



U.S. Department of Justice

Executive Office for United States Attorneys
Office of the Director

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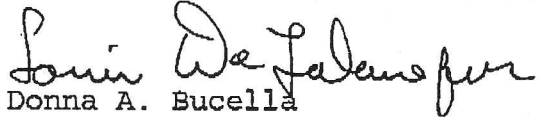
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MEMORANDUM - Sent via Electronic Mail

URGENT

DATE: FEB 12 1999

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL CIVIL CHIEFS

FROM: 
Donna A. Bucella
Director

SUBJECT: Knowing Instruction in Endangered Species Cases

ACTION REQUIRED: Please distribute to all Assistant United States Attorneys.

DUE DATE: As soon as possible.

CONTACT PERSONS: John Webb
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The attached document on using a particular mens rea knowledge instruction in endangered species cases is being

provided to you at the Solicitor General's request. Please distribute it to all Assistant United States Attorneys who may handle such cases.

Thank you.

cc: All United States Attorneys' Secretaries.

**FEDERAL PROSECUTORS MAY NOT USE KNOWLEDGE INSTRUCTION
UPHELD IN UNITED STATES V. MCKITTRICK**

The Solicitor General has informed the Supreme Court that Department of Justice prosecutors will no longer use the mens rea knowledge instruction approved by the Ninth Circuit in United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998). In McKittrick, the Ninth Circuit upheld a jury instruction in an **Endangered Species Act taking prosecution** that required the government to prove that (1) the defendant knowingly shot an animal and (2) the animal was a species protected under the Endangered Species Act. The instruction expressly stated, however, that the government was not required to prove the defendant knew the biological identity of the animal at the time he shot it. In approving this instruction, the Ninth Circuit relied in part upon Fifth Circuit decisions in United States v. Ivey, 949 F.2d 759 (5th Cir. 1991) and United States v. Nguven, 916 F.2d 1016 (5th Cir. 1990), an Eleventh Circuit decision in United States v. Grigsby, 111 F.3d 806 (11th Cir. 1997), and several district court decisions.

In opposition to a cert petition in McKittrick, the Solicitor General informed the Supreme Court that the United States would no longer "request the use of this instruction, because it does not adequately explicate the meaning of the term 'knowingly' in [Title 16] Section 1540(b)(1)." **All Department prosecutors are instructed not to request, and to object to, the use of the knowledge instruction at issue in McKittrick.** For an approved mens rea instruction, or any other questions concerning prosecutions under the Endangered Species Act or any other wildlife or fisheries statute, contact John Webb, Assistant Chief, Wildlife and Marine Resources, Environment and Natural Resources Division, Department of Justice. Phone: (202) 305-0227; Fax: (202) 305-0275; Email: john.webb@usdoj.gov.