended at 16 U.S.C. SS 3371-3378 (1988 & Supp. V 1993)).

[FN229]. [Sylvester](#), 605 F.2d at 475.

[FN230]. *Id.*

[FN231]. *Id.*

[FN232]. *Id.*

[FN233]. *Id.* This holding essentially permitted application of the Alaska regulation to acts committed outside the state, which is usually prohibited. The court concluded that a state may reach beyond its borders to regulate fish and game as long as there is a sufficient nexus between the regulation and the protection of Alaskan wildlife, and therefore between the state and the defendant. *Id.*

[FN234]. See [United States v. Gay-Lord](#), 799 F.2d 124, 126 (4th Cir. 1986); [United States v. Bryant](#), 716 F.2d 1091, 1093 (6th Cir. 1983); [United States v. Sylvester](#), 605 F.2d 474, 475 (9th Cir. 1979).

[FN235]. [799 F.2d 124](#).

[FN236]. [Gay-Lord](#), 799 F.2d at 125.

[FN237]. *Id.* at 126.

[FN238]. "It is unlawful for any person . . . to import . . . wildlife . . . taken, possessed, transported, or sold in violation of any law . . ." [16 U.S.C. S 3372\(a\)](#).

[FN239]. *Id.*

[FN240]. [16 U.S.C. S 3373\(d\)\(2\)](#). Congress intended the common-law definition of "due care" to apply, i.e., the degree of care that a reasonably prudent person would exercise under the same or similar circumstances, applied differently to persons with varying degrees of knowledge and responsibility. S. Rep. No. 123 at 10-12, reprinted in 1981 U.S.C.C.A.N. at 1757-58.

[FN241]. See [16 U.S.C. S 3373\(d\)](#). See also *infra* notes 283, 289 and accompanying text.

[FN242]. [985 F.2d 1275 \(4th Cir. 1993\)](#).

[FN243]. [Mitchell](#), 985 F.2d at 1284.

[FN244]. [937 F.2d 1388 \(9th Cir. 1991\)](#), cert. denied, 502 U.S. 1076 (1992).

[FN245]. [Lee](#), 937 F.2d at 1390.

[FN246]. *Id.* at 1393.

[FN247]. [United States v. Todd](#), 735 F.2d. 146, 151 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

[FN248]. See, e.g., S. Rep. No. 123, 97th Cong., 1st Sess. 11 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1758; [Todd](#), 735 F.2d at 151. See also *supra* notes 152-53 and accompanying text (discussing the elimination of the "double intent" requirement in the 1981 amendments).

[FN249]. [Todd](#), 735 F.2d at 151. In [Todd](#), the defendant testified that he knew that hunting from a helicopter violated federal law. The court held that his general knowledge of the illegality of the hunts was sufficient to satisfy the mens rea elements of the Lacey Act. *Id.*

[FN250]. Section 3378(c) provides:

Nothing in this chapter shall be construed as -

(1) repealing, superseding, or modifying any provision of Federal law other than those specified in subsection (b) of this section;

(2) repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or executive order pertaining to any Indian tribe, band or community; or

(3) enlarging or diminishing the authority of any State or Indian tribe to regulate the activities of persons within Indian reservations.

[16 U.S.C. S 3378\(c\)](#).

[FN251]. For a discussion of the Lacey Act's application to acts occurring on tribal lands or in violation of tribal law, see *infra* notes 355-70 and accompanying text.

[FN252]. [888 F.2d 1279 \(9th Cir. 1989\)](#).

[FN253]. Northern Pacific Halibut Act of 1982, 16 U.S.C. SS 773-773k (1988). The Halibut Act provides a civil penalty for anyone who transports or offers to sell illegally taken halibut. 16 U.S.C. S 773e(a)(5), f(a).

[FN254]. [Cameron](#), 888 F.2d at 1282-83.

[FN255]. *Id.* at 1284 (citing [United States v. Sohappy](#), 770 F.2d 816, 818-20 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986)).

[FN256]. *Id.* at 1284.

[FN257]. *Id.*

[FN258]. 16 U.S.C. S 3377(c). This section provides:

The provisions of paragraph (2) of section 3372(a) of this title shall not apply to the interstate shipment or transshipment through Indian country as defined in section 1151 of title 18 or a State of any fish or wildlife or plant legally taken if the shipment is en route to a State in which the fish or wildlife or plant may be legally possessed.

[16 U.S.C. S 3377\(c\)](#).

[FN259]. [United States v. Martinell](#), 611 F. Supp. 399, 400 (M.D. Pa. 1985).

[FN260]. [16 U.S.C. S 3371\(i\)](#).

[FN261]. 16 U.S.C. S 1362(13) (Supp. V 1993).

[FN262]. [16 U.S.C. S 1532\(19\) \(1988\)](#).

[FN263]. *Id.*

[FN264]. [16 U.S.C. S 3371\(i\)](#).

[FN265]. [16 U.S.C. S 3371\(j\)](#).

[FN266]. [799 F.2d 124 \(4th Cir. 1986\)](#).

[FN267]. [Gay-Lord](#), 799 F.2d at 125.

[FN268]. *Id.* at 126.

[FN269]. *Id.*

[FN270]. *Id.*

[FN271]. [966 F.2d 1270 \(9th Cir. 1992\)](#).

[FN272]. [Atkinson](#), 966 F.2d at 1275.

[FN273]. The Senate, describing the sale language within the 1981 amendments, stated:

The .commercial activity' portion of Section 4(d)(1) does not encompass the dealings of a hunter with his taxidermist. Such dealings clearly do not constitute a sale or purchase of wildlife. Similarly, the dealings of a hunter with his travel agent or an airlines to arrange a trip for the acquisition of wildlife clearly does not constitute a sale or purchase of wildlife. However, a commercial arrangement whereby a professional guide offers his services to illegally obtain wildlife is, in effect, an offer to sell wildlife. When such an offer is made with the requisite knowledge of the illegal nature of the act, Section 4(d)(1) will apply.

S. Rep. No. 123, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1759. See also H.R. Rep. No. 276, 97th Cong., 1st Sess. 21 (1981).

[FN274]. [735 F.2d 146, 152 \(5th Cir. 1984\)](#), cert. denied, 469 U.S. 1189 (1985).

[FN275]. [Todd](#), 735 F.2d at 152. Based on legislative history, the Fifth Circuit used the price paid for the hunt as the market value of the illegally taken game. It decided the case on other grounds, however.

[FN276]. [803 F.2d 422 \(9th Cir. 1986\)](#).

[FN277]. [Stenberg](#), 803 F.2d at 435-36 ("Such uncertainty in meaning cannot be tolerated in a criminal provision."). The Ninth Circuit noted the *Todd* ruling, but found it an unpersuasive reiteration of the legislative history containing no supportive analysis. *Id.* at 436-37.

[FN278]. *United States v. DeMasters*, 866 F.2d 327, 330 (10th Cir. 1989).

[FN279]. The statute currently provides:

(1) Sale: It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other consideration to offer or provide--

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(2) Purchase: It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration--

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

[16 U.S.C. S 3372\(c\).](#)

[FN280]. S. Rep. No. 563, 100th Cong., 2d Sess. 10 (1988), reprinted in 1988 U.S.C.C.A.N. . 5366, 5375.

[FN281]. 16 U.S.C. S 3372(a)(4). See also *United States v. Miller*, 981 F.2d 439, 442 (9th Cir. 1992) (affirming Lacey Act convictions based on attempted transport of illegally taken saguaro cactus), cert. denied, 113 S. Ct. 2945 (1993).

[FN282]. Attempt is usually defined as an intent to commit the prohibited act combined with a substantial step toward the commission of the act. Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992) (hereinafter Ninth Circuit Jury Instructions). See also *United States v. Dolt*, 27 F.3d 235, 239 (6th Cir. 1994); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1369 (11th Cir. 1994); *United States v. Davis*, 8 F.3d 923, 927 (2d Cir. 1993); *United States v. Smith*, 962 F.2d 923, 928 (9th Cir. 1992).

[FN283]. [16 U.S.C. S 3371\(b\).](#)

[FN284]. S. Rep. No. 123 at 5, reprinted in 1981 U.S.C.C.A.N. at 1748, 1752.

[FN285]. Note that the Lacey Act, like most other federal statutes, does not use the terms "felony" or "misdemeanor." Rather, federal law distinguishes between these categories by the penalty associated with each. In general, a misdemeanor is anything carrying a maximum penalty of one year imprisonment. 18 U.S.C. S 3559 (1988). A felony, on the other hand, is anything for which more than one year of incarceration can be imposed. Id. Section 3373(d)(1) provides for a maximum incarceration period of five years, making violation of this section a felony. Violation of S 3373(d)(2), however, carries a one- year maximum penalty, which is a misdemeanor sentence.

[FN286]. The relevant portion of the statute states:

(1) Any person who-

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title), or

(B) violates any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of \$350,

knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than \$20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

[16 U.S.C. S 3373\(d\)\(1\).](#)

[FN287]. In all Lacey Act cases, the government must also establish that the wildlife at issue is covered by the Act, and that the underlying law is wildlife-related. See *supra* notes 187-94 and *infra* notes 322-29. These are issues of law, which are usually decided by the court prior to trial.

[FN288]. [16 U.S.C. S 3372\(a\)\(4\).](#)

[FN289]. Here, "knowingly" refers to the commission of a volitional act. See, e.g., *United States v. Feola*, 420 U.S. 671, 684-86 (1975); *United States v. Stanford*, 589 F.2d 285, 297-98 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); Ninth Circuit Jury Instructions, *supra* note 279, at Jury Instruction 5.06.

[FN290]. [16 U.S.C. S 3372\(a\)\(4\).](#)

[FN291]. No commercial conduct or market value elements are required for a misdemeanor conviction. Although the government may be prepared to prove the defendant knew the wildlife had been taken, transported, possessed, or sold in violation of an underlying law, it need only prove, for a misdemeanor, that the defendant should have known, in the exercise of due care, of the wildlife's illegal nature. This negligent mental state is a subset of the felony scienter requirement. See, e.g., *United States v. Hansen-Sturm*, 44 F.3d 793, 794 (9th Cir. 1995).

[FN292]. Marking and labeling offenses are covered separately. [16 U.S.C. SS 3372\(b\), \(d\).](#) The penalty provision states:

Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty

or regulation shall be fined not more than \$10,000, or imprisoned for not more than one year, or both.

[16 U.S.C. S 3373\(d\)\(2\)](#).

[FN293]. See supra note 240 for a discussion of "due care."

[FN294]. [16 U.S.C. S 3372\(a\)\(4\)](#).

[FN295]. [44 F.3d 793 \(9th Cir. 1995\)](#).

[FN296]. [Hansen-Sturm](#), 44 F.3d at 794.

[FN297]. Id.

[FN298]. Id. at 795 (finding that "the conspirators in the exercise of due care should have known that the protected prey was taken and possessed in violation of state law").

[FN299]. 16 U.S.C. S 3373(a) states:

(a) Civil Penalties

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, and any person who knowingly violates section 3372(d) of this title may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation: Provided, That when the violation involves fish of wildlife or plants with a market value of less than \$350, and involves only the transportation, acquisition or receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty or regulation, or \$10,000, whichever is less.

[16 U.S.C. S 3373\(a\)\(1\)](#). See also [Newell v. Baldrige](#), 548 F. Supp. 39, 45-46 (W.D. Wash. 1982).

[FN300]. [16 U.S.C. S 3373\(a\)\(1\)](#).

[FN301]. [16 U.S.C. S 3373\(a\)\(2\)](#).

[FN302]. See 18 U.S.C. SS 3559, 3571.

[FN303]. See, e.g., [16 U.S.C. S 3373\(d\)\(2\), \(3\)\(B\)](#) (examples of Class A misdemeanor conduct).

[FN304]. 18 U.S.C. S 3559(a)(5). See also [16 U.S.C. S 3373\(d\)\(1\), \(d\)\(3\)\(A\)](#) (describing conduct that will be classified as a Class E felony).

[FN305]. 18 U.S.C. S 3559(a)(5).

[FN306]. 18 U.S.C. S 3571(b)(3), (c)(3).

[FN307]. 50 C.F.R. SS 13.1-.50 (1994).

[FN308]. 16 U.S.C. SS 1801-1882 (1988).

[FN309]. [16 U.S.C. S 3373\(e\)](#).

[FN310]. 16 U.S.C. S 3374(a)(1) provides:

All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 of this title (other than section 3372(b) of this title), or any regulation issued pursuant thereto, shall be subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution included in section 3373 of this title.

[16 U.S.C. S 3374\(a\)\(1\)](#). See also 50 C.F.R. parts 12-14, 16 (1994).

[FN311]. [United States v. Proceeds from Sale](#), 834 F. Supp. 385, 390-391 (S.D. Fla. 1993); [United States v. 2,507 Live Canary Winged Parakeets](#), 689 F. Supp. 1106, 1117 (S.D. Fla. 1988).

[FN312]. [United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep](#), 964 F.2d 474, 476 (5th Cir. 1992). See also [United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare](#), 636 F. Supp. 1281, 1286-87 (S.D. Fla. 1986); S. Rep. 123 at 13, reprinted in 1981 U.S.C.C.A.N. at 1748, 1760.

[FN313]. [16 U.S.C. S 3374\(a\)\(1\)](#).

[FN314]. Id.

[FN315]. Section 3374(a)(2) provides:

All vessels, vehicles, aircraft and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants in a criminal violation of this chapter for which a felony conviction is obtained shall be subject to forfeiture to the United States if (A) the owner of such vessel, vehicle, aircraft or equipment was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of due care should have known that such vessel, vehicle, aircraft, or equipment would be used in a criminal violation of this chapter and (B) the violation involved the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants.

[16 U.S.C. S 3374\(a\)\(2\)](#).

[FN316]. Id.

[FN317]. Id.

[FN318]. Section 3374(b) provides:

All provisions of law relating to the seizure, forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter, except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department may, for the purposes of this chapter, also be exercised or performed by the Secretary or by such persons as he may designate

[16 U.S.C. S 3374\(b\)](#). See also 19 U.S.C. SS 1594, 1602-1624 (1988).

[FN319]. 19 U.S.C. S 1615. See also [2,507 Live Canary Winged Parakeets](#), 689 F. Supp. at 1113; [3,210 Crusted Sides of Caiman Crocodilus](#), 636 F. Supp. at 1283-84.

[FN320]. See, e.g., Endangered Species Act, 16 U.S.C. S 1540(e)(5) (1988); Airborne Hunting Act, 16 U.S.C. 742j-1 (f) (1988); Eagle Protection Act, [16 U.S.C. S 668b\(c\)](#) (1988).

[FN321]. [16 U.S.C. S 3374\(b\)](#). See also 19 U.S.C. S 1602 for a discussion of customs procedures.

[FN322]. Section 3375(b) reads, in part:

Any fish, wildlife, plant, property or item seized shall be held by any person authorized by the Secretary pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, plants, property or item pursuant to section 3374 of this title; except that the Secretary may, in lieu of holding such fish, wildlife, plant, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary. [16 U.S.C. S 3375\(b\)](#).

[FN323]. Id.

[FN324]. [16 U.S.C. 3371\(d\)](#).

[FN325]. *United States v. Powers*, 923 F.2d 131, 132-33 (9th Cir. 1990).

[FN326]. *United States v. Sohapp*, 770 F.2d 816, 823-24 (9th Cir. 1985); see also *Powers*, 1989 WL 69255, at *2 (D. Idaho 1989), *aff'd*, 923 F.2d 131, 132 (1991); *United States v. Burch and Williams*, No. 87-30017 (D. Idaho filed Sept. 7, 1988).

[FN327]. 599 F.2d 1217 (3d Cir. 1979).

[FN328]. *Molt*, 599 F.2d at 1218.

[FN329]. Id. at 1219.

[FN330]. *Id.* at 1219-20.

[FN331]. S. Rep. No. 123, 97th Cong., 1st Sess. 6 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1753.

[FN332]. *Id.*

[FN333]. [16 U.S.C. SS 3377\(a\), \(b\)](#). The Act exempts activities regulated by plans under the Magnuson Fishery Conservation and Management Act, [16 U.S.C. S 1801 \(1988\)](#), as well as activities regulated by the Tuna Conventions Act of 1950, 16 U.S.C. SS 951-961 (1988), and the Atlantic Tunas Convention Act of 1975, 16 U.S.C. SS 971-971h (1988). 16 U.S.C. SS 3377(a), (b). In addition, the statute excepts:

any activity involving the harvesting of highly migratory species (as defined in paragraph (14) of section 3 of the Magnuson Fishery Conservation and Management Act (citation omitted)) taken on the high seas (as defined in paragraph (13) of such section 3) if such species are taken in violation of the laws of a foreign nation and the United States does not recognize the jurisdiction of the foreign nation over such species.

[16 U.S.C. S 3377\(b\)\(2\)](#).

[FN334]. S. Rep. No. 123 at 7, reprinted in 1981 U.S.C.C.A.N. at 1748, 1749.

[FN335]. 441 U.S. 322 (1979).

[FN336]. Hughes, 441 U.S. at 336-38. See also *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992) (remanding Lacey Act case to determine whether state law prohibiting private possession or import of living big game animals was unconstitutional restriction of interstate commerce); [United States v. Doyle](#), 786 F.2d 1440 (9th Cir. 1986) (holding that a predicate Montana falconry law was not too vague to support a Lacey Act conviction), cert. denied, 479 U.S. 984 (1986); *United States v. Hagen*, 782 F. Supp. 1351 (D. Neb. 1991) (dismissing Lacey Act charges predicated on Nebraska law requiring higher nonresident fee for shipping wildlife into the state as unconstitutional under Commerce Clause).

[FN337]. 786 F.2d 1440.

[FN338]. [Doyle](#), 786 F.2d at 1443.

[FN339]. 477 U.S. 131 (1986).

[FN340]. Taylor, 477 U.S. at 132-33.

[FN341]. *Id.* at 133.

[FN342]. *Id.* at 138-39. According to the "congressional consent" doctrine, even state statutes that demonstrably violate the Commerce Clause may be valid given the "unmistakably clear" intent of Congress to allow them. *Id.* (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)).

[FN343]. *Id.* at 139-40.

[FN344]. *Id.* at 140-51 (relying on the test established in Hughes, 441 U.S. at 336).

[FN345]. See also *United States v. Borden*, 10 F.3d 1058 (4th Cir. 1993).

[FN346]. See, e.g., [United States v. Hansen-Sturm](#), 44 F.3d 793, 794 (9th Cir. 1995); [United States v. Lee](#), 937 F.2d 1388, 1393 (9th Cir. 1991), cert. denied, 112 S. Ct. 977 (1992); *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989); [United States v. Rioseco](#), 845 F.2d 299, 301-02 (11th Cir. 1988); [United States v. Bryant](#), 716 F.2d 1091, 1094 (6th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *United States v. Molt*, 599 F.2d 1217, 1218 (3d Cir. 1979); [United States v. 2,507 Live Canary Winged Parakeets](#), 689 F. Supp. 1106, 1119-20 (S.D. Fla. 1988).

[FN347]. [Lee](#), 937 F.2d at 1390.

[FN348]. *Id.* at 1393. The Constitution states that "(a)ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, S 1.

[FN349]. [Lee](#), 937 F.2d at 1393, 1394 (citing *594,464 Pounds of Salmon*, 871 F.2d at 830).

[FN350]. *Id.* at 1393.

[FN351]. See *594,464 Pounds of Salmon*, 871 F.2d at 829.

[FN352]. [Lee](#), 937 F.2d at 1394.

[FN353]. *Id.* at 1394-95 (citing [16 U.S.C. S 3373\(d\)\(1\)-\(2\)](#)).

[FN354]. *Id.* (citing S. Rep. No. 123 at 12, reprinted in 1981 U.S.C.C.A.N. at 1759).

[FN355]. *Id.* at 1395.

[FN356]. [16 U.S.C. S 3372\(a\)\(1\)](#).

[FN357]. [16 U.S.C. S 3372\(a\)](#) (stating "in violation of any Indian tribal law"); [16 U.S.C. S 3371\(c\)](#) (defining Indian tribal law as "any regulation of, or other rule of conduct enforceable by, any Indian tribe, band, or group but only to the extent that the regulation or rule applies within Indian country as defined in section 1151 of title 18"). Indian country is defined as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. S 1151 (1988).

[FN358]. S. Rep. No. 123 at 4, 5, reprinted in 1981 U.S.C.C.A.N. at 1751, 1752.

[FN359]. [770 F.2d 816, 817 \(9th Cir. 1985\)](#), cert. denied, 477 U.S. 906 (1986).

[FN360]. [Sohappy](#), 770 F.2d at 818. The disclaimer language is found in 16 U.S.C. S 3378(c). See supra notes 249-56 and accompanying text.

[FN361]. [Sohappy](#), 770 F.2d at 820 (citing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981)).

[FN362]. *Id.* at 818 (citing *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

[FN363]. *Id.* at 819.

[FN364]. *Id.* at 820. The court noted these parts of the history: "Because of the resource management responsibilities of Indian tribes, the legislation proposes that . . . the provisions of the Act apply to fish and wildlife taken in violation of Indian tribal law or regulations." *Id.* (citing S. Rep. No. 123 at 4, reprinted in 1981 U.S.C.C.A.N. at 1748). The court further stated:

Resource management responsibilities of Indian tribes on Indian tribal lands indicate the need to expand the application of the current law to fish and wildlife taken in violation of Indian tribal laws or regulations. Any such changes would not constitute a broadening of their authority under the Act but would merely allow support for the full range of laws that protect wildlife.

Id. (citing H.R. Rep. No. 276, 97th Cong., 1st Sess. 13 (1981)).

[FN365]. *Id.* at 821.

[FN366]. 881 F.2d 539 (8th Cir. 1989), cert. denied, 493 U.S. 1084 (1990).

[FN367]. *Big Eagle*, 881 F.2d at 540.

[FN368]. *Id.*

[FN369]. *Id.* at 540-41.

[FN370]. *Id.* at 541.

[FN371]. *Id.* at 541-42.

[FN372]. *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986).

[FN373]. *Id.*

[FN374]. *Id.* at 1356.

[FN375]. *Id.* at 1359-61.

[FN376]. *Id.* at 1361-62.

[FN377]. 898 F.2d 727 (9th Cir. 1990).

[FN378]. *Williams*, 898 F.2d at 728.

[FN379]. *Id.* at 728-29.

[FN380]. *Id.* at 729 (citing *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973)).

[FN381]. [Sohappy](#), 770 F.2d at 823 (citing *Antoine v. Washington*, 420 U.S. 194, 207 (1975)).

[FN382]. [Williams](#), 898 F.2d at 729.

[FN383]. *Id.*

[FN384]. See, e.g., *United States v. Howard*, 352 U.S. 212 (1957).

[FN385]. See, e.g., *United States v. Hagen*, 782 F. Supp. 1351, 1351 (D. Neb. 1991).

[FN386]. See, e.g., [United States v. Cameron](#), 888 F.2d 1279, 1282 (9th Cir. 1989) (holding that an underlying civil law may trigger a Lacey Act violation). See also *Lee*, 937 F.2d 1388; *United States v. Doubleday*, 804 F.2d 1091 (9th Cir. 1986) (holding Magnuson Fishery Act management plan does not exempt halibut fishing from Lacey Act prosecution), cert. denied, 481 U.S. 1005 (1987).

[FN387]. [937 F.2d 1388 \(9th Cir. 1991\)](#), cert. denied, 112 S. Ct. 977 (1992).

[FN388]. [Lee](#), 937 F.2d at 1391-94. *Lee* also argued the "regulation v. law" issue, which was rejected for the reasons expressed in *United States v. 594,464 Pounds of Salmon. Id.*; see also *594,464 Pounds of Salmon*, 871 F.2d at 826-828.

[FN389]. 871 F.2d 824.

[FN390]. *Id.*

[FN391]. *Id.* at 1393 (citing S. Rep. No. 123 at 12, reprinted in 1981 U.S.C.C.A.N. at 1759).

[FN392]. *Id.*

[FN393]. 871 F.2d 824 (9th Cir. 1989).

[FN394]. *594,464 Pounds of Salmon*, 871 F.2d at 825.

[FN395]. 18 U.S.C S 43(a)(2) (1976), repealed by Lacey Act Amendments of 1981, Pub. L. No. 97- 79, S 9(b)(2), 95 Stat. 1079 (1981).

[FN396]. *594,464 Pounds of Salmon*, 871 F.2d at 827-28.

[FN397]. *Id.* at 828 (citing S. Rep. No. 123 at 2-4, 1981 U.S.C.C.A.N. at 1749-51).

[FN398]. *Id.*

[FN399]. 10 F.3d 1058 (4th Cir. 1993).

[FN400]. *Borden*, 10 F.3d at 1062.

[FN401]. *Id.*

[FN402]. [United States v. Thomas](#), 887 F.2d 1341 (9th Cir. 1989); Hagen, 782 F. Supp. 1351.

[FN403]. Borden, 10 F.3d at 1062 (citing Thomas, 887 F.2d at 1349).

[FN404]. Id.

[FN405]. 18 U.S.C. S 3282.

[FN406]. Borden, 10 F.3d at 1062.

[FN407]. Id.

[FN408]. See, e.g., [16 U.S.C. SS 3373\(d\)\(1\)\(B\)](#) and [3373\(d\)\(3\)\(A\)\(ii\)](#).

[FN409]. [United States v. Atkinson](#), 966 F.2d 1270, 1273 (9th Cir. 1992) (citing [United States v. Stenberg](#), 803 F.2d 422, 433 (9th Cir. 1986)). Market value of wildlife is also an important factor in determining the sentence imposed for wildlife offenses, but its impact at that stage of litigation is sufficiently complex that it falls outside the scope of this article.

[FN410]. See, e.g., [United States v. Stenberg](#), 803 F.2d 422, 432 (9th Cir. 1986).

[FN411]. [16 U.S.C. S 3373\(d\)\(1\)\(B\)](#), [\(d\)\(3\)\(A\)\(ii\)](#).

[FN412]. See, e.g., Borden, 10 F.3d 1058 (payments made for shipments of illegal mussels); [Lee](#), 937 F.2d 1388 (payments made for shipments of illegal salmon).

[FN413]. See, e.g., [United States v. Todd](#), 735 F.2d 146 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); [Atkinson](#), 966 F.2d 1270; [Thomas](#), 887 F.2d 1341 (payments made for guided hunting trips).

[FN414]. [966 F.2d 1270](#).

[FN415]. [Atkinson](#), 966 F.2d at 1271.

[FN416]. Id.

[FN417]. Id. at 1273.

[FN418]. Id.

[FN419]. [16 U.S.C. S 3372\(c\)](#).

[FN420]. [Atkinson](#), 966 F.2d at 1273.

[FN421]. [803 F.2d 422 \(9th Cir. 1986\)](#).

[FN422]. [Atkinson](#), 966 F.2d at 1273. Stenberg also involved guide services for illegal big-game hunts, but was decided before Congress added S 3372(c). [Stenberg](#), 803 F.2d at 422. In Stenberg, the Ninth Circuit refused to equate the provision of guiding services with the actual sale of wildlife, saying the former was more of an opportunity to kill wildlife than the provision of wildlife itself. Id. at 436. While this logic defeated a Lacey Act conviction in Stenberg, in Atkinson it served to strengthen the language of the new S 3372(c), which was enacted in response to Stenberg. [Atkinson](#), 966 F.2d at 1273 n.4.

[FN423]. [Atkinson](#), 966 F.2d at 1273 (quoting Todd, 735 F.2d at 152).

[FN424]. 33 Cong. Rec. 4871 (1900) (statement of Rep. John Lacey).

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