

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

State of Alaska,)
)
Plaintiff,)
)
v.)
)
Donald L. Crane,)
)
Defendant.)

Case No.: 3KN-12-1868CR

DECISION—GUILTY OF MINOR OFFENSE

Defendant Crane was originally charged with a class A misdemeanor for negligently committing the offense of interference with anadromous waterways. The State amended the charge to a strict liability violation and trial was held.

The relevant Alaska Statute provides as follows:

Sec. 16.05.871. Protection of fish and game.

(a) The commissioner shall, in accordance with AS 44.62 (Administrative Procedure Act), specify the various rivers, lakes, and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish.

(b) If a person or governmental agency desires to construct a hydraulic project, or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed of a specified river, lake, or stream, the person or governmental agency shall notify the commissioner of this intention before the beginning of the construction or use.

Based on the testimony and evidence presented, the court finds beyond a reasonable doubt that Defendant Crane engaged in construction of a solid-fill dock which damaged riparian habitat at Daniels Lake without notifying the commissioner or obtaining a permit. The court therefore finds Defendant guilty of the minor offense.

Findings of Fact

Virginia Litchfield testified that she works for the Alaska Department of Fish and Game. She is the Area Manager for the Kenai Peninsula Habitat Protection and writes permits for habitat altering activities under the authority of Title 16 of the Alaska Statutes. The habitat that is protected includes waters, beds and associated areas important for maintaining populations of anadromous species. High-water in a lake is basically where the water normally is. Daniels Lake is specified as an anadromous water body under AS 16.05.871.

On September 13, 2012 Litchfield received an anonymous e-mail that work was being done in Daniels Lake. The anonymous reporter gave a location and Litchfield discovered that Crane's property was the closest to the reported construction site. She looked for a permit but was unable to locate one. Litchfield contacted Crane and he came down to the River Center to fill out a permit application and gave Litchfield permission to go onto his property to look at the construction that had already occurred. Crane said that the work was not on the lake. There was a pile-supported dock that had been there for years. After reviewing pictures that Crane showed her from his cellphone, Litchfield told Crane that the new dock did not look like work that would be allowed and went out to investigate. She discovered that there was 40 to 60 feet of destroyed riparian habitat with sheet piling in the water and fill on the land side. Natural riparian habitat had been destroyed by the act of pounding plastic sheeting directly into the water at the edge of the lake.

Based on her observations she spoke with Crane on September 17, 2012 and requested that he discontinue the work. The normal procedure is for the Department of Fish and Game is to work with land owners to repair damaged habitat. Crane was not willing to discontinue the work. The old dock on Crane's property would have been allowed. While Crane believed that all the new work was above high water, Litchfield determined when she visited that it was not. No permit was ever issued for the work on the new dock that Crane was in the process of completing.

Photographs were introduced of the new dock that Crane was building. Litchfield emphasized that this structure would not have been approved because it took away

riparian habitat, the interface between water and land that was important for fish. Vegetation in this area is especially important for new fish. The photos supported Litchfield's testimony that the piling was driven directly into the lake. The bed of the lake was impacted.

After Crane indicated that he was not going to pull out the sheet piling, Litchfield contacted the Alaska State Troopers and went back out to Crane's premises with Trooper Kumfer in October. It appeared that additional work had been performed on the dock including smoothing in backfill and capping dock edges off with wood. Litchfield testified that the additional work would have necessarily been done after Crane was advised that he needed a permit.

Trooper Kumfer, a wildlife trooper, testified that he learned of the habitat violation and discussed it with Litchfield on September 18, 2012. He did not treat it as a priority because the damage had already been done. Kumfer was unable to investigate further until October 22. He tried to call Crane before the site visit but was unable to reach Crane, who resided in Anchorage, until after the site visit. During the visit Trooper Kumfer observed a finished dock consisting of sheet piling and graded backfill material. The dock's edge appeared to go straight down into the floor of the lake and created a peninsula out into Daniels Lake.

In a recorded phone conversation between Kumfer and Crane, Crane was adamant that the work was on his own property and above the ordinary high-water mark. Crane believed that the work was not in anadromous water.

Charles Ross testified that he was a pile driver and that he helped Crane in September of 2012. He knew that the lake was protected and drove the sheet pilings two feet in from the lake. The closest he got to the lake was 8 to 10 inches. Donald Crane also testified that nothing was driven into Daniels Lake.

Legal Analysis

It is not disputed that Daniels Lake has been specified as important for the spawning, rearing or migration of anadromous fish. The defense argues that because the State reduced the charge from a misdemeanor to a minor offense there is nothing to litigate. More specifically The Defendant was originally charged with violating AS

16.05.871(b) and, once this charge was dismissed, there was no permitting requirement in 5 AAC 95 that the Defendant can be charged with violating.

This argument fails because 5 AAC 95.011(b) adopts the permit application procedures of AS 16.05.871 by reference. 5 AAC 95.902 provides that "A person who violates a provision of this chapter is strictly liable." The State's decision to pursue this case as a minor offense rather than a misdemeanor deleted the *mens rea* requirement which would be required if the offense were pursued as a misdemeanor.

The Defendant also argues that the State did not prove where the ordinary high-water mark was in Daniels Lake. Crane did all of the work on his own property and above the ordinary high water mark. Because Crane's work was done on his property it did not interfere with an anadromous waterway. The defense contends that the water seen in the pilings clearly seeped or swelled up from the ground.

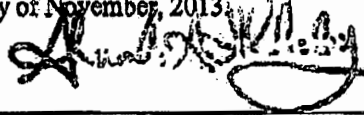
The State counters arguing that the evidence established that Crane constructed below the mean high-water mark. The building of the dock necessitated the invasion and alteration of the bed of Daniels Lake and resulted in a significant destruction of riparian habitat. Since Daniels Lake is a lake specified by the Department of Fish and Game as being a lake important for the spawning, rearing or migration of anadromous fish, Defendant did use, divert, obstruct, pollute or change the natural flow or bed of Daniels Lake without first properly notifying the Department of Fish and Game and therefore Defendant is guilty as charged.

The court finds that Litchfield's testimony was credible. Her testimony and the supporting photographs establish that the solid-fill dock constructed by Crane destroyed riparian habitat. The sheet piling was driven into standing water and not into dry land. Trooper Kumfer's observations were consistent with what was observed by Litchfield. The Defendant and Charles Ross testified that they believed that the work was not done in the lake bed. Since the State proceeded on a strict liability theory, proof of *mens rea* was not required. The testimony of Litchfield and Kumfer and the photos proved that the Defendant engaged in the building of a solid-fill dock without notifying the commissioner of his intentions before beginning construction. No permit was ever obtained.

Conclusion

The State has proved beyond a reasonable doubt that the Defendant is guilty of the minor offense charged. Sentencing is set for Dec. 11, 2013 at 11 a.m.

DATED in Kenai, Alaska, this 24th day of November, 2013:



Sharon Illsley
District Court Judge

CERTIFICATE OF DISTRIBUTION	
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