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RIGHT OF PRE-EMPTION TO LAND UNDER INLAND STANDING WATERS

Abstract

In the Polish legal system, the statutory right of pre-emption could be exercised in respect of various types of real properties. Some of them, due to their specific characteristics, are protected by the state, such as agricultural real properties or forest land. However, the scope of the pre-emption right is sometimes unclear and the application of this right can lead to problems in practice. This claim can be made against the right of pre-emption to land under inland standing waters due to the fact that the definition of inland standing waters may be complicated. This article is focused on the complicated scope of the right of pre-emption to land under inland standing waters and shows, by means of specific examples, which aspects need to be verified during the examination and whether the pre-emption right should be exercised. After a brief introduction to the subject discussed, the author presents the key definitions used in the Water Law. The next part of the article discusses relevant issues concerning the definition of real property. The author also examines individual cases in which real property meets the legal requirements for the application of the right of pre-emption, but the exercise of this right is doubtful. The final part of the article is a summary of the author's reflections.

KEYWORDS

Water Law, inland standing waters, pre-emption right

SŁOWA KLUCZOWE

prawo wodne, śródlądowe wody stojące, prawo pierwokupu

1. INTRODUCTION

The right of the pre-emption to real properties is a right granted to a specific entity to purchase real property with priority over any other entity to which it will be sold.¹ However, sometimes it is not easy to verify over any doubt and assess whether the real property meets the conditions for exercising this right. As a result, a sale agreement is concluded with unnecessary conditions and the sale is prolonged, which can be of considerable economic importance. On the other hand, the sale of real property without the statutory right of pre-emption leads to the invalidity of the sale agreement in accordance with Article 599 § 2 of the Civil Code² (hereinafter referred to as the Civil Code). The situation of the contracting parties is aggravated by the fact that such a legal action cannot be validated. An example of such an unclear regulation is Article 217 Section 13 of the Water Law Act³ (hereinafter referred to as the Water Law), which grants the right of pre-emption to the State Treasury, represented by the Starost, acting in agreement with the Minister responsible for water management, in the event of the sale of real property comprising land under inland standing waters.

The provision of Article 23 Section 1 of the Water Law defines inland standing waters as inland waters in lakes and other natural bodies of water not directly connected, in a natural way, with surface inland flowing waters. Section 2 indicates that the provisions on inland standing waters apply accordingly to waters located in depressions of land created by human activity that are not ponds. A literal interpretation leads to the conclusion that the right of pre-emption applies to land under a small body of water, designed for aesthetic purposes, on the real property developed with a single-family building. The ambiguity of the regulation is also evidenced by the fact that the Ministry of Maritime Affairs and Inland

¹ R. Strzelczyk, *Prawo nieruchomości*, Warsaw 2019, p. 427.

² Act of 23 April 1964 Civil Code (Journal of Laws of 2022, item 1360 as amended).

³ Act of 20 July 2017 Water Law (Journal of Laws of 2022, item 2625 as amended).

Navigation⁴ issued an opinion on the matter (hereinafter referred to as the Ministry's Opinion), which was intended to clarify possible ambiguities. This article is an analysis of the subject of the pre-emption right under Article 217 Section 13 of the Water Law, the doctrinal voices, and the interpretation of the authorities.

The first part focuses on explaining the key concepts related to the issue of real property on which bodies of water are located. The following part focuses on the relevant issues relating to the definition of real property and the particular situation where real property meets the statutory prerequisites for the application of the pre-emption right, but where the exercise of this right may be questioned. The summary contains the author's conclusions and reflections.

2. INLAND STANDING WATERS

The provision of Article 217 Section 13 of the Water Law grants the Starost, acting in agreement with the Minister responsible for water management and representing the State Treasury the right of pre-emption in the event of the sale of real property that includes land under inland standing waters. Therefore, the definition of inland standing waters needs to be analyzed. Referring to Article 19 of the Water Law, all waters other than internal marine waters and waters of the territorial sea should be considered inland waters. The first term is defined in Article 4 of the Act on Maritime Areas of the Republic of Poland and Maritime Administration⁵ (hereinafter referred to as the Maritime Areas Act), in conjunction with Article 16 point 29 of the Water Law. The territorial sea, on the other hand, is the area of marine waters 12 nautical miles wide (i.e. 22,224 m), calculated from the baseline of that sea, according to Article 5 of the Law on Maritime Areas.

According to Article 23 Section 1 of the Water Law, standing inland water shall be regarded as inland water in lakes and other natural bodies of water not directly connected, in a natural way, with surface inland running waters. According to the dictionary definition, a lake is a depression in the ground filled with spring water, river water, rainwater, or a natural inland body of standing water.⁶ Other natural water bodies include, e.g. ponds, i.e. inland bodies of surface water, formed naturally or created artificially,⁷ ponds, i.e. bodies of water in a natural or

⁴ Legal opinion on the pre-emption right in the case of sale of land under inland standing waters prepared by the Ministry of Maritime Affairs and Inland Navigation, <https://www.gov.pl/web/gospodarkamorska/opinia-prawna-w-sprawie-prawa-pierwokupu-w-przypadku-sprzedazy-gruntow-pod-srodladowymi-wodami-stojacymi> (accessed 2 July 2023).

⁵ Act of 21 March 1991 on maritime areas of the Republic of Poland and maritime administration (Journal of Laws 2023, item 960).

⁶ W. Doroszewski (ed.), *Słownik języka polskiego*, Vol. III, H-K, Warsaw 1964, p. 411.

⁷ *Ibidem*, p. 733.

excavated depression,⁸ or lagoons meaning a sea bay separated from the high seas by a spit of land.⁹ This list is for illustrative purposes only and is not intended to be an exhaustive one.¹⁰ Waterholes – natural mid-field and mid-forest water bodies up to 1 hectare in size, not subject to soil classification – may also be indicated,¹¹ and the pre-emption right shall apply to the land on which they are situated.¹² However, lakes or other bodies of water may not be directly associated with surface inland flowing waters, i.e. with 1) natural watercourses and the springs from which these watercourses originate, 2) lakes and other natural bodies of water with continuous or periodic natural inflow or outflow of surface water, 3) artificial bodies of water situated on flowing waters, and 4) canals. These waters, under Article 211 Section 2 of the Water Law, are the property of the State Treasury. W. Gonet¹³ rightly noted that, in practice, it is difficult to resolve whether a water body is directly associated with flowing waters. For example, due to the shape of the shoreline, spotting a narrow stream that flows into or out of a body of water can be problematic. Moreover, such inflow or outflow may be periodic, which does not affect the application of Article 217 Section 13 of Water Law as the trading of the properties on which the bodies of water are located in general. According to Article 216 Section 2 of Water Law, inland flowing waters are not subject to civil trade except in cases specified in the Act. It cannot be excluded that a body of water will gain periodic access to flowing waters as a result of natural processes. When such a body of water is the subject of a sale, even careful verification may not be sufficient, especially when the agreement is concluded during a period in which the relationship with flowing waters does not happen. The agreement will be invalid under Article 216 Section 2 of the Water Law. The owner of such real property can only be the State Treasury, and the parties to the sale agreement are left in the mistaken belief that the ownership has been transferred to the buyer. Dense vegetation obstructing a watercourse may also affect the assessment of the nature of the water body in question.¹⁴

According to Article 23 Section 2 of the Water Law, the provisions on inland standing waters apply accordingly to waters in depressions of land resulting from human activity that are not ponds. However, the provision contains several unclear phrases. Firstly, it does not specify what a “depression of land” means.

⁸ *Ibidem*, p. 7.

⁹ W. Doroszewski (ed.), *Słownik języka polskiego*, Vol. X, Wyg-Ż, Warsaw 1968, p. 593.

¹⁰ K. Maj, *O ustawowym prawie pierwokupu nieruchomości w ustawie prawo wodne z dnia 20 lipca 2017 roku*, (in:) *Krakowski Przegląd Notarialny*, No. 3, 2017, p. 60.

¹¹ Article 4 point 10 of the Act of 3 February 1995 on the protection of agricultural and forestry land (*Journal of Laws of 2022*, item 2409).

¹² W. Gonet, *Problematyka prawa pierwokupu gruntów pod śródlądowymi wodami stojącymi, przysługującego Skarbowi Państwa*, (in:) *Gdańskie Studia Prawnicze*, No. 3(51)/2021, pp. 53-54.

¹³ *Ibidem*, p. 53.

¹⁴ K. Maj, *O ustawowym prawie pierwokupu nieruchomości...*, p. 58.

The dictionary definition of “depression” identifies it as a place that is concave or set back into something.¹⁵ The Water Law does not contain any specification as to surface area or depth, which leads one to assume that Article 23 Section 2 of the Water Law applies to any depression of land that is filled with water and is not a pond. However, the problem may relate to the distinction between a pond and another body of water. On the other hand, the phrase “resulting from human activity” suggests that it refers to those depressions of land which have an anthropological origin and are the result of, for example, earthworks. How such depressions should be treated if some of them are artificial while others are the result of natural processes? It is also questionable whether the water should be in these depressions as a result of natural or human activity. An appropriate application of Article 23 Section 1 of the Water Law leads to the conclusion that waters in man-made depressions should not be directly naturally connected to flowing surface waters, as in such situations they cannot be treated as inland standing waters.¹⁶

As the above analysis indicates crucial definition of the right of pre-emption from the Water Law remains ambiguous in many cases. Article 23 Section 2 of the Water Law is unclear and the reconstruction of the legislator’s intentions by the participants in the trade is subjective which may lead to different results in each case. It is not possible, on the basis of its content, to indicate precisely which depressions of land are inland standing waters. The catalogue of surface-standing waters is not bound to a minimum surface area and even small bodies of water created by natural forces will meet the definition in Article 23 Section 1 of the Water Law. It can be problematic to decide whether a water body, despite siltation and grass growth, should still be considered as a type of inland standing water. The scope of Article 217 Section 13 of the Water Law appears to be too broad and a literal interpretation of the provision may lead to absurd conclusions. The pre-emption right can be applied to real properties that are of little or even no relevance to the proper management of water, however, it limits the rights of the owner.

3. THE REAL PROPERTY GENERAL ISSUES

In view of the scope of the article, it is crucial to define the concepts of real property and land.

According to Article 46 of the Civil Code, real property is defined as parts of the earth’s surface that constitute a separate subject of ownership (land), buildings permanently connected to the land or parts of such buildings, if under specific provisions they constitute a separate subject of ownership from the land. For land

¹⁵ W. Doroszewski (ed.), *Słownik języka polskiego*, Volume X, Wyg-Ż..., p. 508.

¹⁶ W. Gonet, *Problematyka prawa pierwokupu gruntów...*, p. 54.

properties two criteria must be met: part of the plot must be separated by marked external boundaries and it must constitute a separate object of ownership.¹⁷

Although there are two different views regarding real property as land, the dominant view in the doctrine¹⁸ and the accepted one in the judiciary¹⁹ is that real property is a land surface for which a land and mortgage register has been established. In civil law, the terms “landed property” and “land” should be considered synonymous.²⁰

As real property may consist of one or more plots of land,²¹ the terms “real property” and “plot of land” are not identical and must be clearly distinguished. According to paragraph 7 Section 1 of the Ordinance on the registration of land and buildings,²² a registered land parcel is a continuous area of land located within one registration area, homogenous in legal terms, separated from the surroundings by the boundaries of the registered parcels.

The provision of Article 217 Section 13 of the Water Law refers not to real property but to a specific type of land, i.e. concerns land under inland standing waters. Such a formulation may lead to the conclusion that, in principle, there is no separate object of ownership on which the pre-emption right could be exercised. A particular object may in fact be considered to be land, defined by its external borders, but not a piece of land with undefined borders, which is not geodetically divided into a separate cadastral parcel.²³ This approach seems to be too restrictive. It is more reasonable to assume on the basis of Article 37a Section 1 of the Forest Act²⁴ that the right of pre-emption applies to the entire real property. What is more, if only part of the real property meets the prerequisites for the right of pre-emption, this right may be exercised with respect to the whole of it.²⁵

¹⁷ Ł. Żelechowski, (in:) K. Osajda (ed.), *Prawo cywilne. Komentarz, T. I, Przepisy wprowadzające (art. 1-LXV PKW), Część ogólna, Własność i inne prawa rzeczowe (art. 1-352 KC)*, Warsaw 2013, p. 543.

¹⁸ A. Kaźmierczyk, (in:) M. Habdas, M. Fras (eds.), *Kodeks cywilny. Komentarz, T. I. Część ogólna (art. 1-125)*, Warsaw 2018, pp. 352-354.

¹⁹ E.g.: Decision of Supreme Court dated 30 October 2003 r. (IV CK 114/02); Resolution of Supreme Court dated 7 April 2006 (III CZP 24/06); Resolution of Supreme Court dated 17 April 2009 (III CZP 9/09); Resolution of Supreme Court dated 21 March 2013 (III CZP 8/13); Judgment of Supreme Court dated 29 December 2020 (I CSK 27/19).

²⁰ Footnote No. 1613, A. Kaźmierczyk, (in:) M. Habdas, M. Fras (eds.), *Kodeks cywilny. Komentarz...*, p. 351.

²¹ T. Sokołowski, (in:) M. Gutowski (ed.), *Kodeks cywilny. T. I. Komentarz. Art. 1-449*, Warsaw 2016, p. 279.

²² Ordinance of the Minister of Development, Labour and Technology of 27 July 2021 on the registration of land and buildings (Journal of Laws of 2021, item 1390).

²³ P. Czubik, *Pierwokup gruntów pod wodami stojącymi – refleksja na kanwie ustawy z dnia 20 lipca 2017 r. Prawo wodne*, (in:) Nowy Przegląd Notarialny, No. 3, 2017, p. 7.

²⁴ Forest Act of 28 September 1991 (Journal of Laws of 2022, item 672 as amended).

²⁵ W. Fortuński, M. Kupis, *Prawo pierwokupu w nowym prawie wodnym*, (in:) Nowy Przegląd Notarialny, No. 2 (75), 2018, pp. 21-22.

The overlap between the boundaries of the real property and the area of land under water means that the application of the right of pre-emption should not cause major difficulties – the subject of the pre-emption right will be separated.²⁶ However, it is possible that the area covered by water may only be a part of the real property. The method of exercising the pre-emption right, constructed in this way, is imprecise and may in practice be a subject of individual interpretations by judges and notaries.²⁷

The above comment is reinforced by the fact that the Ministry of Maritime Economy and Inland Navigation has issued a legal opinion (hereinafter referred to as the Opinion of the Ministry), which appears to be a response to the doubts that arise when a body of water is located on a real property. The need for such a document is evidence that Article 217 Section 13 of the Water Law is not an example of the most perfect legislation and that the scope of the subject matter of the right of pre-emption is problematic in the practice of trading. Legal opinions of this kind, although they may provide interpretative guidelines for Starosts, notaries and contracting parties, should not be treated as an unquestionable interpretation of the law. Even less do they create obligations or claims.

The Ministry's opinion places great emphasis on the designation in the land register, citing Article 21 Section 1 of the Geodetic and Cartographic Law,²⁸ according to which the data contained in the land and building register constitute the basis for economic planning, spatial planning, assessment of taxes and benefits, designation of real property in land and mortgage registers, public statistics, real property management and the register of agricultural holdings. Paragraph 9 Section 4 of the Land and Building Register Ordinance divides land into those under: 1) internal marine waters, designated by the symbol "Wm", 2) flowing surface waters, designated by the symbol "Wp", and 3) standing surface waters, designated by the symbol "Ws". Following the Opinion of the Ministry, the pre-emption right applies to the last category only.

Nevertheless, the importance of land registration in determining the subject of the pre-emption right should not be overestimated. Firstly, the designation should only be relevant in cases where the water is actually located on the real property. However, if, it is no longer filled with water, the designation with the symbol "Ws" should be irrelevant. Having regard to Article 23 Section 2 of the Water Law, it cannot be ruled out that there will be water-filled depressions on the real property, which have been created by human activity, but the land register will not be updated. The owner's action cannot be a condition for the pre-emption right. It seems that the land register has an important but auxiliary function only, while the analysis of the actual state of affairs on the property is most relevant.

²⁶ P. Czubik, *Pierwokup gruntów pod wodami stojącymi – refleksja...*, p. 7.

²⁷ *Ibidem*, p. 7.

²⁸ Act of Geodetic and Cartographic Law of 17 May 1989 (Journal of Laws 2021, item 1990 as amended).

Doubts arise when the water body is only part of the real property. In such situations, when a fragment of land is marked “Ws”, the pre-emptive right should be referred to the whole real property.²⁹ However, it has to be decided whether the inclusion in one land and mortgage register of several plots of land, where only one meets the conditions of Article 217 Section 13 of the Water Law, should lead to the application of the pre-emption right to all plots of land included in the one land and mortgage register? The answer must be twofold, as it depends on the scope of the sale agreement. If only the plot of land on which the body of water is located, marked “Ws” in the land register, is sold, then the pre-emption right extends only to this particular plot of land. What is relevant for the exercise of the right is the scope of coverage by the sale agreement, so it should not be extended to plots of land that are not the subject of the transaction. The purchase of a plot of land and its detachment from the original land and mortgage register results in the inability to exercise the pre-emption right with regard to the rest of the land covered by that register. Since it relates to real property comprising land under inland standing waters, there are no grounds for covering with pre-emption right plots of land that used to be in the same land and mortgage register with a plot of land covered by such pre-emption right. A different approach must be taken in the case where all plots of land from the same land and mortgage register are sold, and only one of them fulfills all conditions to exercise the right of pre-emption. In such a case, this right should apply to the entire real property i.e. all plots of land constituting the subject of the transaction. However, this principle cannot be applied when the subject of the sale is an area formed by plots of land located in several land and mortgage registers. This would lead to the extension of the scope of the pre-emption right to real property which has no significance for water management, but to be sold in the same transaction with plots covered by water. The sale of several plots of land, one of which meets the conditions for the application of the pre-emption right, while there are other plots in the land and mortgage register, is also complex. Plots of land that are sold together with a plot of land that meets the criteria of Article 217 Section 13 of the Water Law will be subject to the right of pre-emption. However, to the other plots of land in the same land and mortgage register, which were not the subject of the sale agreement, Article 217 Section 13 Water Law should not be applied. It would be irrational to claim that a plot of land is covered by the pre-emption right despite the fact that it does not meet the statutory criteria, but was in the same land and mortgage register with the plot of land that did meet these criteria. Therefore, the contracting parties may cover in conditional agreement the plot of land in respect of which the right of pre-emption may be exercised, and later sell the other plots of land that do not meet the statutory conditions for the application of the right of pre-emption.

²⁹ W. Fortuński, M. Kupis, *Prawo pierwokupu...*, p. 22.

The analysis concerning the definition of land and the scope of application of Article 217 Section 13 of the Water Law indicates the imprecise nature of this regulation. The designation of land with the symbol “Ws” in many cases does not provide a comprehensive answer for determining the scope of the pre-emption right. Opting for the definition of real property as plots covered by the same land and mortgage register leads to the conclusion that this right applies in the event of the sale of real property, partially covered by inland standing waters. The inclusion of several plots of land in the same land and mortgage register in the transaction leads to the conclusion that the right of pre-emption applies to all of them if only one meets the criteria of Article 217 Section 13 of the Water Law. In the case of the sale of real property from several land and mortgage registers, the pre-emption right can only be applied to the one on which inland standing waters are located.

4. SUBJECT MATTER OF PRE-EMPTION RIGHT - DETAILED ANALYSIS

The content of Article 217 Section 13 of the Water Law indicates that the pre-emption right may be exercised in a wide range of factual situations. Reducing the above regulation to absurdity, an artificial pit filled with water would meet the conditions for exercising the right. Thus, since a literal interpretation of the regulation leads to absurd conclusions, it seems most reasonable to refer to the purposes of the Act. These can be reconstructed on the basis of Article 1 of the Water Law. The management of water in accordance with the principle of sustainable development, in particular, with the shaping and protection of water resources, the use of water and the management of water resources, may be relevant when analyzing individual facts.

It is necessary to point out those situations in which the right of pre-emption does unquestionably not apply. By its nature, it may only be exercised by the right holder in the event of the conclusion of a sales agreement and, therefore, will not apply to real property comprising land under inland standing waters disposed of otherwise than by the conclusion of a sales contract.³⁰ Internal sea waters and territorial sea waters are also excluded from the scope of the right of pre-emption, as they are not inland waters. Ponds with intermittent inflow or outflow of water cannot be treated as inland standing waters, which also leads to the fact that they cannot be covered by Article 217 Section 13 of the Water Law.³¹

³⁰ Examples of this are the conclusion of a donation agreement or exchange agreement.

³¹ W. Gonet, *Problematyka prawa pierwokupu gruntów...*, pp. 53-54.

The right of pre-emption applies to land under inland waters in lakes and other natural bodies of water that cannot be associated with inland flowing waters. These include lakes or ponds within the meaning of Article 4 Section 10 of the Act on the protection of agricultural and forestry land. The designation of the land in the register with the symbol “Ws” does not seem to be necessary in these circumstances. More difficulties in providing an unambiguous assessment are caused by depressions of land created as a result of human activity. They can be classified as ditches within the meaning of Article 16 Section 47 of the Water Law, according to which they are artificial channels leading water continuously or periodically, with a bottom width of less than 1.5 meters at the mouth. However, these lands cannot be classified as inland standing waters and are not covered by the pre-emption right.³² This position was also adopted in the Ministry’s Opinion. An interesting view was expressed by W. Fortuński and M. Kupis indicating that water in ditches is collected not for water management purposes, but for appropriate or efficient use of land adjacent to these ditches in connection with agricultural, industrial, or residential activities.³³ The criterion adopted may also apply to other cases. One has to wonder whether such reasoning can be applied to other circumstances and other subjects of the sale agreement.

The construction of roads sometimes involves the need to drain water, which is assisted by retention basins. They fulfill the prerequisites to qualify under Article 232 of the Water Law – they are depressions of land created by human activity. They are built to collect and drain water. On the other hand, it seems that the overriding purpose is to enable the proper use of roads. Given this circumstance, it would have to be concluded that the application of the right of pre-emption would be questionable in this case. However, considering the literal interpretation of Article 217 Section 13 in conjunction with Article 23 Section 2 of the Water Law, it shall be concluded that the right of pre-emption may be applied.

The case of land containing bogs or moorlands is also complicated. It seems that finding the answer in this case requires reference to the provisions of the Regulation on the registration of land and buildings. According to point 25 of Schedule 1 – Classification of land into particular land uses, land under standing surface water does not include the indicated areas, but is wasteland, according to point 9 of that Schedule. The legislator includes in this category *i.a.* bogs, mudflats, meltwaters, moors, swamps, mires, and land covered by waters that are unsuitable for fish production – ponds, waterholes, post-peat pits. The importance of the land register in determining the subject of the right of pre-emption cannot be overestimated, but it seems that the above areas will not constitute the subject of the right of pre-emption under Article 217 Section 13 of the Water Law, as they constitute agricultural land – wasteland.³⁴ In order to carry out proper water management, such areas are not of

³² *Ibidem*, pp. 54-55, see also: W. Fortuński, M. Kupis, *Prawo pierwokupu...*, p. 17.

³³ W. Fortuński, M. Kupis, *Prawo pierwokupu...*, p. 18.

³⁴ W. Gonet, *Problematyka prawa pierwokupu gruntów...*, p. 56.

key importance, and limiting the right of ownership in this case would constitute an excessive burden imposed on the owner. In order to carry out proper water management, such areas are rather not important, and restricting the right of ownership in this case would be an undue burden imposed on the owner.

It seems more common in the market to sell real properties developed with a single-family house on which there are waterholes³⁵ to improve the aesthetics of the garden or swimming pools built for recreational purposes. In this case, it would be irrational for the purposes of the Water Law to exercise the pre-emption right under Article 217 Section 13 of the Water Law.³⁶ For water management that kind of real property is not relevant. The above conclusion is supported by the small size of backyard water bodies. The pools, apart from their small size, are most often filled with water containing chemicals to ensure their cleanliness, and thus the applicability of the pre-emptive right seems doubtful.

In the Opinion of the Ministry, the above problem has been partially solved, as it has been indicated that in the case of pools and ponds located on real property, the right of pre-emption does not apply, as the water in them is not of natural origin. However, such wording is unclear and leads to other potential issues. Determining what the opinion makers meant by the natural origin of the water is problematic – is it the method of supply, the source of drawing, or perhaps the chemical composition? The problem also arises when water has accumulated in waterholes or pools as a result of rainfall or snow melting. In the doctrine, M. Kupis and W. Fortuński pointed out that the right of pre-emption would then apply³⁷ and, given the content of the Ministry's Opinion, one would have to agree with this statement. On the other hand, the rational approach as well as the reference to the objectives of the Act do not justify the above view. The importance of such small reservoirs for water management can be considered limited. Such land covered by the right of pre-emption, and consequently also to the houses erected on it, which form part of the land, leads to the imposition of a highly onerous burden on the trading participants. In the case of swimming pools, the filling with rainwater or snowmelt can only be temporary, as the water will disappear as a result of natural physical processes, making the application of the pre-emption right all the more absurd. Equally skeptical is the inclusion in its scope of land under open pools, thermal baths, or salt pans.³⁸ This is because they are mainly created for recreational or rehabilitation purposes.

³⁵ These are ponds other than those covered by Article 4 Section 10 of the Agricultural and Forestry Land Protection Act.

³⁶ W. Fortuński, M. Kupis, *Prawo pierwokupu...*, pp. 18-19, see also: Legal opinion on the pre-emption right ..., p. 1, and Reply to Interrogation No. 18492 by the Undersecretary of State at the Ministry of Maritime Affairs and Inland Navigation, <https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=60E82B8D> (accessed 2 July 2023).

³⁷ W. Fortuński, M. Kupis, *Prawo pierwokupu...*, p. 19.

³⁸ W. Gonet, *Problematyka prawa pierwokupu gruntów...*, p. 56.

It is also common that fire tanks are located on industrial plants or warehouses. Paragraph 3 Section 1 point 2 in conjunction with paragraph 8 Section 1 of the Ordinance of Ministry of Administration and Internal Affairs on fire water supply and fire roads³⁹ indicates that if there is no water source providing the required amount of water for firefighting purposes, such water may be provided by *i.a.* natural or artificial body of water. If they are an object, not connected to the ground, it is difficult to see how the pre-emption right maybe exercised. However, it cannot be excluded that they represent a depression in the ground, filled with water and created by human activity. The literal interpretation of Article 217 Section 13 *et sq.* of the Water Law leads to the conclusion that in the case of selling such real property, the pre-emption right may be exercised. As in the case of swimming pools, it is difficult to find justification for the exercise of the pre-emption right. The purposes of the Water Law, as defined in Article 1, are incompatible with the function of this type of body of water. Their location next to industrial plants or warehouses is intended to ensure adequate fire safety, as required by the law. The building located on the land, the technical infrastructure (e.g. internal roads), and the fire tank form a coherent whole. It also seems controversial to exercise the pre-emption right over a real property only because the fire tank is located in a depression of land whereas if it were an object standing on the surface of the property, it would be impossible to exercise the right. Finally, it is difficult to agree that in every case of the sale of real property on which an industrial plant or warehouse is located and of which the land under a fire reservoir is a part, it is justified to exercise the pre-emption right in favour of the State Treasury. It is strengthened by an argument that in some cases under paragraph 3 Section 1 point 2 in conjunction with paragraph 8 Section 1 of the Ordinance of the Minister for Internal Affairs and Administration on fire water supply and fire roads such as fire tanks are the only way to provide sufficient fire protection. In addition to the acquisition of the real property, production or storage buildings, which are of no significance for water management, would also be taken over. In such situations, the exercise of the right by the State Treasury would be difficult to be rationally explained by considerations of the Water Law.

A different view should be taken on a body of water on former mining areas of sand, gravel, gypsum, or peat. These areas, when filled with water, will be subject to the pre-emption right under Article 217 of the Water Law. However, if this land is developed for fish farming purposes, the land will no longer be subject to the pre-emption right.⁴⁰ The extension of the right of pre-emption to mined land and land created after gravel pits where water has accumulated is also confirmed in the Ministry's Opinion.

³⁹ The Ordinance of Ministry of Administration and Internal Affairs of 24 July 2009 on fire water supply and fire roads (Journal of Laws of 2009, item 1030).

⁴⁰ W. Gonet, *Problematyka prawa pierwokupu gruntów...*, p. 55 and K. Maj, *O ustawowym prawie pierwokupu nieruchomości...*, p. 64.

An interesting case is the land underneath sedimentation tanks where wastewater is collected in order to be treated and put back into circulation. These facilities are a component of wastewater treatment plants, are the product of human activity, and are located in depressions in the ground. Although they meet the criteria to be covered by the provision of Article 23 Section 2 of the Water Law, it is difficult to consider them as the subject of the right of pre-emption. First of all, they are filled with wastewater, which only becomes clean water after a proper treatment process. The sedimentation tanks are part of the sewage treatment plant and, therefore, exercising the pre-emption right only to them would result in the impossibility of operation of such plants, while extending such a right to the plant itself would be an expansive interpretation, which is impermissible in the case of limiting the right of ownership. Even if we accept that sewage treatment plants can be seen in terms of the use and management of water resources (Article 1 in fine of the Water Law), it is difficult to agree that the State Treasury has exclusivity in this sphere, which is confirmed, for example, by Article 3 Section 1 in conjunction with Article 1 Section 1 point b of the Act on collective water supply and collective sewage disposal.⁴¹ It is, therefore, questionable whether the pre-emption right to acquire land under sedimentation ponds is covered.

The land under the water in the well is not covered by the operation of Article 217 Section 13 of the Water Law. Such water cannot be classified as surface water as it is, by its nature, groundwater. The provision of Article 16 Section 68 of the Water Law includes in this concept all the waters below the surface of the ground in the saturation zone, including groundwater in direct contact with the ground or subsoil.⁴² Consequently, the sale of the property with the well on it will be free of pre-emptive rights.

Hypothetically, the wording of Article 217 Section 13 in conjunction with Article 23 Section 2 of the Water Law also prompts consideration of the case of the sale of real property on which there are depressions of land filled with water which form part of an animal enclosure located in a zoo within the meaning of Article 5 Section 11 of the Nature Conservation Act.⁴³ The land under such basins should not be subject to the pre-emption right. This is because they play a vital role in shaping the semi-natural ecosystem in which the animals on display inhabit. They are, therefore, sometimes necessary for a species to be able to function in a zoo. The relevance of such reservoirs for the purposes indicated in Article 1 of the Water Law appears to be low. Furthermore, if the zoo grounds were a single registered parcel of land, the right of pre-emption would have to be exercised over the entire zoo, which is irrational from the point of view of the Act.

⁴¹ Act of 7 June 2001 on Collective Water Supply and Collective Sewage Disposal (Journal of Laws of 2023 item 537).

⁴² K. Maj, *O ustawowym prawie pierwokupu nieruchomości...*, p. 64.

⁴³ Act of 16 April 2004 on nature protection (Journal of Laws 2022, item 916 as amended).

Finally, the reference should be made to the Opinion of the Ministry, in which it is indicated that the pre-emption right from the Water Law applies only to the sale of land covered by inland standing waters acquired from the State Treasury after the date of entry into force of the Act in accordance with the procedure indicated in Article 217 of the Water Law. This position is derived from paragraph 55 of the Regulation of the President of the Council of Ministers on “Principles of Legislative Techniques”.⁴⁴ The presented view is controversial. First of all, it is not justified to take into account the content of Article 217 Section 13 of the Water Law. The provisions of Article 217 Section 1 and 2 of that act refer to “land under inland standing waters owned by the State Treasury”. A comparison with Article 217 Section 13 of the Water Law, which refers to “land under inland standing waters”, makes it possible to conclude that if the legislator had wanted to extend the pre-emption right only to land acquired from the State Treasury, this would have been reflected in the wording of the provision. The method of interpretation presented in the Opinion of the Ministry significantly alters the wording and meaning of Article 217 Section 13 of the Water Law, narrows the subject-matter scope of the pre-emption right and, in principle, leads to the creation of a completely new provision. Finally, it should be noted that the Ministry’s Opinion is in no way a binding interpretation. It is also difficult to see it as a document on which courts dealing with possible disputes may base their decisions. Moreover, the assumptions adopted in the Ministry’s Opinion are an addition to the Water Law of certain elements that were not introduced by the legislator.⁴⁵

As can be seen from the analysis presented above, the multiplicity of factual situations and the variety of objects that can be qualified as “man-made depressions of land” containing water make it difficult to determine the subject scope of the right of pre-emption under the Water Law. The wording of Article 217 Section 13 in conjunction with Article 23 Section 2 of the Water Law should be considered first and foremost, but these articles do not provide a sufficiently precise answer. An uncritical application of the literal interpretation leads to unacceptable conclusions, as the pre-emptive right would then be applied to such reservoirs which are of no significance for water management. This is unacceptable, as this entitlement constitutes a significant restriction of the right of ownership. It is, therefore, first and foremost necessary to apply a purposive interpretation, which rationalizes Article 217 Section 13 of the Water Law.

⁴⁴ Ordinance of the Prime Minister of 20 June 2002 on the “Principles of Legislative Techniques” (Journal of Laws of 2016, item 283).

⁴⁵ Fortuński, M. Kupis, *Prawo pierwokupu...*, p. 20.

SUMMARY

The conducted analysis of the right of pre-emption from the Water Law reveals a number of problems associated with this right granted to the State Treasury. The problem seems to be twofold. Firstly, it is sometimes difficult to determine whether the subject of the right of pre-emption is only one property or several, and how to deal with a situation in which the subject of the sale and the plots in the Land Register do not coincide. In addition, the multiplicity of cases in which a property may be sold, on which there are depressions of land created as a result of human activity, other than ponds, makes it difficult to see the rationality of applying the provisions on the right of pre-emption of the real property.

First of all, it is difficult to define the subject scope of Article 217 Section 13 of the Water Law. Sale agreements may concern not one, but several or even dozens of plots of land for which a common Land Register is kept, and only part of them will have a body of water constituting inland standing waters. In this situation, it seems that the right of pre-emption should be extended to the entire property in the sense of the Land and Mortgage Register, which, however, cannot apply if several Land and Mortgage Registers are kept for the plots. Extending its application to the other real property, just because it is covered by the same agreement as the real property subject to the right of pre-emption, should be considered too burdensome for the owners and thus unacceptable. There are also problems with the interpretation of Article 217 Section 13 of the Water Law because a literal interpretation leads to the conclusion that the right of pre-emption should be applied to various real properties. It happens more than once that adopting this position leads to absurd results. It is difficult to agree that real properties developed with a single-family house with a swimming pool or pond, as well as industrial plants with fire reservoirs, are important for shaping the country's water management. The issuing of a legal opinion by the Ministry of Maritime Affairs and Inland Navigation only confirms the ambiguity of the regulations. It is not always possible to refer to the land designation in the Land Register, although this is undoubtedly helpful. A more appropriate attitude is to assess each case individually and apply a purposive interpretation, relying heavily on the content of Article 1 of the Water Law.

These problems do not make the pre-emption right unenforceable, but they are a source of practical problems that arise when selling a property on which any body of water in a depression of land is located. The ambiguity in the identification of the object, the complicated notification procedure, and the problematic resolution of the coincidence of pre-emption rights should be considered undesirable for the participants in the transaction.

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