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CREDITORS' RIGHTS TO FORECLOSE ON OUTER SPACE RESOURCES

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ABSTRACT

One of the motives behind the movement for direct space governance as a supplement to space treaty law is the desire to define and use private property rights in space resources (as opposed to space objects that we bring into space). Part of that private property scheme will be the motive to mortgage, pledge, or assign interests in that property to creditors of developers of facilities in space. No such legal capacity is recognized, defined, or used in outer space financing at this time. A new paradigm must be identified for this purpose. The essential element of all creditors' rights for security purposes is the foreclosure remedy. This paper will define the problem and identify a legal structure that will support a foreclosure remedy in favor of creditors of space resource developers. The mortgage, and its modern version called the deed of trust, are common law security devices. These may fit into a common law property rights scheme impressed on public lands and common property such as space resources. The "escheating trust foreclosure" is described as a likely way to secure investors who fund space development projects that involve any incorporation of, citing on, or planning for space resources. The security device will fit real property, personal property, public property, and mixed or combined property in outer space. A direct space governance paradigm is recommended until a treaty regime is adopted for such purpose. This is recommended because there is no other defined escheat agent to manage these foreclosures for the benefit of humanity.

INTRODUCTION

The law of creditors' rights to foreclose on space resources is non-existent because creditors have not taken any security interest in space resources. That is a result of the fact that space resources have been developed by governments which do not need to borrow on the value of the resources they develop and because commercial

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developers have not yet entered space for the purpose of developing its resources. When mortgage lenders are approached to finance outer space development projects, then this issue will become timely.

Furthermore, space is a place but it has not yet been recognized as a place where local commercial law applies. By force of the 1967 Space Treaty it is legally certain that space resources are common property of all humanity and not subject to private ownership or appropriation by nation's corporations, or individuals.[1]

Ownership is commonly referred to as the estate in "fee simple absolute." It is the hallmark of private property at common law. It is our modern day successor to the King of England's grant of Tenements to the landed gentry, knights, and favored members of the court. This kind of title is no longer available in space resources: the treaty burden against appropriation cancels out this possibility. The kind of estate that the treaty created for space resources is known as "public lands."

Common law estates developed over 700 years without infringing on the king's title, the owner's fee simple absolute. These estates at common law were commonly known as possessory estates with infirm title of limited life and equitable only enforcement. The astro law analogy for common law estates is that the highest form of ownership, such as fee simple absolute, is replaced in outer space by the treaty burden of common ownership known as "public lands" and neither are infringed upon by the infirm titles of limited life of possessory estates. The common law equitable estates proposed for space resource public lands are the trust, the lease, the easement, and the mortgage.[2]

In this paper we focus on the mortgage. It is a common law estate like the trust. However, in this estate the trustee is the state and the beneficiary is the creditor and the grantor is the settler (who granted the mortgage estate to the creditor in return for borrowing money). The purpose is to propose a way for creditors to obtain security rights in space resources so future developers in space can borrow money for their projects.

TWO ESTATES ARE BETTER THAN ONE

Legal vs. Equitable Estates

The magic of common law is that it forced every legal title to become subject to a secondary but quite often more important equitable title in the same property. Two titles existed. The legal title was enforced in the court of law. The equitable title was enforced in a court of equity, which evolved from the church court in England and merged into the English judicial system about 500 years ago. One could evoke the Court of Equity jurisdiction in a court of law by first proving that "no adequate remedy existed at law" and then, by asserting "traditional fairness principles" that came out of the church court.

The mortgage estate came about when the holder of a king's deed in fee simple absolute borrowed money from a creditor in return for a promise to repay out of the security of value in the land he owned. The creditor received a written trust agreement that described the land. However, when the owner/borrower defaulted on the loan, the

creditor soon found out that the king's law of titles was not a remedy for creditors: the trust agreement was unenforceable.

The Court of Equity was used to remedy this unfair situation. It had long ago enforced trusts in favor of heirs so the extension of that concept to creditors was logical and legally compelling. This is how the mortgage deed was born: the owner merely had to recite that he pledged his property for security purposes and a secondary estate resulted in the property. The legal consequence in equity was foreclosure, the transfer of possession of the property from the owner to the creditor through the good offices of the state as trustee. In effect the equitable estate of the mortgage was executed and the legal estate of the owner was forfeited.

This worked on any kind of ownership: fee simple absolute, a trust estate, a lease, an easement, and it eventually applied to personal property as well as real estate. For example, today you can register creditor's rights to foreclose on your automobile (clearly personal property) by pledging it under a recording procedure at the motor vehicle department as trustee.

The Space Resources Application

By analogy it is asserted that creditors rights may be applied to space resources as follows:

A. Legal title to remain in Humanity as public lands.

B. Equitable title to be vested in the space developer, such as under a trust, lease or easement (let's say a lease).

C. Creditors may take a pledge of the lease to create an equitable title under the lease (also an equitable title).

D. Foreclose through a trustee of the lease by executing the mortgage estate and forfeiting the lease.

Here three titles are involved: the public lands, the lease, and the mortgage. It is important to observe that the mortgage does not execute on any public lands. It executes only on another equitable title, the lease. This is important because under international space law we are prohibited from owning, holding, or otherwise appropriating the public lands known as space resources.

If we follow the common law model in astro law, the king's title becomes the treaty title, i.e. public lands or space resources. The secondary estates of the lease and the mortgage of the lease are philosophically constructed legal superstructures where the two magic conditions are ripe:

A. There is no adequate remedy at law because the treaty is silent and the United Nations is inactive on titles, and

B. Traditional fairness principles of 700 years are applicable.

In legal effect the two equitable estates are manmade superstructures that append the treaty legal titles to space resources, i.e. the public lands. By analogy the public lands are real estate and the equitable titles are mixed, part real estate and part

personal property. The temporary, limiting, and possessory parts are realty and the manmade superstructure, and legal consequences characteristics are personal property, in a sense. This distinction allows for the recordation of the equitable estates as personal property taken into space by the human developer and, therefore, categorized as "space objects" for recording purposes.

Recordation of space objects is required under the Recordation Treaty of 1975. The manmade equitable titles should be recorded on the sponsoring nation's local registry. Every local registry, such as that maintained by NASA and our Department of Transportation, is legally connected per force of that treaty to the UN Registry of Space Objects in the Office of the Secretary General of the UN. Therefore, the unwitting result is that mortgages of space objects known as leases of space resources may be required by treaty to be registered with the UN.[3]

Possessory Estates are Protected

The foregoing complication of dual titles and resulting policy in favor of creditors' rights against outer space developers of space resources has one lynchpin that needs to be reviewed. The lynchpin is the widely recognized legal principle that possession and the right to possession are typically protected by the courts. The 700-year history of the common law is the best evidence of that principle.

Here the status of the king's title is reflected by a treaty that bestows the higher title of public lands on space resources. The issue is whether any superstructure of possessory rights can attach to the elevated, underlying, treaty decreed, and never before compromised status of space resources as public lands.

The answer is that the courts do it all the time to public lands. The case law is legion in describing legal protection for ranchers who graze cattle on public lands; fisherman who fish in public waters; and people who live on state property for a long time; mine it for various minerals and precious metals; and recreate at will and by habit. The highest court in America has sustained possessory rights on public lands in one form or another for over a century.[4]

Some public lands are not subject to possession. For example, "public monuments" are protected so that no one from the private sector can trespass on them. Here public policy is to prevent defacing of the monument. This exception to the rule is particularly important in outer space policy because there is a movement within the UN to accommodate all kinds of requests to identify vast areas of space resources as public monuments. In 1992 a group of lawyers proposed to the International Institute of Space Lawyers (IISL) meeting in Washington, D.C., that vast areas of the Moon be reserved as a public monument: variations on this theme occur periodically.

Fortunately for future space developers, the lawyers could not agree on how to go about achieving the requested status. Treaty amendment seemed impossible and General Assembly Resolution appeared unlikely. This caveat is a warning to the effect that UN lawyers are not fools and, unless we move forward with a viable and reasonable property regime for outer space soon, the corpus of our trust, space resources, may be placed out of reach of civilians by UN action. It is not impossible for the UN to decree all of outer space a monument.

On the other hand, UN inaction is the first principle of equity: there is a resulting lack of any adequate "remedy at law" so long as the UN fails or refuses to act. This circumstance represents the threshold legal condition for evoking the Court of Equity and its 700-year tradition of providing traditionally fair remedies, such as the creation of possessory estates, including the common law mortgage.

Mining Law

Mining law was never part of the common law as such. The king and parliament made extensive statutory provisions for mining in England. There was always an adequate remedy at law so the courts of equity never obtained jurisdiction in this activity area. Coal mining was by far the dominant kind of mining and the state had an obvious and substantial interest in it.

Regardless of the fact that mining estates did not evolve at common law in England, the creation of mortgages and the execution by foreclosure could nevertheless act on mine titles. The mortgage estate for security purposes was one of the broadest and most powerful legal remedies effected by the court system.

This circumstance makes it ripe for outer space application. Mining in space will probably be effected on leaseholds rather than under mining statutes. Creditors may become protected in such cases.

WHO IS IN CHARGE

By treaty each nation is in charge of its own activity in space. This comes out of the 1967 Outer Space Treaty.[1]

The UN General Assembly has authority to make (or declare by resolution) space policy. It has done so as recently as 1998. Unfortunately, that authority is not broad enough to change treaties. For example, the 1998 UN Resolution on International Cooperation declared that "benefit sharing" was no longer enforceable as a treaty burden, and, instead, should be considered a variation of the treaty burden called "International Cooperation." This resolution most likely will not be effective to eliminate benefit sharing as it declares.

UNCOPUOS is a committee of the UN and it does not assert legislative authority in space. It is a space policy forum only. It does not deal with property law at all.

If the nation and the United Nations are analogized by common law standards to the King of England, they are in charge of the legal system in space. However, by that same standard, their lack of attention to common law subject matter, such as creditors' rights to foreclose on property rights of borrowers, is the exact same legal principle that creates the common law capacity of possessory estates in space resources: "there is no adequate remedy at law."

In a sense, there are two entities in charge of outer space, just as there are two titles to all property at common law. The legal paradigm is in charge by treaty (i.e. the nations and their assembly in the UN) and the "equitable paradigm" that is being created by space activists in response to inaction by the legal paradigm. That's how this works and it is clearly the traditional and recognized solution for 700 years.

United Societies in Space has sponsored the creation of ROUSIS, the 100 year Regency of United Societies in Space. One of its primary missions is to extend common law into the void of space and administer possessory estates for the benefit of all.

LITIGATION IS LIKELY

By process of elimination the likely way to recognize the common law mortgage of leasehold interests in space resources is application to the courts. No other scenario makes sense and the common law itself is a court created paradigm. Interestingly, the trust, the lease, the easement, and the mortgage estates all sprang up by court decree rather than by legislative or executive action. Most of the commerce in the free world is conducted on leasehold estates. It is entirely possible that all of the development of outer space will someday be based on astro law estates founded on a court case rather than by the UN. This scenario would occur when a lender of money to a space developer sought to foreclose on the project as its remedy for default.

The UN is not likely to act in this field of space resource development. The UN Committee of Peaceful Uses of Outer Space (UNCOPUOS) acts on consensus voting where the required affirmative vote is 100%. There are over 50 nations represented on this committee so a consensus is difficult at best. Furthermore, the subject of possessory estates would have to go through its legal subcommittee first and that takes time. In 1998, 40 years after the first manmade debris was inserted into space, the legal subcommittee finally put that subject on its agenda. Nothing as happened to it and nothing is ever expected to happen, no doubt. UN lawyers are more focused on creating a monument out of space than creating useful property rights for future space developers.

Individual states are not likely to solve this problem. The International Space Station was a cooperation among 20 or more states (the European Space Agency representing 16). Despite the opportunity to engage in meaningful ownership/legal problem solving, they all adopted Article 8 of the 1967 Space Treaty – each nation's laws applied inside of its component of the station in space. That precedent will be difficult to amend in the future.

No national legislature will act because space is not viewed as part of its jurisdiction. Nor will any state unilaterally. Nor will any county, city, or special authority.

The only hope for an end to legal uncertainty and for the recognition of rights such as those created at common law is through the courts. Public interest litigation can be commenced by individual citizens for the benefit of all. The legal principle of standing to sue is available to interested parties.[5]

CONCLUSION

Creditors may have a legal right to foreclose security interests in leasehold and other possessory estates that involve space resources. They would not have any rights to the public lands known as space resources apart from the mortgages estate. There is a common law tradition that may be recognized by court action but there is no expectation of legal assistance from any other governmental agency, including the UN.

ENDNOTES

[1] The Outer Space Treaty, 1967, Article 3.

[2] O'Donnell, D.J., Space Resources Roundtable Paper, 1999, *"Property Rights and Space Resources Development,"* Colorado School of Mines, October 27, 1999.

[3] O'Donnell, D.J., Space Resources Roundtable Paper, 2000 A.D., *"Registration of Space Based Property Interests,"* Colorado School of Mines, October 25, 2000 A.D.

[4] Cases that recognize possessory estates on public lands are:

(a) Hunting and Fishing on Public Lands, 35 AM JUR 2nd.

(b) Grazing and Pasturing on Public Lands, Light vs. U.S., 220 U.S. 525; 55 L. Ed. 510; 31 S. Ct. 485.

(c) States that protect private uses of public lands by their highest courts: Arizona, Florida, California, Mississippi, Missouri, Oklahoma, and Oregon for example.

(d) U.S. Supreme Court affirming other private possessory estates on Public Lands in America: Daniels vs. Johnston, 237 U.S. 568, 59 L. Ed. 110, 35 S. Ct. 748; Hedrick vs. Atchison T & S & F.R. Co., 167 U.S. 673, 42 L. Ed. 320, 17 S. Ct. 922.

[5] Plaintiffs for public interest litigation need to demonstrate a relationship to the persons being affected, plus some distinct and palpable threat to those plaintiffs' rights personally. See Warth vs. Selvin, 428 U.S. 106 (1975); Gardner, J., *"Discrimination Against Future Generations,"* Vol. 9 Environ. Law Journal; Allen, T., *"Recognizing Standing,"* Georgetown Int'l Environ Law Journal, Vol. 6.