

Are Private Ventures Deterred by Current Space Laws?

Article by: Aaron Thiel

Picture yourself as a savvy venture capitalist looking to invest your wealth on the next best opportunity. Across from the table is some hot-shot engineer explaining how his firm is going to mine six trillion dollars of platinum from an asteroid. He lays out the blueprints, uses fancy acronyms like NEO and LEO, and describes how there are at least 2,000 more asteroids that size, with about 50 more being discovered each year!

Cutting through the hype, you put your business acumen into high gear and ask, "So how long is this project going to take? Projected investment? And risk of failure?"

"Twenty years, start to finish," comes his reply without hesitation. "Eight billion dollar investment with a high probability of failure. But don't forget, we're going after a six trillion dollar opportunity."

The next question, however, will determine whether you sign the papers or show the young lad to the door. "Are you 100% certain that you'll have a right to claim legal ownership over what you extract?"

The face of the engineer goes blank. He reaches down, pulls out a 100-page memorandum from his briefcase, and lays it in front of you. It's from a law firm in which he paid thousands of dollars to answer that very question. Unfortunately, it doesn't answer it very well. In fact, it tells the potential investor that there are two camps with two very different interpretations of the law. To make matters worse, because there is no case law to interpret who's right, the outcome is rather unpredictable and nebulous. At that point, you quickly shuffle the engineer towards the door. As he attempts one final sales pitch, you retort, "Sonny, I'm not going fishing unless I'm absolutely sure that I own 100% of what I catch!"

Ambiguous, unsettled, underdeveloped, and vague are just some of the adjectives to describe the current status of space law. The 1967 Outer Space Treaty (OST), described by some as the "Magna Carta" of space law, is the primary document which governs outer space activities. It is best known for banning the national appropriation of outer space and its celestial bodies. The intent was to keep outer space from becoming our version of the "Wild West." But almost forty years later, the Cold War is history and private enterprise is knocking at the door. Knowing they cannot claim ownership over a celestial body (i.e. the Moon, Mars, or an asteroid), the real question becomes whether the OST will allow a private entity to claim ownership over what it can extract from a celestial body. The answer diverges into two camps.

One camp argues that since the OST prohibits ownership over celestial bodies, the natural resources located on those celestial bodies are also prohibited from ownership and exploitation. In support of their argument, they quote from Article I of the OST, which states in part, ". . . celestial bodies shall be free for exploration and use by all States." They contend that the word "use" should not be interpreted broadly to include the "exploitation" or "appropriation" of natural resources on these celestial bodies.

The second camp argues that although nobody can claim ownership over a celestial body, the appropriation of natural resources from a celestial body is permissible. By using similar analogies which rule the high seas, they contend that the right to appropriate natural resources from a celestial body comes from the freedom to "use" the celestial bodies. Take fishing for example. The fisherman maneuvers his vessel into the international high seas and proceeds to haul in his catch. Although the fisherman doesn't claim ownership to that part of the ocean or the sea bed underneath, he owns his catch. The fish are the natural resource. This is a classic example of how private enterprise can extract natural resources from land it does not own. Another example would be offshore drilling platforms located in international waters. They don't claim ownership to that part of the ocean or the sea bed they're drilling into, but they do own what's extracted.

These arguments using the high seas are further solidified by the events that took place during the lunar landings. Both the U.S. and the Soviet Union collected Moon rocks and returned them to Earth. Neither country claimed ownership to the territory from where they were removed, but they clearly claimed ownership to what they took. In fact, it was reported that the Soviets even sold a small amount of their Moon dirt for \$500,000. To date, no country has disputed either of the appropriations. These circumstances have set a precedent that countries can indeed appropriate a limited amount of natural resources from the celestial bodies and even sell them. The key word, however, is "limited." A bagful of Moon rocks is the precedent. If someone were to rocket tons of natural resources back from Mars, the lunar precedent would do little to deter the onslaught of legal objections.

The prospect of litigation is almost always a bitter pill to the venture capitalist because it means higher risks and added costs. Seeking further amendments or a new treaty could take countless years to obtain. A quicker option might be to test the litigation waters with a series of smaller ventures. These might create just enough precedent to spark the next "Gold Rush." Once investors know for sure that their quarry would belong to them, the floodgates of private enterprise could bust wide open. But until then, the role of private enterprise in space will flounder because of the lack of direction in the law.

Copyright 2005 by Aaron S. Thiel
Attorney Aaron S. Thiel is an avid Space Law enthusiast and published author. Mr.

Thiel has written his latest novel, *The Payload*, to captivate readers with issues relevant to today's Mars rover missions and not-so fictional scenarios that will thrill and excite the imagination. The book provides fast paced suspense, meticulous and intelligent research, fascinating detail, and a surprising twist in the end. To learn more about the author and his writings, please visit his website <http://www.aaronstiel.com> or read his blog at <http://dutchbennettnovelseries.blogspot.com>