Journal of Vasyl Stefanyk Precarpathian National University
http://jpnu.pu.if.ua
Vol. 5, No. 2 (2018), 9-16

UDC 349.6:502.211:592/599
doi: 10.15330/jpnu.5.2.9-16

ECOLOGIZATION OF THE ORIGIN OF THE OWNERSHIP RIGHT ON THE OBJECTS OF FAUNA IN THE AQUACULTURE AREA

ANATOLIY GETMAN, VOLODYMYR SHEKHOVTSOV

Abstract. The authors of the article have studied theoretical and practical problems of delimitation of the ownership right to the objects of aquaculture and the fauna objects in the context of determining the grounds for the emergence of property right. The mechanisms of resolving disputes concerning the belonging of the fauna objects that are located in a water object together with the objects of aquaculture have been offered. The authors have developed propositions for making amendments and alterations to the current legislation.

Keywords: use of natural resources, aquiculture, objects of fauna, objects of aquiculture, property right on the objects of fauna**.**

1. INTRODUCTION

Public relations in regard to the protection and use of natural objects have been regulated by the norms of environmental law. It has been emphasized in the legal literature that the current stage of the development of environmental law is characterized by two opposite, but interconnected tendencies: on the one hand, the termination of the expansive development of certain branches of environmental legislation, ensuring their internal structuring and differentiation, and, on the other, – an adequate response to the change of social and economic factors, the emergence of new objects of legal regulation and factors affecting them, the realization of the objectives of environmental policy of different levels (international, national, public, industrial) and orientation (internal or external). Considering this fact, in the context of the tendency towards sustainability, environmental science can not help but respond to modern challenges, by transforming in accordance with the needs of society and era, involving new and emerging phenomena to the sphere of its influence [1, p. 105].

The modern development of the branches of the economy is characterized by a high degree of dynamism and such a dynamics is not always positive with a tendency to increase. However, the state, society and certain business entities make all necessary efforts to increase the socially useful result that ultimately should be derived from one or another type of activities: an increase in production, a decrease in the price of a unit of production, an increase in profits, creation of new jobs, etc. This is the basis of the economic demands of society that must be satisfied.

But along with economic requirements there are other needs of society and its individuals. Spiritual, aesthetic, cultural, recreational and other needs are inherent to both an individual and a social being. And these needs of one subject quite often go against the economic needs of another one. A similar situation occurs in the field of aquaculture. On the one hand, there is, at a minimum, the need to ensure the needs of the population of Ukraine in the consumption of fish products, as a maximum – to increase the volume of production to create export potential. For this purpose, the procedure for the use of existing reservoirs is regulated, the procedure of conducting this type of business is simplified, the creation of new jobs is encouraged, etc. However, it is at the state level. At the level of a water facility, the issue arises differently: can anyone fish for free or can an entrepreneur charge a fee for this? In practice, the answer to this question depends on the definition of when and how the ownership right to the objects of fauna can occur or transfer in case of the latter being in the reservoirs provided for aquaculture.

Degree of the topic development. The research of the legal nature of the ownership right to natural objects or its certain aspects was the scope of interest of the works of lawyers in the field of environment as: V. I. Andreitsev, H. V. Anisimova, H. I. Baliuk, A. H. Bobkova, Yu. O. Vovk, A. P. Getman, V. I. Hordieiev, I. I. Karakash, V. V. Kostytskyi, S. M. Kravchenko, P. F. Kulynych, N. R. Malysheva, V. L. Muntian, V. V. Nosik, O. O. Pohribnoi, V. K. Popov, S. V. Razmietaiev, B. H. Rozovskyi, A. K. Sokolova, P. V. Tykhyi, O. M. Tkachenko, V. S. Shakhov, Yu. S. Shemshuchenko, V. V. Shekhovtsov, M. V. Shulha and others. But the issue of determining the basis for the origin of the ownership right to the objects of fauna in the sphere of aquaculture remains unresolved.

2. Analysis and Discussion

The key theoretical aspect in solving the issue of the origin of ownership right to the objects of fauna, including in the field of aquaculture, is the fact what law doctrine is used to study this issue. Scholars in the field of environmental law have already emphasized the negative tendencies of "commoditization" of environmental and natural resource law [2; 3]. The urgent main short-term problem of the state is to ensure economic growth. The regulatory base becomes only an instrument for implementing such a state policy. Scholars within the law sphere, in turn, must develop propositions to the law on the basis of the doctrinal approaches of each branch of law, which is one of the external forms of consolidation of state policy.

Doctrinal approaches to the elaboration and further development of environmental law, through a number of controversial issues in the field of environmental and natural resource law, are increasingly interfered by scholars who study the issues of related branches of law. The feasibility of the existence of environmental law as an independent branch is put in question; and the authors prove the need to include an array of legal regulation of nature-oriented or natural resource legal relations, for example, to administrative [4, c. 348] or commercial law [5 c. 58].

At the same time, it is necessary to pay attention to the fact that by defining the high level of research within the various scientific specialties, while respecting scholars who formed their scientific and methodological basis, it should be noted that the activity of specialists of a particular scientific specialty affects the approaches in regard to solving scientific problems, demonstrating sometimes one-sided approach. Taking this into account, attempts to enter environmental legal relations into the system of administrative or civil or commercial law are prior doomed to failure that has already been emphasized before [6, p. 100].

In our opinion, the issue of determining the ownership right to the objects of fauna, regardless of their scope of use, should be considered from the standpoints of environmental law. Wild animals, in all their biological diversity, irrespective of their place of residence and species characteristics, are an integral part of the natural environment, a link of the food chain, the allocation of which is impossible without causing harm to all other links. Ecologization of material production in the field of aquaculture should be realized through scientifically grounded admissible inclusion of economic activity into natural processes, and not vice versa – granting of "permission" to the elements of the environment to

be present at the realization of the economic activity by a person. Moreover, the economic activity, which includes some natural objects, should be made taking into account the requirements of the Art. 13 of the Constitution of Ukraine, which establishes the ownership right of Ukrainian people to natural resources, as well as the right of everyone to use natural objects of property rights of the people in accordance with the law.

Aquaculture in its legal nature should be considered as one of the types of special natural management, and accordingly, to a certain extent, should take into account the requirements of the current environmental legislation in ensuring the right of general natural management. Moreover, scholars generally distinguish as a principle of the right of natural management – the priority of general natural management, the essence of which is paramount restitution of the needs for overall natural management due to the natural resources [7, p. 97].

Thus, in case of the allocation of natural resources for the implementation of aquaculture – a water object or objects of the fauna, it should be primarily taken into account that they are an integral part of the environment and are subject to the rights of other citizens.

Another problem that causes the need to ecologize aquaculture is the task of creating an environmental network. In previous scientific papers, the authors emphasized on the tasks of creating the indicated network and the problems that arise in this connection [8, p. 286–287]. Most of the reservoirs, including Ukrainian fishery waters, were largely built more than 30 years ago, for a long time were part of the landscape and performed certain functions in the ecosystems of the territories of the location. The practice of forming an ecological network indicates that, for the most part, such reservoirs are used as connecting territories (ecological corridors), which combine key areas among themselves, provide for the migration of animals and the exchange of genetic material. It is especially actual for reservoirs, which exist in the form of a cascade – sequential placement along the watercourse.

Everything above stated causes the need of the ecologization of the activities in the field of aquaculture.

Having analyzed the current legislation, primarily we would like to stress that according to the Art. 1 of the Law of Ukraine "On Aquaculture" [9] aquaculture (fish farming) – is an agricultural activity for artificial breeding, maintenance and cultivation of aquaculture objects in fully or partially controlled conditions for obtaining agricultural products (aquaculture products) and their sale, production of feeds, reproduction of biological resources, conduction of breeding and stock breeding, introductions, resettlement, acclimatization and re-acclimatization of aquatic organisms, replenishment of aquatic biological resources, preservation of their biodiversity, as well as providing recreational services.

It is obvious that we do not aim to research property relations in the entire aquaculture industry. This activity can be carried out using various technologies, intensification stages, species composition of the livestock, etc. All these features impose their imprint on both legal regulation and the very nature of property in this sphere. Thus, according to the Law of Ukraine "On Aquaculture" there is an industrial aquaculture – activity on artificial breeding, maintenance and growing of aquaculture objects with the use of fishing and floating gardens, fishing pools, other technological devices, including the use of closed water supply plants. Essentially, such activities are isolated from the environment, often do not occur on the territory of water facilities, and therefore in practice there is no question of the belonging of the fish and the rules of its use. Besides, in case of industrial type of aquaculture, there is a question: whether there is a natural object – the object of fauna, or there is a peculiar form of keeping live-stock animals.

We should focus attention on the issue of the ownership right to the objects of fauna that are in the water facility in the state of natural will and are not objects of aquaculture in the context of the possibility of exercising the right of their general natural management. In turn, aquaculture objects are aquatic organisms used for the purposes of breeding, maintenance and growing in aquaculture conditions.

From the content of the mentioned Law it is understood that the subjects of aquaculture (legal entities or individuals engaged in fishing activities in the field of aquaculture) have the right "to own

the objects of aquaculture and aquaculture production, as well as to receive income from their implementation". And although the norm is not very well written out, it is clear that business entities engaged in aquaculture acquire the ownership right to its objects.

At the same time, if we correlate all the aforementioned concepts, then for the recognition of each individual fish or other object of fauna as the property object of a business entity, it must correspond to the following features:

- be artificially bred, maintained or grown;
- kept in a fully or partially controlled environment;
- be an agricultural product.

Part 3 of the Art. 38 of the Law of Ukraine "On Environmental Protection" stipulates that citizens, enterprises, institutions and organizations according to the procedure of special use of natural resources are provided with the possession, use or lease of natural resources on the basis of special permits registered in the established procedure for a fee for the implementation of production and other activities, and in cases stipulated by the legislation of Ukraine – on concessional terms [10].

The Art. 17 of the Law of Ukraine "On the Fauna" also stipulates that special usage of the objects of fauna includes all kinds of using fauna (except for the cases of free amateur and sport fishing on water facilities of general use, stipulated by the law), which are carried out from their extraction (plunder, collection, etc.) from the natural environment" [11].

From the systematic analysis of the norms of the Laws of Ukraine "On Aquaculture" and "On the Fauna" it becomes obvious that those species of animals that were in the water facility before the start of aquaculture activities remain in a state of natural will and are not the objects of aquaculture. Since, all the sub-normative acts, researched by us, regulating the procedure for conducting aquaculture, do not contain provisions on the assessment and transfer to the ownership or use of the objects of fauna (fish), already contained in a water facility.

Moreover, a document establishing the right to own and use an existing water facility for aquaculture purposes is a lease contract for a water facility. Analysis of the typical form of this agreement shows that the elements of the environment, the right of use of which is transferred under this agreement, are water and lands [12]. The objects of fauna are beyond the scope of this agreement. In addition, because of the very nature of animals, the Law of Ukraine "On the Fauna" does not at all consider the concept of renting objects of fauna that we consider to be justified.

Thus, in accordance with the requirements of the same Law of Ukraine "On the Fauna", the person who owns the objects of fauna (fish) must documentary verify the legality of their acquisition. Synthesis of all the requirements of the legislation allows to assert that for the emergence of the ownership right for all species of fish and water invertebrates in a water facility provided for aquaculture, the business entity must documentary verify the purchase of all fish contained in the water facility or demonstrate the documents on the implementation of special nature management – industrial fishing. It should be noted that in the course of a multi-year study, we were unable to find any case of the receipt of documents of the special use of objects of fauna by the business entity, which would precede the receipt of the water facility for use. This provides grounds for concluding that the types of objects of fauna that were located in the water facility before its transfer for aquaculture, as well as those that were not the subject for breeding (acquisition), were not the property of the subject of aquaculture.

As we have already stressed [13, p. 52–54], the analysis of the provisions of the Law of Ukraine "On the Fauna" reveals certain problems. Thus, the Art. 6 of the Law states: "The objects of fauna, which are maintained (kept) by enterprises, institutions and organizations of the state or communal form of ownership are the object to the right of respectively state or communal ownership". In fact, the law links the right of state and communal property with the maintenance (storage) of such objects by respectively state or communal enterprises, institutions and organizations. Part 1 of the Art. 7 of the Law states that the objects of fauna withdrawn from the state of natural freedom, bred (received) in a semi-free conditions or in captivity or acquired by another way, not prohibited by law, may be privately owned by legal entities and individuals. This made it possible to conclude that the right of state, communal and private property primarily relates to the removal of the objects of fauna from the

state of natural freedom on the basis of appropriate permissions. Then it is logical to ask: who then acts as the owner of the objects of fauna that are in a state of natural will?

The consolidation of this right exclusively by the Ukrainian people, which does not actually belong to civil society participants, is not endowed with adequate capacity and legal capacity by the Civil Code of Ukraine, seems inappropriate in relation to the existing works within environmental law [14, p. 80; 15, p. 78]. Therefore, it has been offered to consolidate the relevant provision in the Law of Ukraine "On the Fauna", establishing that all objects of fauna, other than those removed from the state of natural freedom, are bred (received) in semi-free conditions or in captivity acquired in the state property other way not prohibited by law by enterprises, institutions and organizations of communal ownership, as well as individuals and legal entities.

The discussion about the membership of "aboriginal" species of fauna in leased water facilities is becoming more acute in society [16]. Adoption of the Law of Ukraine "On Aquaculture" further complicated this area. Formally, aquaculture can be carried out to provide recreational services. Providing services to fishermen to organize and conduct sports and amateur fishing may be such recreational services. However, the service must be paid, and indicated types of fishing are types of general nature management, that is, free of charge.

The Art. 47 of the Water Code of Ukraine, which specifies that the general use of water is carried out by citizens to meet their needs (bathing, boating, amateur and sports fishing, watering animals, taking water from water facilities without the use of buildings or technical devices and from wells) free of charge, without fixing water objects by individuals and without issuing appropriate permits, did not add clarity to the researched issue [17]. The legislator has indicated the possibility of amateur or sports fishing in the general water management and use by fauna members. It is clear that to allow the usage of the objects of fauna, in particular fish, by the right of general nature management can only be given to the objects of state or communal property. The private owner has the right to independently determine the range of people, the time, the volume of use of his property.

In our opinion, in order to determine the ownership right to the objects of fauna that are in the reservoir simultaneously with the objects of aquaculture, it is necessary to take into account the mode of these animals that existed before the transfer of the water facility to use. Based on the analysis of regulatory acts regulating accounting and reporting in the field of aquaculture, the aquaculture subject must fully reflect in the documentation the species, number, age groups, mass and other characteristics of each type of aquaculture object.

Consequently, there are no grounds for claiming that the subject of aquaculture has the ownership right to all fish in the reservoir that was provided to him. Accordingly, he has no right to impose restrictions on the use of local fish species in the implementation of general nature management.

Moreover, the typical form of a lease contract for a water facility is one of the grounds for termination of such an agreement, which stipulates the prohibition of general water management, which, according to the Art. 47 of the Water Code of Ukraine, includes sports and amateur fishing.

Another important issue is the implementation and protection of the ownership right to the objects of fauna – aboriginal species of fish that were in the reservoir before it was handed over for aquaculture in case of their destruction. It is not about such cases of unlawful destruction as illegal catching, poisoning, immorality, etc. The legal development of events is possible, namely, the death of fish during the implementation of measures of fishing melioration – reduction of water level or complete discharge of water from the water facility, and some others.

In accordance with c. 8 of the Art. 17 of the Law of Ukraine "On Fisheries, Industrial Fisheries and Protection of Water Bioresources" the level of water in fish-farming water agencies should be sufficient to ensure the natural reproduction and life of aquatic organisms. The increase or decrease of water level in water facilities is agreed with the central executive agency, which implements the state policy in the field of fisheries [18].

Thus, the legislator has foreseen the need to agree the issue of water discharges from the water facility with the fish protection agencies. However, there were no compensatory mechanisms for the

reimbursement of losses of natural fish stocks. Since, as it was earlier indicated, aboriginal species of fish are not transferred to the property of the subject of aquaculture. Thus, the legislator's logic regarding the lack of compensation for losses of aquatic living resources that occurs as a result of economic activity is not clear.

In our opinion, we should foresee a mechanism for restoration of the state or compensation of losses of biodiversity in case of the destruction of water level in a water facility. It is advisable to establish the owner's obligation to restore the biological diversity of aquatic organisms or to compensate for the costs of such a restoration. In case of the restoration of species diversity in a water facility, such aquatic living resources shall not be the property of a business entity. In case of the compensation for the cost of destroyed water facilities, the funds received should be target-oriented and to be used to implement measures to increase fish stocks in the region, but not necessarily in the water facility, which became the source of the corresponding funds.

In turn, it will allow restoring the aquatic living resources of the region, while not engaging such activities on water objects, where such restoration is inappropriate (aquaculture facilities with periodic water level reductions). Besides, it disciplines the aquaculture subjects in part of responsible attitude for the species diversity in the provided water facility. Since, there are many cases of water level reduction only to facilitate the catching of commercial fish and its more complete catch without purchasing special means of its catching.

3. CONCLUSIONS

1. Relationships regarding the emergence of the ownership right to the objects of aquaculture in case of its implementation with the granting the right to use a water object, should be regulated by law, which is developed and applied primarily from the standpoint of the doctrine of environmental law, taking into account the right of other citizens to use natural objects, in compliance with the nature-oriented regime of reservoirs. One of the main requirements to be adhered to by the subject of aquaculture is to preserve the property right of the Ukrainian people to the objects of fauna that have fallen into the sphere of its activity together with the reservoir.

2. The basis for the origin of the ownership right to aquaculture objects is the conclusion of agreements for purchasing stocking material and / or artificial breeding activities of such objects. However, this is not the reason for the termination of the right of state or communal property and, accordingly, the emergence of private ownership to the objects of fauna that are in the water facility provided for the aquaculture maintenance.

3. We offer to amend the Art. 1 of the Law of Ukraine "On Aquaculture" with the notion of local (aboriginal) aquatic organisms as those that were before the provision and / or were in a water facility after being used for aquaculture purposes, artificial reproduction or if the subject of aquaculture didn't make their invasion. To supplement c. 2 of the Art. 5 of the Law of Ukraine "On Aquaculture" with the provisions on the obligation of the subject of aquaculture not to prevent the implementation of amateur and sport fishing of citizens for local (aboriginal) aquatic organisms.

4. To develop a methodology for calculating the cost of aboriginal aquatic organisms located in a water facility, and to provide a mechanism for the compensation of their restoration in case of destruction in connection with the implementation of measures of fishery reclamation.

Such changes will make it possible to avoid ambiguous interpretation of the requirements of regulatory acts in the field of aquaculture; to distinguish aquaculture objects – agricultural animals and objects of fauna; to ensure the right of general environmental management on water facilities that were provided for aquaculture.

REFERENCES

[1] Getman A.P., Zuiev V.A. Formation of ecological and legal science: resource aspect and its integration problems. *Problems of Legality*, **132** (2016), 104–123. doi: 10.21564/2414-990x.132.63175 (in Ukrainian)

[2] Zuiev V.A. Commoditization of the national economical legislation as a threat to sustainable development of the state. In: Hetman A.P. Materials of the workshop "Theoretical and practical aspects of the implementation of environmental, land, agrarian law in terms of the sustainable development of Ukraine", Kharkiv, Ukraine, December 2, 2016, Pravo, Kharkiv, 107–109. (in Ukrainian)

[3] Getman A.P., Zuiev V.A. Environmental law: thoughts on its origins and perspectives of development. *Problems of Legality*, **137** (2017), 75–91. doi: 10.21564/2414-990x.137.104013 (in Ukrainian)

[4] Melnyk R.S. The system of administrative law of Ukraine. Thesis for a doctoral degree: 12.00.07. Kharkiv, 2010. (in Ukrainian)

[5] Dzhumaheldiieva H.D. *Legal regulation of economic use of natural resources.* Yurydychna Dumka, Kyiv, 2014. (in Ukrainian)

[6] Getman A.P., Zuiev V.A. *Administration of sustainable development in terms of transitional economy: 2-nd edition revised and enhanced.* In: Schmidt M. (Ed.). Akcent, Dnipropetrovsk–Kottbus, 2016. (in Russian)

[7] Kotenov O.H. Principles of the Right to Natural Management. Thesis for a candidate's degree: 12.00.07. Kharkiv, 2016. (in Ukrainian)

[8] Shehovtsov V.V. On the issue of the need to create environmental network. Materials of all-Ukrainian scientific and practical Conference devoted to the 50th anniversary of Donetsk National University and 30th anniversary of Commercial Law Department of Donetsk National University "Legal provision of economic development and environmental safety of society", Vinnytsia, Ukraine, May 14–15, 2015, Vinnytsia, 286–288. (in Ukrainian)

[9] On Aquaculture: Law of Ukraine dated from September 18, 2012, No. 5293-VI. Vidomosti Verkhovnoi Rady Ukrainy, 43. (in Ukrainian)

[10] On the Protection of Environment: Law of Ukraine dated from June 25, 1991, No. 1264-XII. Vidomosti Verkhovnoi Rady Ukrainy, 41. (in Ukrainian)

[11] On Fauna: Law of Ukraine dated from December 13, 2001, No. 2894-III. Vidomosti Verkhovnoi Rady Ukrainy, 14. (in Ukrainian)

[12] On Approval of a Typical Rent Agreement of Fishery Facilities: Order of the Cabinet of Ministers of Ukraine dated from May 29, 2013, No. 420. Ofitsiinyi visnyk Ukrainy, 47. (in Ukrainian)

[13] Shehovtsov V.V. The right of private property on the objects of fauna. Thesis for a candidate's degree: 12.00.06. Kharkiv, 2009. (in Ukrainian)

[14] Shulha M.V. *Relevant legal problems of land relations within modern conditions.* Konsum, Kharkiv, 1998. (in Russian)

[15] Muntian V. L. Some relevant problems of legal regulation of land relations in Ukraine. *Chto delat'? Dajdzhest levoj oppozicii*, **7–8** (2001), 77–81. (in Ukrainian)

[16] Attention! A tenant has no right to prohibit amateur fishing on a reservoir. Natsyonalnyi antykoruptsiinyi portal "ANTYKOR". Available at: http://antikor.com.ua/articles/43222-uvaga_orendar_ne_maje_prava_zaboronjati_ljubiteljsjke_ribaljstvo_na_vodojmi (in Ukrainian)

[17] Water Code of Ukraine: Law of Ukraine dated from June 6, 1995, No. 213/95-VR. Vidomosti Verkhovnoi Rady Ukrainy, 24. (in Ukrainian)

[18] On Fisheries, Industrial Fisheries and Protection of Water Resources: Law of Ukraine dated from July 8, 2011, No. 3677-VI. Vidomosti Verkhovnoi Rady Ukrainy, 17. (in Ukrainian)

Address: Anatoliy Getman, Volodymyr Shehovtsov, Environmental Law department Yaroslav Mudryi National Law University, 77, Pushkinska Str., Kharkiv, 61024, Ukraine.

E-mail: prof.getman@gmail.com, shehovtsov2004@ukr.net

Received: 20.02.2018; **revised:** 21.06.2018.

Гетьман Анатолій, Шеховцов Володимир. Екологізація виникнення права власності на об'єкти тваринного світу в галузі аквакультури. *Журнал Прикарпатського університету імені Василя Стефаника*, **5** (2) (2018), 9–16.

У статті розглянуто теоретичні та практичні проблеми розмежування права власності на об'єкти аквакультури та об'єкти тваринного світу в контексті визначення підстав для виникнення права власності. Запропоновано механізми вирішення спорів щодо належності об'єктів тваринного світу, які перебувають у водному об'єкті разом з об'єктами аквакультури. Напрацьовано пропозиції для внесення змін та доповнень до чинного законодавства.

Ключові слова: природокористування, аквакультура, об'єкти тваринного світу, об'єкти аквакультури, право власності на об'єкти тваринного світу.