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ABSTRACT

The article considers organizational and preparatory measures for the inspection of a land plot of state or communal property to which illegally acquired rights. Based on the analysis of the practice of investigating the specified category of criminal offenses, conclusions were drawn that were made by investigators, interrogators and prosecutors during the inspection of the land plot, violations and shortcomings, in most cases, become the basis for an acquittal. The article provides a list of measures that are inherent in such components of the preparation of the inspection, carried out before departure and upon arrival at the place of its conduct.

It is noted that in the case of proper organizational activities, the determination of the necessary measures and means for effective review will be carried out before arrival. The needs to adjust the planned actions that have appeared/have arisen immediately upon arrival at the place of inspection should, if possible, be implemented before it is carried out.

Keywords: *illegal acquisition of the right to land, inspection of land, authorized person, participants of investigative (search) action, ruling of the investigating judge, organizational and preparatory measures, scientific and technical means.*

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THE SUBJECT OF CRIMINAL ENCROACHMENT AS AN ELEMENT OF THE FORENSIC CHARACTERISTICS OF THE ILLEGAL FISHING

Діана Гарашчук. ПРЕДМЕТ ЗЛОЧИННОГО ПОСЯГАННЯ ЯК ЕЛЕМЕНТ КРИМІНАЛІСТИЧНОЇ ХАРАКТЕРИСТИКИ НЕЗАКОННОГО ЗАЙНЯТТЯ РИБНИМ ДОБУВНИМ ПРОМИСЛОМ. Наукова стаття присвячена дослідженню предмету злочинного посягання незаконного зайняття рибним добувним промислом, як складового елементу криміналістичної характеристики. Досліджено поняття предмету злочинного посягання і його

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особливості для вказаного кримінального правопорушення, зокрема зазначено умови при яких водні біоресурси не являються предметом злочинного посягання.

Акцентовано увагу, що основними нормативними актами в яких міститься перелік видів водних біоресурсів, добування, яких всупереч установленому порядку є протиправним діянням, зокрема це: Правила любительського і спортивного рибальства, затвердженого наказом Міністерства аграрної політики та продовольства України № 700 від 19.09.2022 та Закон України «Про Червону книгу України» від 07.02.2002, який визначає перелік риб, вилов, яких категорично заборонений. Відповідно до наказу Міністерства захисту довкілля та природних ресурсів України № 29 від 19.01.2021 вказаний перелік містить в собі 77 видів риб.

На основі аналізу вивчення судових справ за 2013-2022 роки за фактами незаконного зайняття рибним добувним промислом, наведено перелік порід риб, які є предметом злочинного посягання, а саме: карась – 67 %, плитка – 55 %; окунь – 39 %, судак – 36 %, лящ – 34 %, плоскирка – 24 %, щука – 22 %, сазан – 20 % та інші.

Авторка зазначає, що предмет злочинного посягання, як елемент криміналістичної характеристики, досліджуваного протиправного діяння, пов'язаний з її обстановкою та способом. Даний взаємозв'язок ми маємо змогу прослідкувати завдяки дослідженню обов'язкової ознаки – істотної шкоди, зміст і поняття якої на законодавчому рівні не визначено, що створює певні труднощі для сторони обвинувачення. Тільки Пленум Верховного Суду України № 17 від 10.12.2004 «Про судову практику у справах про злочини та інші правопорушення проти довкілля» розкриває нам критерії істотної шкоди: знищення нерестовищ риби; вилов риби в період нересту, нечисленних її видів або тих, у відтворенні яких є труднощі; добування великої кількості риби, або риби, вилов якої заборонено тощо.

Ключові слова: незаконний рибний промисел, предмет злочинного посягання, водні біоресурси, істотна шкода, кримінальне правопорушення, матеріальні збитки.

Relevance of the study. The main task of modern society is the preservation of natural resources and their rational use. The state, for its part, has established certain restrictions on their use, and in case of violation of these requirements, punitive measures are taken against citizens in accordance with the norms of administrative or criminal legislation.

For the most part, this category of criminal offenses is committed in conditions of obviousness, i.e. the person who committed this illegal act is found at the scene of the commission of a criminal misdemeanor or crime, therefore, in the future, problematic issues should not arise regarding the conduct of the investigation, in terms of the implementation of investigative actions, aimed at establishing the location of a person. According to the statistical information presented by the Office of the Prosecutor General, we can see that only 50-60 % of criminal proceedings in Ukraine are sent to court to bring the guilty person to justice. Thus, in 2018, out of 538 registered criminal proceedings, 346 were sent to court (64 %); in 2019 from 619 to 372 (60 %), in 2020 from 608 to 376 (62 %), in 2021 from 613 to 355 (58 %), in 2022 from 576 to 321 (56 %) [8].

The above indicates the existence of problems in relation to the investigation of criminal proceedings initiated on the facts of the illegal fishing. In addition, after analyzing the above-mentioned data, we can claim that in 40-50% of the proceedings, the decision to close is made by the authorized official or they remain in the proceedings without a decision being made on them.

Therefore, we see an urgent need to investigate in detail the subject of the criminal offense of illegal fishing and its components, as it is evidence for the subsequent sentencing of the accused by the court to the person guilty of the illegal act.

Recent publications review. The study of the specifics of the subject of criminal encroachment of criminal offenses against the environment has received the attention of such scientists as V. Vasylynychuk, S. Havrysh, O. Dudorov, O. Zakharova, S. Knyzhenko, V. Konovalova, H. Matusovskyi, O. Oderii, Ye. Priakhin, M. Saltevskyi, F. Sokyran, Ya. Furman, S. Cherniavskyi, V. Shepitko, V. Yusupov and other scientists. However, due attention was not paid to this element of the criminalistic characteristics of illegal fishing in the scientific works of forensic scientists.

The article's objective. Research of the subject of criminal encroachment as an element of criminalistics characteristics of the illegal fishing.

Discussion. Starting the consideration of the mentioned element, we consider it necessary to cite the opinion of M. Saltevskyi, who defines the subject of direct encroachment as a wide variety of physical objects (things and objects) of organic and inorganic origin, which are a material expression of social relations. In addition, he notes that the description of the object of direct encroachment creates prerequisites for the use of forensic characteristics for the construction of a methodology for the investigation of a specific crime [4, pp. 268-269].

V. Shepitko emphasizes that the object of criminal encroachment is the things of the material world, affecting which a person encroaches on certain social relations. Accurate identification of the subject of a criminal offense makes it possible to distinguish one crime from another related to it. These or other signs of the object of the offense may act as mitigating or aggravating circumstances of the same crime or turn the crime into a particularly serious one [3, pp. 427-428].

V. Konovalova and H. Matusovskyi claim that the subject of environmental criminal offenses are things of the material world, affecting which a person encroaches on certain social relations [16, p. 78]. This opinion is also held by Ye. Priakhin, who also notes that the precise identification of the subject of the offense allows one to distinguish one type of crime from another [6, p. 11].

According to O. Oderii, the subject of encroachment makes it possible to distinguish specific types from the general group of crimes against the environment, to determine the circumstances of the crime, the methods of committing a criminal act, and the criminal behavior of a person [7, p. 256].

The subject of the criminal offense of illegal fishing is aquatic biological resources – a set of aquatic organisms (hydrobionts), the life of which is impossible without staying (being) in water at all stages of their development (caviar, fry, adults), in particular:

- freshwater fish;
- sea fish;
- anadromous fish (species of fish that spawn in fresh water and migrate to the ocean to forage and mature);
- catadromous fish (species of fish that live most of their adult lives in freshwater, but must return to saltwater to spawn) [10].

Undoubtedly, aquatic biological resources are the subject of criminal encroachment of the illegal act investigated by us in the case of their illegal extraction from the natural environment from the natural environment, which is carried out in violation of the current legislation that regulates the order and conditions of industrial, recreational, sport fishing, other use of aquatic living resources. In particular, fishing is illegal if it is carried out contrary to the existing rules: without proper permission, at prohibited times, in prohibited places, with the use of prohibited fishing gear, exceeding the established limits or catch rates [11].

It is worth noting that fish caught from specially equipped or adapted reservoirs, in which they are grown by enterprises, organizations or citizens, are not subject to criminal trespass. If there are appropriate reasons, the actions of the guilty person can be qualified as encroachment on someone else's property [11].

The opinion of O. Dudorov deserves attention, who notes that a fish removed from a reservoir that died as a result of anthropogenic influence, water intake or for other reasons (however, not due to the deliberate behavior of the person carrying out the removal) ceases to be an object of the animal world, and therefore, the object of legal (in particular, criminal law) protection of the animal world [2, p. 652].

It should be noted that the list of types of aquatic biological resources allowed for fishing is contained in the Recreational and sport fishing rules approved by order of the Ministry of Agrarian Policy and Food of Ukraine of September 19, 2022 № 700. The Law of Ukraine "On the Red Book of Ukraine" of February 07, 2002, specifies a list of fish, the catch of which is categorically prohibited.

Thus, the Recreational and sport fishing rules define the following list of types of aquatic biological resources: Azov sea turbot, red mullet, gobies (except for species listed in the Red Data Book of Ukraine), asp, grass carp, chub, platichthys luscus, prussian carp, spiny dogfish, mullets (except for species listed in the Red Data Book of Ukraine), tench, common bream, whiting, pontic shad, redlip mullet, common roach, Azov shad, vimba bream, common carp, peipsi whitefish, blue bream, Atlantic mackerel, wels catfish, mediterranean horse mackerel, zander, silver carp, bighead carp, brown trout, ziege, Black Sea turbot, northern pike. These rules contain the daily catch rate for one fisherman with an indication of the permitted size of fish catch and its weight [9].

For example, one fisherman per day is allowed to catch northern pike within the limits of the Dnipro reservoirs, each 50 centimeters long and weighing 3 kilograms, with non-prohibited fishing gear, in the permitted place and during the non-prohibited fishing periods specified by the rules.

In turn, the Red Book of Ukraine is an official state document that contains a list of rare

and endangered species of animal and plant life within the territory of Ukraine, its continental shelf and exclusive (marine) economic zone, as well as general information about the current state of these species of animal and plant life and measures for their preservation and reproduction.

The Red Book of Ukraine is the basis for the development and implementation of programs (action plans) aimed at the protection and reproduction of rare and endangered species of animal and plant life listed in it [12].

The list of fish species listed in the Red Book of Ukraine was approved by the order of the Ministry of Environmental Protection and Natural Resources of Ukraine of 19 January 2021 № 29. This list includes 77 species of fish, the fishing of which is strictly prohibited, including: carpathian brook lamprey, Ukrainian brook lamprey, bastard sturgeon, sterlet, Atlantic sturgeon, starry sturgeon, beluga European sturgeon, European eel, common dace, Black Sea roach, cactus roach, Azov shemaya, Crimea shemaya, vimba tenella, vistula barbell, thinlip mullet and others fish.

According to the results of the study of court cases for the years 2013-2022 on the facts of illegal fishing, we have the opportunity to observe that the following species of fish are the subject of criminal encroachment: crucian carp – 66,5 %, common roach – 55 %, common perch – 39 %, zander – 36 %, common bream – 34 %, white bream – 24 %, northern pike – 22 %, common carp – 20 %, tench – 12 %, common rudd – 10 %, blue bream – 9 %, wels catfish – 7 %, silver carp – 6 %, ziege – 5 % and others fish.

It should be noted that the subject of criminal encroachment, as an element of the forensic characteristics of the investigated illegal act, is related to its conditions and method. We are able to follow the specified relationship thanks to the study of the mandatory feature – substantial damage. The concept and content of substantial damage for the criminal offense provided for in Article 249 of the Criminal Code of Ukraine is not defined at the legislative level, which creates certain difficulties for the person authorized to conduct a pre-trial investigation. Only thanks to the Plenum of the Supreme Court of Ukraine № 17 of December 10, 2004 "On judicial practice in cases of crimes and other offenses against the environment" do we understand the meaning of this concept.

The fact that the damage is substantial can be indicated, in particular, by the following data:

- destruction of fish spawning grounds;
- fishing of fish during the spawning period, its few species or those that are difficult to reproduce;
- catching a large amount of fish, or fish whose fishing is prohibited, etc.;

If, as a result of the committed actions, no significant damage occurred, the guilty person, if there are grounds for that, may be held liable under Part 3 or Part 4 of Article 85 of Code of Ukraine on Administrative Offenses [11].

Let's consider in more detail the first criterion of substantial damage for illegal fishing. Spawning is a process of mass natural reproduction of aquatic biological resources, which occurs during a period determined by climatic and biological conditions [9]. The spawning period is determined annually by the orders of the relevant territorial bodies of the State Agency of Melioration and Fisheries of Ukraine on the establishment of a spring-summer ban on fishing in fishery water bodies. For the most part, the spawning period in the entire territory of Ukraine begins on April 1.

Destruction of fish spawning grounds is also one of the components of substantial damage and consists in catching fish in areas of water bodies designated as spawning grounds during the spring-summer ban on fishing. The list of such areas, together with the spawning period, is determined by the orders of the relevant territorial bodies of the State Agency of Melioration and Fisheries of Ukraine. For example, on April 29, 2017 at 03:00 a.m. P. during the spring-summer ban on fishing in fishery water bodies, with the help of pre-prepared fishing nets in the amount of 10 pieces, arrived at the area located on the Bokova River, which according to the Order of the Department of State Agency of Fisheries in the Dnipropetrovsk region of March 15, 2017, is a spawning area, where an illegal catch of fish totaling 590 units was carried out. Thus, the implementation of citizen P., illegal fishing led to the loss of offspring, as well as the ecological value of species of illegally caught fish, the catch of which affects the spread of this type of fish to a specific water body [13].

The criterion "extraction of aquatic biological resources, the fishing of which is prohibited" applies primarily to species that have a special environmental protection status (in

particular, those listed in the Red Book of Ukraine). As one of the options, the specified criterion and the criteria "fishing of few species of aquatic biological resources" and "fishing of those species of aquatic biological resources, in the reproduction of which there are difficulties" can be identical and include species that are included in the Red Book of Ukraine. At the same time, it should be noted that for species of aquatic biological resources listed in the Red Book of Ukraine, damage assessment is generally inadmissible and may lead to the complete destruction of Red Book species of aquatic biological resources [1, p. 799].

For example, on May 17, 2020 V., R. and K. with the aim of engaging in illegal fishing with the help of electric current, arrived at the Kleven River, which flows near the village of Cherneve, Glukhiv district, Sumy region, where in the proper V. a rubber boat, they set sail on the Kleven River. Further, moving along the water, V. using electrofishing: an electric fishing rod, together with R. and K. caught fish, namely: 111 common roach, 3 white bream, 16 common perch, 15 northern pike, 1 burbot, 6 tench, 4 ide, 2 common rudd, 1 common carp, which caused damages in the total amount of 16 939 UAH. Taking into account the fact that fishing was carried out by the method of mass destruction of water resources (electric current), during the spring-summer ban on fishing for aquatic biological resources (spawning), its few species and species that are difficult to reproduce (ide and common carp), extraction of large number of fish (159 specimens) and fish listed in the Red Book of Ukraine (burbot), the fishing of which is strictly prohibited. Therefore, there is every reason to consider the damage caused to the natural environment to be substantial [14].

The criterion of catching a large amount of fish is also an evaluative concept, which is relied on by the prosecution at the beginning of the pre-trial investigation. For example, K. on April 05, 2016 from 10 p.m. to 11:30 p.m., without proper permission deliberately engaged in illegal fishing in the waters of the Sulyn Bay of the Kremenchug Reservoir on the territory of the landscape reserve of national importance "Sulinsky" in the area of the village of Mykhailivka, Chornobayiv district, Cherkasy region, in a place prohibited for amateur and sport fishing, using three net fishing tools, caught a large number of valuable fish: 1 common bream, 7 common roach, 17 blue bream, 1 common perch, 143 crucian carp. By his illegal actions, K caused substantial damage to the protected interests of the state, which consists in the illegal fishing of a large number of valuable species of fish for the total amount of 8 332 UAH [15].

An authorized person conducting a pre-trial investigation, upon arriving at the scene, must analyze in detail the signs of substantial damage and decide whether it is necessary to enter data based on the discovered fact in the Unified Register of Pre-Trial Investigations and to initiate investigation, or whether it is necessary to bring the guilty person to administrative responsibility under Part 3 or Part 4 of Article 85 of Code of Ukraine on Administrative Offenses.

Officials of the State Agency of Melioration and Fisheries of Ukraine are involved in determining the material component of significant damage, the investigated illegal act, and mostly they are the ones who identify persons who commit illegal activities in fish extraction. Based on The Resolution of the Cabinet of Ministers of Ukraine of September 29, 2023 № 1042, these officials assess the damages caused as a result of the illegal extraction of aquatic biological resources and provide a calculation of damages, which is subsequently attached to the materials of criminal proceedings and, as investigative practice shows, on the basis of it, a judicial economic examination to confirm the determination of the amount of damages.

It must be noted that in accordance under Clause 6 Part 2 of Article 242 of the Criminal Procedural Code of Ukraine the investigator or public prosecutor shall commit an expertise to conduct examination in respect of determination of the amount of pecuniary damages, the amount of non-pecuniary damage, environmental damage caused by a criminal offence [15]. This provision on the basis of Article 300 of the Criminal Procedural Code of Ukraine also applies to the investigation of criminal misdemeanours for part 1 of Article 249 of the Criminal Code of Ukraine.

Having analyzed the judicial practice, we can see that there are cases of disregarding the norm of Clause 6, Part 2 of Article 242 of the Criminal Procedural Code of Ukraine. Thus, the authorized persons of the prosecution take as a basis for determining the amount of damage caused by illegal actions – the calculation of damages, provided by officials of the Agency of Melioration and Fisheries of Ukraine, without conducting the appropriate examination. As a result, the courts believe that the pre-trial investigation body did not establish significant damage and recognize the person who was engaged in the extraction of water resources as

innocent and acquit him.

Conclusions. Taking into account the above, the subject of the criminal offense of illegal fishing is aquatic biological resources – a set of aquatic organisms (hydrobionts), the life of which is impossible without staying (being) in water at all stages of their development (caviar, fry, adults), in particular: freshwater fish, sea fish, anadromous fish and catadromous fish. The investigated constituent element of the forensic characteristics plays an important role, since the result of the analysis of the signs of significant damage caused as a result of an illegal act aimed at extracting fish resources is the beginning of a pre-trial investigation or bringing a person to administrative responsibility.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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ABSTRACT

The scientific article is devoted to the investigation of the subject of criminal encroachment of the illegal fishing, as a constituent element of the forensic characteristics. The concept of the subject of criminal encroachment and its features for the specified criminal offense were studied, in particular, the conditions under which aquatic biological resources are not the subject of criminal encroachment were specified.

Attention was drawn to the fact that the main normative acts, which contain a list of types of aquatic bioresources, extraction of which, contrary to the established procedure, is an illegal act, in particular: Recreational and sport fishing rules approved by order of the Ministry of Agrarian Policy and Food of Ukraine of 19 September 2022 № 700 and in The Law of Ukraine «On the Red Book of Ukraine» of 07 February 2002, which defines the list of fish, the catch of which is categorically prohibited. In accordance with the order of the Ministry of Environmental Protection and Natural Resources of Ukraine of 19 January 2021 № 29, the specified list contains 77 species of fish.

Based on the analysis of the study of court cases for the years 2013-2022 based on the facts of illegal fishing, a list of fish species that are the subject of criminal encroachment is given, namely: crucian carp – 67%, common roach – 55 %, common perch – 39 %, zander – 36 %, common bream – 34 %, white bream – 24 %, northern pike – 22 %, common carp – 20 % and others.

The author notes that the subject of criminal encroachment, as an element of the forensic characteristics of the investigated illegal act, is related to its conditions and method. We are able to follow this relationship thanks to the study of a mandatory feature - substantial damage, the meaning and concept of which is not defined at the legislative level, which creates certain difficulties for the prosecution. Only the Plenum of the Supreme Court of Ukraine № 17 of 10 December 2004 «On judicial practice in cases of crimes and other offenses against the environment» reveals to us the criteria for significant damage: destruction of fish spawning grounds; catching fish during the spawning period, few of its species or those that are difficult to reproduce; catching a large amount of fish, or fish whose catch is prohibited, etc.

Keywords: *Illegal fishing, subject of criminal encroachment, aquatic biological resources, substantial damage, criminal offense, material damage.*