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NEMITZ vs. U. S., THE FIRST REAL PROPERTY CASE IN UNITED STATES COURTS[1]

by

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Abstract

In 2003, United States citizen Gregory Nemitz registered a claim to Asteroid 433 Eros in the Archimedes Institute's internet registry. Mr. Nemitz subsequently submitted an invoice to NASA for parking and storage fees, after NASA landed the NEAR Shoemaker spacecraft on the asteroid. NASA and the United States Department of State formally rejected Mr. Nemitz' claim. NASA also stated that it had no legal basis for payment of the invoiced parking and storage fees.

Mr. Nemitz later filed suit against NASA and the State Department in the federal district court for the District of Nevada, alleging that he legally owned the asteroid pursuant to the 1967 Outer Space Treaty and various provisions of the United States Constitution. Upon motion of the United States, the Court dismissed the case for failure to state a claim. The case is now before the Ninth Circuit Court of Appeals.

The author describes and summarizes the principal issues and arguments set forth in the parties' pleadings and briefs, the procedural progress of the case, and the case's current status in the Court of Appeals. Finally, the author discusses the significance of the case for the United States and the international space law community.

Introduction

The issue of real property rights in outer space has become increasingly urgent in recent years. Various individuals have asserted claims to territory in outer space, and various organizations are selling deeds to extraterrestrial property on the Internet.[2] As the media have widely publicized claims, and the number of deeds sold have increased, the issue of property rights has received increasing attention in the space law community.

In 2004 the IISL issued a "Statement by the Board of Directors Of the International Institute of Space Law (IISL) On Claims to Property Rights Regarding The Moon and Other Celestial Bodies."[3] The Statement notes that "'deeds to lunar property' have started to appear, raising the opportunity for individuals to be misled. In addition, the scope of such claims has been extended recently to other celestial bodies. Thus, the Board of Directors of the International Institute of Space Law (IISL) has concluded that there is a need for a statement regarding the current legal situation concerning claims to private property rights to the Moon and other celestial bodies or parts thereof."

One of the claims that the Statement refers to has been asserted by a United States citizen, Mr. Gregory Nemitz. Mr. Nemitz has claimed ownership of Asteroid 433, Eros, and is attempting to collect "parking and storage fees" for NASA's NEAR Shoemaker spacecraft, which landed on the asteroid and remains there as this is written. NASA and the United States Department of State have rejected Mr. Nemitz' claim, and Mr. Nemitz is now suing the United States government. This article explains the lawsuit, analyzes the parties' legal arguments, and discusses the case's significance for the United States and the international space law community.

Factual Background

On February 17, 1996 NASA launched the NEAR Shoemaker spacecraft from Cape Canaveral Air Station.[4] On March 3, 2000, Gregory Nemitz filed a "Class D Claim" with the Archimedes Institute internet registry. Said Claim registered Mr. Nemitz' claim of ownership over Asteroid 433, Eros, and "a volume of space 50 km in altitude into space from every point on the surface of the asteroid."[5] One purpose of the Class D Claim, according to the Archimedes Institute Internet registry, is to set priority among competing claims.[6] A Disclaimer on the Archimedes web site states that "The Institute makes no warranties either express or implied regarding the validity of the claims filed with the registries by any and all claimants. . . . The Archimedes Institute makes no claims of ownership on space resources by virtue of this Registry."[7]

On February 12, 2001, the NEAR Shoemaker craft landed on Eros. On February 16, 2001, Mr. Nemitz sent a letter to Daniel Goldin, the Administrator of NASA, informing him of Mr. Nemitz' "ownership" of the asteroid. Therein, Mr. Nemitz asked NASA to pay a "parking/storage fee" for the NEAR spacecraft, in the amount of $20.00 for a period of one century.[8] NASA denied Mr. Nemitz' claim and refused to pay the invoice, explaining its reasons for during so during the course of a series of letters between the parties.

In a letter dated April 9, 2001, then General Counsel of NASA Edward Frankle said the following:

"Your individual claim of appropriation of a celestial body (the asteroid 433 Eros) appears to have no foundation in law. It is unlike an individual's claim for seabed minerals, which was considered and debated by the U.S. Congress that subsequently enacted a statute, The Deep Seabed Hard Mineral Resource Act, P.L. 96-283, 94 Stat. 553 (1980), expressly authorizing such claims. There is no similar statute related in outer space.

Accordingly, your request for payment of a 'parking/storage fee' is denied. In taking this action NASA does not need to and does not take any position on whether the requirements of the Outer Space Treaty of 1967 apply to private individuals, or whether the Treaty should be amended for this purpose. Your claim depends on the establishment and validity of your ownership of asteroid 433. On the basis of the evidence provided, including your admission that the Archimedes Institute does not have legal authority to confer property rights, you have not established a legal right to any payment. Therefore, NASA has no authority to use its appropriated funds to pay your claim."[9]

On March 7, 2002 Mr. Nemitz filed a Uniform Commercial Code ("UCC") Financing Statement Amendment with the California Secretary of State. Mr. Nemitz filed another Financing Statement Amendment on July 17, 2002. These UCC documents listed Mr. Nemitz as both debtor and creditor, and identified the Eros asteroid as collateral.[10]

In a letter dated August 15, 2003, Ralph L. Braibanti, the Director of Space and Advanced Technology in the Department of State's Bureau of Oceans and International Environmental and Scientific Affairs, wrote: "We have reviewed the 'Notice' dated February 13, 2003, that you sent to the U.S. Department of State. In the view of the Department, private ownership of an asteroid is precluded by Article II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty of 1967). Accordingly, we have concluded that your claim is without legal basis."[11]

Having exhausted his administrative remedies, Mr. Nemitz filed suit against NASA and the Department of State in the United States District Court for the District of Nevada on November 6, 2003.[12] Mr. Nemitz has no formal legal training and is prosecuting the case without the assistance of legal counsel ("*In Propria Persona*").

District Court Case

Mr. Nemitz' Complaint[13]

In his Complaint, Mr. Nemitz asserts that registration of his Archimedes Class D Claim and UCC financing documents evidenced his property rights in asteroid Eros. Mr. Nemitz alleges that his property rights flowed from the "Natural, Inherent Rights of Man to acquire and own property" [sic]. The NEAR Shoemaker spacecraft added value to Eros in the form of "'work equity'" by performing mineral surveying measurements, Mr. Nemitz reasons, and because the United States ratified the Outer Space Treaty, the U.S. government could not own it. Therefore, "This in-situ work-equity was created without an owner. The in-situ work-equity remained unclaimed until Plaintiff, who holds the highest property right to 'Asteroid 433, Eros', subsequently claimed and appropriated that work-equity on February 13th, 2001."

The author is unsure of exactly how Mr. Nemitz claimed and appropriated the work-equity on that date, and is unaware of any legal precedent for imputing work-equity from one party to another. Mr. Nemitz provides no legal authority for this proposition. Moreover, he notes in his Complaint that he "has researched and found no applicable codified or statutory law, either Federal or State, concerning any type of

ownership of property in 'Outer Space.'"

Mr. Nemitz asserts that "An asteroid is a thing and according to centuries of jurisprudence, things are not property unless and until a party originates a claim to it. At the instant of the pronouncement of the claim, a 'thing' transforms into property of one species or another. Upon pronouncement of the claim, a property right immediately vests in the claimant, even before physical possession. This is well settled law under centuries of jurisprudence. Physical possession is not the sole or absolute standard that vests property rights or vests the ability to derive income from property and rights. The level of perfection of the claim increases with the infusion of work-equity into the property, and with the owner's defense of his property rights."

Mr. Nemitz does not provide any legal authority for this line of argument either. And, in fact, the author's research on the subjects of real property rights and mining law, while not exhaustive, leads the author to believe that none of the prominent property theories or statutory schemes for the regulation of real property and mining activities permit acquisition of property or mineral rights based upon nothing more than a claim of ownership.

The United States' General Mining Law of 1872, for example, provides that miner must *discover* a *valuable mineral deposit*, *locate* the claim, record the claim, do at least $100 of annual assessment work or other improvements, file annual affidavits of assessment work with the Bureau of Land Management, and apply for a patent (the italicized words are terms of art that have been defined by the courts).[14] Similarly, the United States' Homestead Act of 1862 required homesteaders to live on the land, build a home, make improvements and farm for 5 years before they were eligible to "prove up" and keep their "free land."[15]

Even in cases where possession may be a difficult or impossible requirement of establishing ownership, the courts have required evidence that the claimant has taken significant steps to possess the property before granting a preliminary claim which can only be perfected by actual possession or appropriation of materials. Uranium mining provides some good examples, because uranium deposits are often deep beneath the earth. In 1958, the Utah Supreme Court held that miners could base a valid discovery of uranium on radiometric (Geiger counter) detection and geological analysis, particularly when miners had physically discovered deposits nearby.[16] In a second similar case, Colorado validated a discovery based on radiometric detection, assaying and the type of rock present at the site.[17] Finally, in a third case, the U.S. Geological Survey made an initial discovery while preparing anomaly maps from airborne surveys. The Nevada Supreme Court validated the claim of the first on-the-ground locator using a Geiger counter.[18]

Mr. Nemitz, on the other hand, has not collected any data regarding the composition of Eros. Nonetheless, based upon his purported property rights, Mr. Nemitz Complaint alleges the following causes of action:

1. Violation of the Fifth Amendment to the United States Constitution: refusal of his claim, continued parking of the spacecraft on the asteroid, and non-payment of storage fees

"comprise unconstitutional 'takings' of Plaintiff's property for the use of the United States without just compensation." The Fifth Amendment says that "private property [shall not] be taken for public use, without just compensation."

2. Violation of the Ninth Amendment to the United States Constitution: The Department of States's and NASA's official determination and conclusions of law deny or disparage Mr. Nemitz' unenumerated and retained rights to claim and own an asteroid. The Ninth Amendment says that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

3. Violation of the Tenth Amendment to the United States Constitution: "The power to prevent any citizen . . . from claiming and owning an asteroid . . . was never delegated to the United States government by the . . . Constitution and has never been . . . reserved by any one of the several states, thus all such powers are reserved to the people." The Tenth Amendment says that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

4. Violation of the Fifth, Ninth and Tenth Amendments to the United States Constitution: In essence, NASA and the State Department have deprived Mr. Nemitz of his property without due process of law. The Fifth Amendment says that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

5. Breach of Implied Contract: NASA has an implied contract with the Plaintiff for the payment of parking and storage fees, and has breached that contract.

6. Public Law 85-568, Sec. 102, (c) and Policy Violations: Arbitrary restriction of property rights by the government has a chilling effect upon privatization and commercialization of outer space. Public Law 85-568, Sec. 102, (c) "require[s] NASA to 'seek and encourage, to the **maximum** extent possible, the **fullest** commercial use of space' (emphasis added)".

Mr. Nemitz' prayer for relief asks the Court to rule as follows:

(1.) Defendants' denial of Plaintiff's claim and interpretation of the Outer Space Treaty is in error; (2.) Defendants' denial of Plaintiff's claim violated his rights; (3.) Plaintiff "has a natural and inherent right to acquire and own property in Outer Space"; (4.) Plaintiff's claim to ownership of Asteroid 433, Eros, is a lawful and valid claim; (5.) Plaintiff's claim is protected by the Ninth and Tenth Amendments to the United States Constitution; (6.) Plaintiff has established a valid legal and equitable claim by virtue of his UCC filings; (7.) Defendants are bound by an implied contract with the Plaintiff and are obligated thereby to pay Plaintiff parking and storage fees of $20.00, plus late fees and interest, in the total sum of $1,007.00; (8.) Defendants are Ordered to pay the Plaintiff's reasonable attorney's fees and costs, plus interest.

The United States' Motion to Dismiss[19]

The United States initially filed a motion for additional time to file an Answer to Mr. Nemitz' Complaint. The Court granted that motion; however, the United States never filed an Answer. In lieu of an Answer, the

Defendants filed a Motion to Dismiss.

The Motion to Dismiss alleges that Plaintiff's Complaint fails to state a claim upon which relief can be granted, pursuant to Federal Rules of Civil Procedure 12(b)(6). As stated in the Motion, "A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be granted if it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "The court must presume that general allegations embrace those specific facts that are necessary to support the claim, but conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss" (citing Nevada v. United States, 221 F. Supp. 2d 1241, 1245 (D. Nev. 2002). The Court has the authority to dismiss a complaint with prejudice for failure to state a claim pursuant to Fed. R. Civ. P. Rule 12(b) when it appears that leave to amend would be futile if the requisite facts cannot be shown" (citing Kenison v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983).

Defendants argue that Plaintiff must establish that he possesses a constitutionally-protected property interest before he can assert (1) a Fifth Amendment "takings" claim (citing, among other cases, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978)); or (2) a violation of Fifth Amendment due process rights (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-71 (1972). Defendants conclude that Plaintiff has not established a protected property interest in Eros, and therefore Plaintiff's "takings" and due process claims fail. In this connection, the Defendants note that: (1) "Article 9 of the California Commercial Code provides a comprehensive scheme for the regulation of security interests in *personal property and fixtures* [emphasis added] . . . and the filing of a UCC form cannot be used by Plaintiff to establish an ownership interest in the Asteroid"; (2) Plaintiff relies upon registration of his claim on the Archimedes Institute Space Property Registry, "a registry which itself disclaims any 'claim of ownership on space resource by virtue of [the] registry.'"; (3) "property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984); (4) Plaintiff's Complaint acknowledges that "Affiant has researched and found no applicable codified or statutory Law, [sic] either Federal or State, concerning any type of ownership of property in 'Outer Space"; and (5) "In effect, plaintiff's claim has no more legitimacy than one based on simply pointing to a distant star and declaring exclusive ownership of it."

The Defendants conclude that "This Plaintiff cannot show any reliance on his property interest in the Asteroid that is anything but arbitrary and, consequently, has failed to show that he has a Constitutionally-protected property interest in Eros." The footnote to this statement says "Because plaintiff has failed to show that he has a Constitutionally-protected property interest in Eros, this Court need not address plaintiff's contention that private ownership of an asteroid is permitted by Article II of the [Outer Space Treaty]."

Finally, the Motion to Dismiss says that in order to prove an implied-in-fact contract, the Plaintiff must prove mutuality of intent to contract, consideration, unambiguous offer and acceptance, and, when the United

States is a party, the "government representative whose conduct is relied upon must have actual authority to bind the government . . . ." (citation omitted). Defendants conclude that Plaintiff has failed to prove any of the elements of this cause of action.

Mr. Nemitz' Response to the Motion to Dismiss

Plaintiff begins his Response by conceding "that his claim for 'breach of implied contract' herein, is insufficient." Next, Plaintiff says that he "does not seek a declaration from this Court that he has an ownership interest in . . . Eros . . . as suggested by Defendants." This statement directly contradicts the Demand for Relief in Plaintiff's Complaint.

Plaintiff argues that he relied upon the registry "for the express purpose of giving the Public Due Notice of his Claim" [sic], and not to prove his ownership. Plaintiff argues that his claim of property rights in Eros is not arbitrary, and it is the type of interest that people rely upon in their daily lives. Plaintiff says that Congress did not ratify the Moon Treaty in part because the Treaty would have unduly restricted private property claims and private property rights. Thus, members of Congress did rely on property rights in outer space in their daily lives. This author believes that one reason members of Congress did not ratify the Moon Treaty was because it could hinder or preclude Congress from protecting the interests of U.S. citizens in the *future*. The author is not aware of any facts which would have lead members of Congress to believe that the Treaty would impair an *existing* right of U.S. citizens to assert claims and establish property rights.

Next Mr. Nemitz agrees that the Constitution does not create property rights, but maintains that he created his property rights. Mr. Nemitz says that "he has invested a significant amount of his time and money to prepare a mission to the asteroid; he intends to take physical possession of the property through a mission to the asteroid funded by investments here on Earth and; to recover samples to be brought back to the Earth. . . . . Speaking with regard to property situated in outer space, a peculiar conundrum exists where it is a practical impossibility to first seize the property by occupation. On earth, title to property gained by occupation, can secure for its owner further investment in that property by third parties. Occupancy of property in outer space can only be obtained by a significant investment first made here on Earth. Investment in outer space property can only be secured if the property can be somehow vested prior to the occupancy."

In the author's view, the Plaintiff's logic is flawed. Nations do not have to vest property rights in private entities *prior* to the time when they undertake activities in outer space, based upon nothing more than the entity wanting to own property and having ideas as to how that property might be used. Nations do not have to violate Article II of the Outer Space Treaty by asserting jurisdiction over territory. Nations can protect their citizens' and space objects' tenure at locations in outer space without exercising jurisdiction over territory, as the author has proposed elsewhere. And investors *will* invest in space ventures so long as their governments enact laws which convince them that their investments will be protected *after* their space objects and personnel are actively occupying and conducting activities in outer space. Finally, it is *not* a practical impossibility for

private entities to occupy locations in outer space, as the Plaintiff has argued. When the American company Scaled Composites won the X-Prize this very week, it demonstrated that private space travel is not only possible, but potentially very affordable.

Plaintiff reiterates the argument from his Complaint that "things are not property unless and until a party originates a claim to it. At the instant of the pronouncement of the claim, a 'thing' transforms into property of one species or another. Upon pronouncement of the claim, a property right immediately vests in the claimant, even before physical possession. This is well settled law under centuries of jurisprudence."

Plaintiff argues at length that citizens have certain inalienable rights, fundamental or natural rights, which include property rights, and that the Constitution protects these rights. Plaintiff does not explain by what authority the United States government would grant or recognize property rights beyond the limits of its territorial sovereignty and national jurisdiction.

The Court's Ruling

On April 26, 2004, the District Court granted the Defendants' Motion and dismissed Plaintiffs claims, with prejudice. Dismissal of Plaintiff's claims *with prejudice* means that the Court has made a final decision on the merits of the case, and Plaintiff cannot reassert his claims in the District Court.

The Judge bases his decision on a determination that neither registration of the Plaintiff's claim on the Archimedes registry, nor the filing of UCC forms creates property rights in the Plaintiff. The Court says that 42 U.S.C. § 2451(c) and (d)(9) (the Congressional declaration of policy and purpose for NASA cited by the Plaintiff) also does not confer property rights upon the Plaintiff. "Neither the failure to [sic] the United States to ratify the . . . Moon Treaty, nor the United States' ratification in 1967 of the . . . Outer Space Treaty, created any rights in Nemitz to appropriate private property rights on asteroids." The Court agrees with Defendants that "A takings claim under the Fifth Amendment of the U.S. constitution requires a constitutionally protected property interest [citation omitted]" and says that "Nemitz has failed to assert such an interest." The Court quotes Nemitz' statement in his Response that Nemitz "does not seek a declaration from this Court that he has an ownership interest in Asteroid 433," and holds that "A complaint may be dismissed as a matter of law for lack of a cognizable legal theory" (citation omitted).

Appellate Court Case

On June 9, 2004, Mr. Nemitz filed an appeal of the District Court's decision in the United States Court of Appeals for the Ninth Circuit.

Mr. Nemitz' Appellate Brief

In his "Appellant's Informal Brief," Mr. Nemitz sets forth the issues that he is raising on appeal. From the perspective of those formally educated in the law of the United States, Mr. Nemitz' arguments are incomprehensible. Mr. Nemitz argues at length that there is a legally significant distinction between the terms "legal" and "lawful," arguing that the District Court found that he had no "legal basis" for his claims, but neglected "its duty to be cognizant of the

equitable 'lawful basis' of the property claim." Mr. Nemitz cites no Constitutional, statutory or case-law authority for a distinction between the terms "legal" and "lawful," and apparently doesn't understand that his Complaint in the District Court did not assert any commonly recognized equitable theories of recovery as a basis for his claims.

Mr. Nemitz' Complaint did not even argue the most basic equitable argument, *i.e.*, that denying him the relief requested in his Complaint would not be *fair*. In the author's opinion, the District Court's dismissal of Mr. Nemitz' Complaint was a fair and equitable result. A declaratory judgment finding that Mr. Nemitz had a right to own property rights in outer space without actually possessing extraterrestrial material or occupying an area of outer space, and allowing Mr. Nemitz to collect rents for use of that material or area, would be unfair to the United States government and its citizens, who spent their tax dollars to develop, build, launch and operate a spacecraft capable of gathering scientific data regarding Eros, and of landing on the asteroid.

A declaratory judgment in Mr. Nemitz' favor would also be unfair to other prospective users, possessors or occupiers of areas in outer space or on celestial bodies who might have the financial wherewithal, or financial credibility to obtain financing to accomplish a successful space mission prior to Mr. Nemitz or the company in which he has invested. As a matter of policy, the District Court's dismissal of Mr. Nemitz' claim does promote commercial utilization of outer space, and is consistent with Congress' mandate for NASA to promote commercial activity because it does not institute a legal regime wherein private entities can control activities upon, exclude others from and extract rents for areas of outer space that they have not directly invested in or utilized in an economically beneficial manner.

Mr. Nemitz also appears to struggle in his brief to communicate the theory that he has acquired property rights pursuant to the natural law theory of property rights, and that such rights accrue independent of law or government action. However, Mr. Nemitz cites no authority for this proposition and avoids or is unaware that the natural law theory of property rights generally requires that a private entity "mix his, her or its labor with the soil" (the author's modern, politically-correct formulation of the ancient principle). Clearly, Mr. Nemitz has not directly invested in or occupied Eros, and merely planning to do so, no matter how many hours are expended in that effort, is not sufficient to establish a valid property claim pursuant to natural law theory. In fact, NASA has directly improved the asteroid, because it functioned as a base for the NEAR spacecraft's collection of scientific data, and the site may one day be a tourist attraction or historical site, as it is the first landing site of a terrestrial spacecraft on an asteroid.

The United States Brief

The United States Appellee Brief points out that Nemitz seeks declaratory judgment pursuant to the Declaratory Judgment Act [citation omitted], but he fails to identify a waiver of sovereign immunity by the United States government or it's agency NASA or its Department of State. The United States reiterates its argument that Mr. Nemitz' claim of a property interest in the asteroid has no legal basis. "Nemitz did not derive his ownership from any source of law, nor has he

relied on his purported ownership in a manner from which one would infer a "natural right" to derive benefits from the property. Instead, he argues that the force of the Constitution should be put behind a property claim established by a regime of his own definition. . . . . He has alleged no basis for his "natural right" to own Eros other than his own statements of ownership.

Mr. Nemitz Reply Brief

Mr. Nemitz Reply again makes arguments that one would not expect from a person trained in the law. He finds something sinister in the Court's requirement that the parties' names be capitalized in the case caption on the cover of documents filed with the court. It apparently doesn't occur to Mr. Nemitz that this requirement springs from a simple common-sense desire of the Court to render the caption of the case readily and easily readable by court personnel who process a large volume of documents on a daily basis.

Mr. Nemitz lists various efforts and expenditures on his part that he says constitute "work-equity," but none of the enumerated effort and expenditures directly benefit Eros and they do not amount to "mixing his labor with the soil." Mr. Nemitz in essence argues that since there is no law directly addressing real property rights in outer space, as a "natural man," Nemitz has the right to make his own law, which constitutes a "LAWFUL basis" for his claim. Nemitz argues that "natural men" have a right "to own private property no matter where it is located," even in outer space. Mr Nemitz fails to recognize that he is not in outer space, where he could argue that the United States has an obligation to ensure that he is safe in his person and property, or that the United States could ensure the safety of his person and property, and promote commercial activity, by enacting a law along the lines of The Deep Seabed Hard Mineral Resource Act, which protects tenure at deep-sea mining sites without exercising territorial sovereignty over the area. If the United States and other nations enacted such laws, they would be consistent with and would not violate the terms of the Outer Space Treaty.

Current Status

Mr. Nemitz has requested that the Court hear oral arguments in this matter, but it is difficult to predict whether the Court will grant that request.

Significance of the Case

Mr. Nemitz has performed a valuable service for the United States, and in particular its aerospace and space law communities. By prosecuting this suit in federal court, he has forced the United States government to critically analyze the domestic law regarding property rights in outer space, and has illustrated and emphasized the importance of this issue to the future of commercial space activity.

The United States government and its legal representatives have alluded to one issue that neither the government nor the Court has addressed in this case. In his letter of April 9, 2001, as quoted above in the Introduction, then General Counsel of NASA Edward Frankle said to Mr. Nemitz "Your individual claim of appropriation of a celestial body (the asteroid 433 Eros) appears to have no foundation in law. It is unlike an individual's claim for seabed minerals, which was

considered and debated by the U.S. Congress that subsequently enacted a statute, The Deep Seabed Hard Mineral Resource Act, P.L. 96-283, 94 Stat. 553 (1980),[20] expressly authorizing such claims. There is no similar statute related in outer space. The United States government also noted in its Motion to Dismiss that in his Complaint Plaintiff acknowledges that "Affiant has researched and found no applicable codified or statutory Law, [sic] either Federal or State, concerning any type of ownership of property in Outer Space."

The issue that the U.S. courts and the parties in this case have not addressed is the question whether the Outer Space Treaty is a "self-executing treaty" under United States law. A "self-executing treaty" is a treaty which directly governs the rights and responsibilities of private entities without implementing national legislation. In the United States, the courts have held, in essence, that a treaty must directly and specifically set forth the rights and obligations of private entities or it is not considered to be "self-executing." In cases where a treaty is not deemed to be self-executing, legislation is required before the treaties' terms govern the actions of or confer rights upon private entities.

The Outer Space Treaty, in this instance, is a public law treaty which clearly governs the actions of national governments that have ratified the treaty. The Outer Space Treaty does not mention the term property rights, nor does it specify the actions that a private entity must take to establish a property right. The treaty is not, therefore, self-executing under United States law, and Mr. Frankle was correct when he informed Mr. Nemitz that his "individual claim of appropriation of a celestial body (the asteroid 433 Eros) appears to have no foundation in law. . . . . There is no [statute similar to the Deep Seabed Hard Mineral Resource Act] related in outer space."

Conclusion

The Courts' final decision in this case will be an important precedent for United States space law. It should establish that private entities in the United States cannot claim private property rights of any sort in the absence of national legislation. In the author's opinion, only movable property rights are permissible under the Outer Space Treaty. Finally, the case is valuable to the United States and international space law communities because it illustrates the need for governments to legally address the issue of property rights in their national legislation.

REFERENCES

1. The author would like to thank Plaintiff Gregory Nemitz and Stephanie Tai, Staff Attorney, Appellate Section of the Environment and Natural Resources Division of the Department of Justice for kindly providing copies of briefs and other documents filed with the Courts in *Nemitz vs. the United States*. The author would also like to acknowledge the assistance of Prof. Carol Rose of Yale University School of Law and David Seipp of Boston University School of Law. Professors Rose and Seipp offered their opinions and case citations regarding the United States theory of property. Both professors teach property law, and Prof. Seipp is an expert on the history of English common law.

2. *E.g.* V. Pop, *The Men Who Sold the Moon: Science Fiction or Legal Nonsense?*, 17 SPACE POLICY 195, 195-197 (2001); V. Pop, *Appropriation in Outer Space: the Relationship Between Land Ownership and Sovereignty on the Celestial Bodies*, 16 SPACE POLICY 275 (2000); W. White, *Interpreting Article II of the Outer Space Treaty*, PROC. FORTY-SIXTH COLLOQUIUM ON THE LAW OF OUTER SPACE, at 171 (IISL 2003).

3. http://www.iafastro-iisl.com/additional%20pages/Statement_Moon.htm (accessed October 5, 2004).

4. Defendant's Motion to Dismiss and Memorandum in Support Thereof, *Gregory William Nemitz v. The United States of America; The United States Department of State; National Aeronautics and Space Administration*, United States District Court, District of Nevada, Case No. CV-N-03-00599-HDM-(RAM) (hereinafter "Motion to Dismiss"), at p. 2.

5. http://www.permanent.com/archimedes/claims/d200003031631.htm (accessed October 5, 2004).

6. *See* http://www.permanent.com/archimedes/PropertyRegistry.html#REGISTRY%20GUIDELINES (accessed December 28, 2004); Motion to Dismiss, *supra*, note 4, at p. 2.

7. http://www.permanent.com/archimedes/register.htm#Disclaimer (accessed October 5, 2004).

8. http://www.erosproject.com/exhibit07.html (accessed October 5, 2004).

9. http://www.orbdev.com/010409.html (accessed Nov. 11, 2003).

10. Complaint for Declaratory Judgment, and Plaintiff's Affidavit and Statement of Facts in Support of Complaint for Declaratory Judgment, *Gregory William Nemitz v. The United States of America; The United States Department of State; National Aeronautics and Space Administration*, United States District Court, District of Nevada, Case No. CV-N-03-00599-HDM-(RAM) (hereinafter "Complaint"), at para. 32; Motion to Dismiss, *supra*, note 10, at p. 3.

11. http://www.erosproject.com/030824.html (accessed October 5, 2004).

12. In the United States, the federal courts do not have jurisdiction to adjudicate claims against the United States government until and unless the plaintiff has exhausted his or her administrative remedies. The Nevada court had *in personam* jurisdiction because Mr. Nemitz was domiciled in Nevada at the time when he filed his Complaint. *See* Complaint, *supra*, note 16, at para. 7.

13. Complaint, *supra*, note 16.

14. W. White, *Mining Law for Outer Space*, SPACE MANUFACTURING 8, ENERGY AND MATERIALS FROM SPACE: PROCEEDINGS OF THE TENTH PRINCETON/AIAA/SSI CONFERENCE, May 15-18, 1991, at Page 83, and citations therein.

15. http://www.nps.gov/home/homestead_act.html (accessed October 5, 2004).

16. *Rummell v. Bailey*, 7 Utah 2d 137, 320 P.2d 653 (1958).

17. *Dallas v. Fitzsimmons*, 137 Colo. 196, 323 P.2d 274 (1958).

18. *Berto v. Wilson*, 74 Nev. 128, 324 P.2d 843 (1958).

19. Defendants' Motion to Dismiss, and Memorandum in Support Thereof, *Gregory William Nemitz v. The United States of America; The United States Department of State; National Aeronautics and Space Administration*, United States District Court, District of Nevada, Case No. CV-N-03-00599-HDM-(RAM) (hereinafter "Motion to Dismiss").

20. Codified at 30 U.S.C. § 1401, *et seq.*