**24.23 Lacey Act—Commercial Activity in Illegally Taken Fish,**

**Wildlife, or Plants (16 U.S.C. §§ 3372, 3373(d)(1)(B))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with violating Sections 3372 and 3373 of Title 16 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knew that the [fish] [wildlife] [plants] had been [taken] [possessed] [transported] [sold] in violation of, or in a manner unlawful under [United States law] [United States regulations] [United States treaties] [tribal law];

Second, the market value of the [fish] [wildlife] [plants] actually [taken] [possessed] [transported] [sold] exceeded $350; and

Third, the defendant [[imported] [exported] [transported] [sold] [received] [acquired] [purchased]] [[fish] [wildlife] [plants]] by knowingly engaging in conduct that involved [its sale] [its purchase] [the offer to sell it] [the offer to purchase it] [the intent to sell it] [the intent to purchase it].

A defendant acts knowingly if [he] [she] is aware of the conduct and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

**Comment**

This instruction is for use in any case involving a violation of 16 U.S.C. § 3373(d)(1)(B) involving 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. Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of one of the subsections of 16 U.S.C. § 3372. For violations of § 3373(d)(1)(A), *see* Instruction 24.22. For violations of § 3372(d)(2), *see* Instruction 24.24. For violations of § 3373(d)(3), *see* Instruction 24.25.

When a violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change. For offenses under subsections (a)(2) and (a)(3) of § 3372, the elements of the instruction should be modified as shown below.

For an alleged violation of 16 U.S.C. § 3372(a)(2)(A) (fish or wildlife taken in violation of state or foreign law), substitute the following elements for the first and third elements, keeping the second element unchanged:

First, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation];

Third, the defendant [imported] [exported] [transported] [sold] [received] [acquired] [purchased] in interstate or foreign commerce the [fish] [wildlife] by knowingly engaging in conduct that involved [[their sale] [their purchase] [the offer to sell them] [the offer to purchase them] [the intent to sell them] [the intent to purchase them]].

For an alleged violation of 16 U.S.C. § 3372(a)(2)(B) (plants taken in violation of state or foreign law), substitute the following elements for the first and third elements, keeping the second element unchanged:

First, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants];

Third, the defendant [imported] [exported] [transported] [sold] [received] [acquired] [purchased] the plants in interstate or foreign commerce by knowingly engaging in conduct that involved the [sale] [purchase] [offer of sale] [offer to purchase] [intent to sell] [intent to purchase] the plants.

For an alleged violation of 16 U.S.C. § 3372(a)(3)(A) (fish or wildlife in special U.S. jurisdiction), substitute the following elements:

First, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law];

Second, the market value of the [fish] [wildlife] actually [taken] [possessed] [transported] [sold] exceeded $350;

Third, the defendant, while within the special maritime and territorial jurisdiction of the United States, possessed [fish] [wildlife], knowing that it had been [taken] [possessed] [transported] [sold] in violation of any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law]; and

Fourth, while possessing the [fish] [wildlife] within the special maritime and territorial jurisdiction of the United States, the defendant knowingly engaged in conduct that involved [its sale or purchase] [the offer to sell or purchase it] [the intent to sell or purchase it].

For an alleged violation of 16 U.S.C. § 3372(a)(3)(B) (plants in special maritime jurisdiction), substitute the following elements:

First, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants];

Second, the market value of the plants actually [taken] [possessed] [transported] [sold] exceeded $350;

Third, the defendant, while within the special maritime and territorial jurisdiction of the United States, possessed plants, knowing that they had been [taken] [possessed] [transported] [sold] in violation of any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants]; and

Fourth, while possessing the plants within the special maritime and territorial jurisdiction of the United States, the defendant knowingly engaged in conduct that involved [their sale or purchase] [the offer to sell or purchase them] [the intent to sell or purchase them].

Normally, a specific definition of market value will not be necessary. If, however, special circumstances arise in which a definition would be appropriate under the facts of the case, the judge might consult *United States v. Stenberg*, 803 F.2d 422, 432-33 (9th Cir. 1986). When the case involves purchases made by government agents it is advisable to instruct the jury that the price paid by the government agent is not conclusive evidence of the market value; market value is the price a piece of property would bring if sold on the open market between a willing buyer and seller. *Id.*; *see also* *United States v. Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992) (noting that proper method for valuing game under 16 U.S.C. § 3372(c) on guided hunt is value of offer to provide services).

*See* *United States v. Senchenko*, 133 F.3d 1153, 1156 (9th Cir. 1998) (permissible to infer commercial intent on facts presented).

“‘[S]ale’ for purposes of 16 U.S.C. § 3373(d)(1)(B) includes both the agreement to receive consideration for guiding or outfitting services and the actual provision of such guiding or outfitting services.” *United States v. Fejes*, 232 F.3d 696, 701 (9th Cir. 2000).