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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	)	Proceeding under Section 107(*l*)
	)	of the Comprehensive Environmental Response,
1045-1049, 1103 South Santa Fe	)	Compensation, and Liability Act
Avenue, City of Pueblo, Colorado	)	42 U.S.C. § 9607(*l*)
	)	
	)	**DOCKET NO.: CERCLA-08-2022-0003**
	)	

RECOMMENDED DECISION

I. INTRODUCTION

This proceeding pertains to whether the United States Environmental Protection Agency ("EPA" or "Agency") had a reasonable basis in law and fact on which to perfect a lien pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(*l*), on certain property that is owned by 1000 South Santa Fe LLC and 1100 South Santa Fe LLC ("the Companies") and is located at 1045-1049 South Santa Fe Avenue and 1103 South Santa Fe Avenue, Pueblo, Colorado 81006 (parcel numbers 1501400002 and 1501400003) (collectively, the "Parcels"). The proceeding has been conducted in accordance with the requirements of EPA's Supplemental Guidance on Federal Superfund Liens, OSWER Directive No. 9832.12-1a, issued by the Agency on July 29, 1993 ("Supplemental Guidance").

Section 107(*l*) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action under CERCLA shall constitute a lien in favor of the United States upon all real property and rights to such property which: (1) belong to such person; and (2) are subject to or affected by a removal or remedial action. 42 U.S.C. § 9607(*l*). The lien arises as a matter of law at the time costs are first incurred by the United States with respect to a response action under CERCLA or at the time the landowner is provided a written notice of potential liability, whichever is later. 42 U.S.C. § 9607(*l*)(2). The lien also applies to all future costs incurred at a site and continues until the liability for the costs or a judgment against the person arising out of such liability is satisfied or becomes unenforceable through operation of the applicable statute of limitations. *Id.*

By letter dated December 2, 2021, EPA notified the Companies' representative of their potential liability under CERCLA and the Agency's intent to perfect a CERCLA Section 107(*l*) lien for costs incurred by the United States in connection with response actions undertaken by the Agency at the Colorado Smelter Superfund Site (Site). *See* Letter to Alan Gilbert, Esq., Bryan, Cave, Leighton, Paisner, from Christopher Thompson, Associate Regional Counsel for Enforcement, EPA Region 8, Office of Regional Counsel, Re: Notice of Potential Liability and

Intent to Perfect a Lien, Colorado Smelter Superfund Site, City of Pueblo, Pueblo County, Colorado, December 2, 2021, Dkt. No. 1 ("EPA Notice Letter"). The letter also advised the Companies' representative of the opportunity to request a meeting before an EPA neutral official to contest the perfection of the lien. *Id.* By email dated December 22, 2021, the Companies' representative requested such a meeting. *See* Email to Sarah Rae, EPA Region 8, Office of Regional Counsel, from Connie H. King, Law Firm of Connie H. King, LLC, Re: Brown – Response to 12/02/21 Letter from EPA – Colorado Smelter Superfund Site – Object to Perfection of Liens and Request, Dkt. No. 3, ("December 22, 2021, Company Response"). On January 28, 2022, I was designated to serve as the EPA neutral official for purposes of this CERCLA lien proceeding.[1] *See* January 28, 2022, Order, Dkt. No. 2.

On February 24, 2022, I conducted a meeting with the parties using Microsoft Teams. The following people attended the meeting:

- Stephanie J. Talbert, Acting Regional Judicial and Presiding Officer, EPA Region 8
- Katherin Hall, Regional Judicial and Presiding Officer, EPA Region 8
- Katherine Tribbett, Regional Hearing Clerk, EPA Region 8
- Dan Brown, son and representative of Cecil H. Brown
- Connie King, Attorney for the Browns and the Companies
- Brandice Eslinger, Environmental Consultant for the Browns
- Sarah Rae, Senior Assistant Regional Counsel, EPA Region 8 Office of Regional Counsel and legal counsel for EPA
- Andrea Madigan, Section Chief, CERCLA Enforcement Section, EPA Region 8 Office of Regional Counsel
- Christopher Thompson, Associate Regional Counsel for Enforcement, EPA Region 8 Office of Regional Counsel
- Christina Baum, Remedial Project Manager, EPA Region 8
- Sabrina Forrest, Remedial Project Manager, EPA Region 8.

Microsoft Teams generated a transcript of the meeting, and each party had a chance to review and suggest corrections. The final transcript is in the docket.

At the meeting, EPA represented that it had mailed the lien to the recorder's office. Meeting Transcript, Dkt. No. 13, at 3:14-15.

Having reviewed the arguments raised by the parties during the proceeding and in their submissions, the Lien Filing Record, Dkt. No. 4, and the transcript of the February 24, 2022, meeting, and for the reasons set forth below, I find that EPA had a reasonable basis in law and fact to conclude that the statutory elements under CERCLA Section 107(*l*) are satisfied for purposes of perfecting a CERCLA lien on the Parcels.

[1] According to the Supplemental Guidance, the neutral official selected to conduct a CERCLA lien meeting must be an Agency attorney who has not performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved. Supplemental Guidance at 7. An EPA Regional Judicial and Presiding Officer can serve as the neutral official. *Id.* I am an Agency attorney and currently serve as EPA Region 8's Acting Regional Judicial and Presiding Officer when the permanent Regional Judicial and Presiding Officer is unavailable. I have not performed any prosecutorial, investigative, or supervisory functions in connection with this case or the Site. *See also* 40 C.F.R. § 22.4(b) and (c).

II. STANDARD OF REVIEW

Pursuant to the Supplemental Guidance, an EPA neutral official in a contested lien proceeding is required to consider the following five (5) factors in determining whether EPA has or had a reasonable basis in law and fact on which to conclude that the statutory elements for perfecting a lien under Section 107(*l*) of CERCLA are satisfied:

1) *Notice* - Was the property owner sent notice by certified mail of its potential liability under CERCLA for payment of response costs;

2) *Removal/Remedial Action* - Is the property at issue subject to or has it been affected by a removal or remedial action (i.e., a response action);

3) *Response Costs Incurred* - Has the United States incurred costs with respect to a response action performed under CERCLA with regard to the property;

4) *Potentially Liable Party* - Is the property owned by a person who is potentially liable for response costs under CERCLA; and

5) *Other Information Considered* - Does the record contain any other information which is sufficient to show that the lien should not be perfected.

Supplemental Guidance at 7. These factors are based on the statutory requirements set forth in CERCLA Section 107, 42 U.S.C. § 9607. Additionally, for purposes of rendering a Recommended Decision, the EPA neutral official must "consider all facts in the Lien Filing Record established for the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record." Supplemental Guidance at 8.

III. FACTUAL BACKGROUND

The Parcels are located at 1045-1049 and 1103 South Santa Fe Avenue, Pueblo, Colorado. One of the Companies, 1000 South Santa Fe LLC, acquired Parcel number 1501400002 from Cecil H. Brown on November 1, 2011. The other Company, 1100 South Santa Fe LLC, acquired parcel number 1501400003 from Cecil H. Brown on February 21, 2012. *See* Tr. at 2, 3. Cecil H. Brown is the registered agent of the Companies. He and his wife, Beverly Ann Brown, acquired parcel number 1501400002, a four-acre parcel, on August 31, 1982, and parcel number 1501400003, an eight-acre parcel, on August 20, 1986. Email to Stephanie Talbert, EPA Neutral Official, Region 8 Office of Regional Counsel, from Connie H. King, Law Firm of Connie H. King, LLC, Re: Brown - Response to 02-03-22 letter from EPA - Colorado Smelter Superfund Site, Pueblo, Colorado, Superfund Lien, February 17, 2022, Dkt. No. 8 ("February 17, 2022, Company Response"). The parties do not dispute that the Companies are the owners of record of the Parcels.

A century prior to Cecil and Beverly Ann Brown's first purchase in 1982, from 1883 to 1908, the Colorado Smelter ("Smelter") operated as a silver and lead smelter in Pueblo. The Smelter was first operated by The Colorado Smelting Company, which later merged with

ASARCO in 1899. After the Smelter was damaged in the Pueblo Flood of 1921, ASARCO conveyed the property to the Newton Lumber Company. The Newton Lumber Company operated the site as a lumber yard into the 1960s. The property was later sold to a number of individuals and small to medium-sized companies. At one time, smelter slag material was used as track ballast for the D&RG track constructed between Florence and Canon City; and in 1923, bricks from the smelter blast furnace smokestack were used to construct a school. The potential for contamination at the Site was discovered in the early 1990s. In 2010, the Colorado Department of Public Health & Environment conducted a focused site inspection and determined the presence of elevated lead and arsenic levels. *See* Superfund Site: Colorado Smelter, Pueblo Colorado, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0802700#bkground (last visited March 10, 2022) ("EPA Colorado Smelter Website").

EPA listed the Site on the National Priorities List in December 2014 due to concerns about high levels of arsenic and lead in smelter slag (waste from the smelting process) and neighborhood soils. The Site includes the former Colorado Smelter facility, designated as operable unit 2 (OU2), and residential, commercial, and city-owned properties within a 0.5-mile radius of the former smelter, designated as operable unit 1 (OU1). OU2 includes building remains from the former smelter and an approximately 700,000-square-foot slag pile that is 30 feet high in some places. *See id.* The Parcels are located within the Site and are commercial properties within OU2. *See* EPA Notice Letter at 2; Letter to Stephanie Talbert, EPA Neutral Official, Region 8 Office of Regional Counsel, from Sarah Rae, Senior Assistant Regional Counsel, Region 8 Office of Regional Counsel, Re: Colorado Smelter Superfund Site, Pueblo, Colorado, February 3, 2022, Dkt. No. 7, at 7 ("February 3, 2022, EPA Response").

In 2014, EPA performed a removal action at OU2 that included putting up "no trespassing" and "caution" signs to raise community awareness about the presence of heavy metals in OU2. In 2016 and 2017, EPA conducted twenty-seven emergency indoor dust cleanups and seven additional priority indoor cleanups inside homes. In 2017, EPA also conducted a time-critical removal action at Benedict Park to cleanup arsenic contamination located below a play area. *See* EPA Colorado Smelter Website.

Based on the human health risks associated with exposure to arsenic and lead, EPA prioritized sampling and cleanup of the residential properties in OU1 and estimates that the OU1 cleanup will be completed in 2023. With respect to OU2, EPA is in the early stages of data collection, including air monitoring, surface soil sampling, and surface water, pore water, and sediment sampling. EPA plans to conduct additional sampling of subsurface soils, slag, and groundwater in OU2; complete a remedial investigation and feasibility study for OU2 and a public comment period; and issue a record of decision selecting the remedy for OU2. *See id; see also* February 3, 2022, EPA Response, Appendix D. As of February 26, 2021, EPA incurred a total of $2,330,0000 in OU2 costs and continues to incur Site costs. Lien Filing Record at 11.

IV. ANALYSIS OF SUPPLEMENTAL GUIDANCE FACTORS

1. Notice of Potential Liability/Intent to Perfect Lien

For purposes of this proceeding, the Companies do not dispute that their representatives were served notice of their potential liability and EPA's intent to perfect a CERCLA lien on the Parcels. As stated above, EPA mailed a Notice of Potential Liability and Intent to Perfect a Lien to the Companies' representative on December 2, 2021, by Certified Mail Return Receipt Requested. *See* EPA Notice Letter. Accordingly, I conclude that EPA had a reasonable basis to believe that the Notice element is satisfied.

2. Property is Subject to or Affected by a Removal or Remedial Action

For purposes of this proceeding, the Companies do not dispute that the Parcels have been subject to or affected by a removal or remedial action (though they dispute the need for the action – see Section IV.5 below).

Section 104(a) of CERCLA provides, in pertinent part, that:

> (1) Whenever
>
> (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or
>
> (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare, the President is authorized to act, consistent with the national contingency plan, to removal or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time (including its removal from any contaminated natural resource) or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a).

Response actions under CERCLA Section 104(a) can take the form of either a removal action or a remedial action. "Removal actions are generally immediate or interim responses, and remedial actions generally are permanent responses." *In the Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993).

As explained in Section III above, EPA has performed several removal and remedial actions to address contamination at the Site and has indicated that it intends to perform future response actions as needed at the Site, including at OU2, which includes the Parcels. *See* EPA Colorado Smelter Website; February 3, 2022, EPA Response at 6-7; Tr: 19 -12. Accordingly, I conclude that EPA had a reasonable basis to believe that the Removal/Remedial Action element is satisfied.

3. United States Incurred Costs with Respect to a Response Action Under CERCLA

For purposes of this proceeding, the Companies do not dispute that the United States has incurred costs with regard to response actions performed at the Site. As provided in Section III above, according to the Summary of OU2 Costs filed by EPA in this matter, EPA incurred a total of $2,330,000 as of February 26, 2021. Lien Filing Record at 11. Accordingly, I conclude that EPA had a reasonable basis to believe that the Response Costs Incurred element is satisfied.

4. The Companies' Potential Liability Under CERCLA Section 107

For purposes of this proceeding, the Companies do not dispute that the Companies currently hold title to and are the current owners of the Parcels. Under CERCLA Section 107(a), Potentially Responsible Parties include owners or operators at the time of disposal of any hazardous substance, as well as current owners or operators. 42 U.S.C. § 9607(a). Under CERCLA Section 107(a),

> (1) the owner and operator of a … facility… shall be liable for:
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
> >
> > (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> >
> > (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> >
> > (D) the costs of any health assessment or health effects study carried out under Section 9604(i) of this title.

42 U.S.C. § 9607(a); *see also id.* § 9601(20)(A) (defining "owner or operator" to include "any person owning or operating" a facility); 9601(21) (defining "person" to include "an individual, firm, corporation, association, partnership . . . or commercial entity"); *United States v. Middleton*, Case No. 1:11-CV-127 (WLS), 2015 WL 5244433, at *4 (M.D. Ga., Sept. 8, 2015) (limited liability company is within the definition of "person" under CERCLA).

EPA provided evidence to establish the following with respect to the Parcels within OU2, which the Companies do not dispute:

- 1000 South Santa Fe LLC acquired parcel number 150100002 by warranty deed on November 1, 2011.
- 1100 South Santa Fe LLC acquired parcel number 1501400003 by warranty deed dated December 21, 2012.

Lien Filing Record at 3, 4.

The Companies state, and EPA does not dispute, that Cecil Brown acquired the parcels in 1982 and 1986. December 22, 2021, Company Response at 2.

Notwithstanding the Companies' status as the current owners of the Parcels, the Companies assert that they are not potentially liable parties because Cecil Brown, as the Companies' agent, qualifies for CERCLA's innocent landowner defense to liability. *Id.* at 3-4. Indeed, whether a party is a potentially responsible party under CERCLA Section 107(a) and whether a party is liable for response costs under CERCLA are two separate questions. *See Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1352 (2020) ("A property owner can be a potentially responsible party even if he is no longer subject to suit in court. . . . That includes innocent landowners whose land has been contaminated by another, who would be shielded from liability by the Act's so-called 'innocent landowner' or 'third party' defense in § 107(b)(3).") (citations and quotations omitted).

a. Statutory and Regulatory Background of the Innocent Landowner Defense

In enacting CERCLA, Congress made responsible parties strictly liable for response costs incurred in connection with the cleanup of contaminated properties and provided only a limited number of affirmative defenses to liability set forth in CERCLA Section 107(b), 42 U.S.C. § 9607(b). *See State of N.Y. v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir. 1985) (citing 126 Cong. Rec. 30,932 (statement of Sen. Randolph)). With CERCLA's basic remedial purposes in mind, federal courts narrowly construe the scope and applicability of these affirmative defenses. *Shore Realty*, 759 F.2d at 1048-49; *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 n. 2 (W.D. Mich. 1989); *Pinhole Point Properties, Inc. v. Bethlehem Steel Corp.,* 596 F. Supp. 283, 286 (N.D. Cal. 1984) (contrasting CERCLA Section 107(b)'s "extremely limited" defenses with CERCLA Section 107(a)'s "extremely broad" scope of liability).

The third party defense is one of the statutory defenses set forth in CERCLA. It provides in pertinent part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of a release of a hazardous substance and the damages resulting therefrom were caused solely by . . . (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b)(3).

The 1986 amendments to CERCLA (Superfund Amendments and Reauthorization Act of 1986) sought to clarify and define the term "contractual relationship" as used in connection with the third party defense and, in effect, created what is now referred to as the innocent landowner defense, which is a subset of the third party defense.

> The term "contractual relationship," for the purpose of Section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility. . . .
>
> In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of Section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

42 U.S.C. § 9601(35)(A).

In order to establish that the property owner had no reason to know that any hazardous substance was disposed of on the property, CERCLA requires that the property owner establish that he conducted "all appropriate inquiries . . . into the previous ownership and uses of the property in accordance with generally accepted good commercial or customary standards and practices" and that the defendant took reasonable steps to stop any continuing release, prevent any threatened release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance. 42 U.S.C. § 9601(35)(B).

The Conference Committee Report for the 1986 CERCLA amendments (that established the innocent landowner defense) explains that the duty to inquire must be judged at the time of acquisition and that good commercial or customary practice with respect to an inquiry shall mean a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles. In addition, the Report explains that the defense is expected to be used under limited circumstances and that those engaged in commercial transactions should be held to a higher standard than those who are engaged in private residential transactions. *See* H. Rep. No. 99-962 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 3279-3280 (99th Cong., 2d Sess.).

Pursuant to the 2002 CERCLA amendments (Small Business Liability Relief and Brownfields Revitalization Act), EPA promulgated regulations establishing the standards and practices sufficient to constitute "all appropriate inquiries" effective November 1, 2006. These standards require numerous specific inquiries, including:

- conduct interviews with past and present owners, operators, and occupants within 180 days of and prior to the property acquisition date (40 C.F.R. § 312.23);
- review historical sources of information (40 C.F.R. § 312.24);
- review federal, state, tribal, and local government records, including records documenting required land use restrictions and institutional controls at the property (40 C.F.R. § 312.26);
- conduct a visual inspection of the subject property and adjoining properties within 180 days of and prior to the property acquisition date (40 C.F.R. § 312.27);
- review commonly known or reasonably ascertainable information (40 C.F.R. § 312.30);
- conduct a search for environmental cleanup liens and institutional controls filed or recorded against the property (40 C.F.R. § 312.25);
- assess any specialized knowledge or experience of the prospective landowner (40 C.F.R. § 312.28);
- assess the relationship of the purchase price to the fair market value of the property if the property were not contaminated (40 C.F.R. § 312.29); and
- assess the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect any contamination (40 C.F.R. § 312.31).

The 2002 CERCLA amendments also provided that, for properties purchased before May 31, 1997, CERCLA Section 101(35)(B)(iv) requires the court to take into account several factors when determining whether a property owner has established "all appropriate inquiries":

- any specialized knowledge or experience on the part of the defendant;
- the relationship of the purchase price to the value of the property, if the property was not contaminated;
- commonly known or reasonably ascertainable information about the property;
- the obviousness of the presence or likely presence of contamination at the property; and
- the ability of the defendant to detect the contamination by appropriate inspection.

42 U.S.C. § 9601(35)(B)(iv)(I).

b. Factual Analysis

As an initial matter, it is undisputed that the smelter-related arsenic and lead contamination was deposited on the Site prior to Cecil Brown's acquisition of the Parcels (and therefore prior to the Companies' acquisitions) and that neither Cecil Brown nor the Companies contributed to the contamination. It is further undisputed that Cecil Brown and the Companies exercised due care with respect to the contamination once he knew about it. Tr. 1:9-15.

However, EPA disputes that the Companies can establish the innocent landowner defense because EPA argues that the Companies failed to prove that they conducted "all appropriate inquiries" before acquiring the Parcels in 2011 and 2012. EPA further contends that the Companies knew or had reason to know about the contamination prior to acquisition. February 3, 2022, EPA Response at 5; Tr. 4: 9-15. The Companies contend that the relevant question for

purposes of the innocent landowner defense is not whether the Companies knew or had reason to know about the contamination before acquiring the Parcels, but rather whether Cecil Brown had reason to know about the contamination prior to his acquisition of the Parcels in 1982 and 1986. The Companies state that Cecil Brown "undertook all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." Namely, the Companies state that "the tenants at the time did not express any concerns." The Companies further state that when the Companies acquired the Parcels, the acquisition was "a technical transfer" and "not a sale." December 22, 2021, Company Response at 4; *see also* February 17, 2022, Company Response, Attachment 7, at 10. The Companies state that the purpose of the transfers was to settle Cecil Brown's wife's estate so that her interest and Cecil Brown's interest were transferred to the Companies and Cecil Brown was made sole owner and manager. The Companies further state that Cecil Brown's personal tax return includes both LLCs. December 22, 2021, Company Response at 4.

The Companies were formed under the Colorado Limited Liability Company Act. Colo. Rev. Stat. § 7-80-101. The Act states that limited liability companies formed and existing under it "may . . . purchase, take, receive, lease or otherwise acquire, own, hold, improve, use, and otherwise deal in and with real or personal property . . . ." Colo. Rev. Stat. § 7-80-104(1)(b). Such companies may also "conduct [their] business, carry on [their] operations, and have and exercise the powers granted by this article in any jurisdiction. . . ." Colo. Rev. Stat. § 7-80-104(h). "A limited liability company's status for federal tax purposes does not affect its status as a distinct entity organized and existing under this article." Colo. Rev. Stat. § 7-80-107(3).

Thus, under Colorado law, the Companies are distinct legal entities separate from Cecil Brown. As such, EPA seeks to hold the Companies, not Cecil Brown, liable under CERCLA. Tr. 5:15-17. Because the Companies received real property in 2011 and 2012 as distinct entities, I conclude that the Companies "acquired" the Parcels in 2011 and 2012 and those acquisitions are the relevant ones for purposes of determining whether the Companies can establish the innocent landowner defense. *See Seven Springs Limited Partnership v. Fox Capital Management Corp.*, No. CIV. S-07-142 LKK/GGH, 2007 WL 1241844, *2 (E.D. Cal. Apr. 26, 2007) (holding that a limited partnership could not claim the innocent landowner defense based on the actions of its general partner, concluding "Lyddon is not Seven Springs. Although Lyddon may own over 99% of the interest in Seven Springs, the two are still separate legal entities, with separate rights and responsibilities").

The Companies do not dispute that the Companies' member or other representatives did not conduct all appropriate inquiries before the acquisitions in 2011 and 2012. Tr. 17:14-34. Indeed, at the time the Companies acquired the Parcels, their sole member, Cecil Brown, knew or had reason to know about the contamination at the Site because EPA began sampling and conducting community outreach in 2010 and held public meetings in Pueblo in 2011. Tr. 19:21-22; February 3, 2022, EPA Response at 14. Accordingly, the Companies knew or had reason to know about the contamination and failed to conduct the required inquiry under 40 C.F.R. part 312. Thus, I conclude that the Companies cannot establish the innocent landowner defense under CERCLA Sections 107(b)(3) and 101(35). 42 U.S.C. §§ 9607(b)(3); 9601(35).

Even if the relevant time period for purposes of determining whether the Companies could establish the innocent landowner defense was 1982 and 1986, and that Cecil Brown's actions could be attributed to them, the Companies could not establish that Cecil Brown performed all appropriate inquiries into the previous ownership and uses of the facility prior to purchasing the Parcels. In reaching this conclusion, I considered the factors set forth in CERCLA Section 101(35)(B)(iv)(I). Each is addressed in turn:

- Any specialized knowledge or experience on the part of the defendant

Dan Brown stated that Cecil Brown did not have any real estate experience prior to purchasing the first Parcel. Additionally, Dan Brown stated that Cecil Brown did not have any familiarity with environmental issues at the time he purchased the Parcels. Tr. 29:28-30:2.

- The relationship of the purchase price to the value of the property, if the property was not contaminated

The parties did not submit documentation regarding the relationship between the purchase price of the Parcels and their fair market value if not contaminated. Tr. 27:5-35. At the meeting, Dan Brown stated that the prior owners "named the price" and that "[t]here was no negotiation." Tr. 27:6. The Browns' consultant stated that Cecil Brown purchased Parcel 1501400002 for $114,100, and Parcel 150140003 for $305,000. Tr. 27:32-35.

- Commonly known or reasonably ascertainable information about the property

Dan Brown did not present any evidence that Cecil Brown conducted any kind of inspection prior to purchasing the Parcels. *See, e.g.*, Tr. 30: 18-21. EPA presented newspaper articles dating back to the early 1900s that discussed the Colorado Smelter and its operations, including reference to the slag pile. February 3, 2022, EPA Response at 6 and Appendix C. EPA further argued that Cecil Brown could have done a title search, contacted an environmental consultant, and contacted state and federal environmental agencies. Tr. 15:3-19, 30:37-31:3. Mr. Brown stated that his father had been a tenant on the Parcels since 1963 and knew that the smelter was north of the Parcels, but also stated that Cecil Brown was not aware that there had been smelter buildings on his property and thought he was buying a lumberyard at the time of purchase. Tr. 27:6-16; *see also* February 17, 2022, Company Response, Attachment 12, at 99. The Companies also presented a letter from Roger J. Sams, a civil engineer working in Pueblo and near the Site at the time of Cecil Brown's purchase of the Parcels. Mr. Sams stated, "[t]o [his] knowledge, [he] does not recall any activities involving consideration of hazardous materials at this location." December 22, 2021, Company Response at 8.

- The obviousness of the presence or likely presence of contamination at the property

EPA asserts that the presence of contamination should have been obvious to Cecil Brown when he purchased the Parcels due to the large slag pile on property adjacent to the Parcels. EPA also argued that information was reasonably ascertainable regarding the smelter operations and the hazards of lead when Cecil Brown purchased the Parcels. Tr. 10:34-38; 11:22-24; 13:30-42;

14:36-15:19; 30:34-31:3. Ms. King stated that people in Pueblo are familiar with slag and that there are slag piles all over the Pueblo area, but that Cecil Brown was not aware that the slag was causing contamination on the Parcels. Tr. 5:42-6:4. Ms. King also presented evidence that the earliest peer-reviewed publication discussing lead and silver slag was published in 1997. She also stated that it was common for people to reuse silver and lead smelter slag at the time Cecil Brown purchased the Parcels and that people were not aware that the slag could be contaminated. Tr. 12:1-29; December 22, 2022, Company Response at 2. Dan Brown added that slag was used in most residential driveways and railroad beds at the time Cecil Brown purchased the Parcels and no one had any concern about contamination. Tr. 31: 6-9.

- The ability of the defendant to detect the contamination by appropriate inspection

Although Cecil Brown was familiar with the presence of slag in the Pueblo area (see paragraph above), the parties did not present evidence that the arsenic and lead contamination could have been detected by visual inspection in 1982 or 1986. Based on the Lien Filing Record, the arsenic and lead contamination was first discovered in 1992 to 1993 when the Colorado Department of Public Health and Environment first sampled the slag pile. *See* Lien Filing Record, Colorado Smelter Site 2008 Preliminary Assessment at 7.

Considering these factors, especially given that federal courts construe the innocent landowner defense narrowly in light of CERCLA's broad remedial purpose, and that Congress expected when it passed the 1986 CERCLA Amendments that those engaged in commercial transactions would be held to a higher standard than those who are engaged in private residential transactions, I conclude that the Companies did not demonstrate by a preponderance of the evidence that they are innocent landowners, even if the relevant time period for "all appropriate inquiry" was 1982 and 1986. Other than talking to the current tenants, Cecil Brown did not conduct any inquiry at all into the previous ownership and uses of the Parcels prior to the purchases in 1982 and 1986. December 22, 2022, Company Response at 4. While it may not have occurred to him to do so, and it may not have been obvious to him that the nearby slag pile could be contaminated, Cecil Brown failed to meet a threshold requirement of the innocent landowner defense—some kind of inquiry into the previous ownership and uses of the property prior to purchase in 1982 and 1986. 42 U.S.C. § 9601(35)(B)(i)(I). *See also, e.g., 1325 "G" St. Assocs., LP v. Rockwood Pigments NA, Inc.*, No. CIV.A.DKC 2002-1622, 2004 WL 21917089, at *11 (D. Md. Sept. 7, 2004) (describing good commercial practices in the 1980s including reviewing geological surveys, topographic maps, county planning documents, transportation plans, aerial photographs, and leases and titles); *Niagara Mohawk Power Corp. v. Consolidated Rail Corp.*, 291 F. Supp. 2d 105, 128 (N.D.N.Y. 2003) (concluding that a defendant had failed to establish the innocent landowner defense when it produced no evidence of any inquiry), *reversed on other grounds, Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010).

For the foregoing reasons, I conclude that EPA had a reasonable basis to believe that the Companies are potentially liable for the response costs. Accordingly, I likewise conclude that EPA had a reasonable basis to conclude that the Potentially Liable Party element is satisfied.

5. Other Potential Reasons Not to Perfect Lien

The Companies raised two other issues in their submissions and during the meeting. First, they contend that "EPA has not proven that soil contamination is present at a level that would require remediation on the entire 12 acres of the property" and that "EPA does not have enough information to determine whether remedial action is needed." March 8, 2022, Brown Response at 2. This issue is not relevant to any of the elements addressed in this proceeding. The Companies may not agree with EPA's determinations and actions at the Site, but as explained in Section IV.2 above, EPA has determined that response action is required and has incurred costs at the Site.

Second, the Companies assert that EPA told Cecil Brown seven years ago that he was not liable for any costs. December 22, 2021, Brown Response at 6. The Browns also stated that EPA made other representations that the Superfund program would clean up contaminated areas at either government expense or at the expense of the responsible polluter. Tr. 16:1-7; 20:18-23; 21:24-30. EPA responded that the Browns misunderstood EPA's policy towards residential landowners to also apply to commercial landowners. Tr. 20:39-21:7, 21:33-22:2. EPA staff have discussed this policy at public meetings regarding the Site as it relates to the residential sampling and cleanup efforts in OU1. EPA states that the policy does not apply to owners of commercial properties at Superfund sites, like the Companies. *Id.* The misunderstanding is unfortunate, but the Companies have failed to explain how it would support a decision that EPA did not have a reasonable basis on which to perfect the lien on the Parcels.

V. CONCLUSION

Based upon my review of the information set forth in the Lien Filing Record for this matter, the parties' submissions, and the transcript of the meeting, and for the reasons set forth in this Recommended Decision, I conclude that EPA had a reasonable basis in law and fact from which to conclude that the statutory requirements for perfection of a lien under CERCLA Section 107(*l*) are satisfied.

The scope of this proceeding is narrowly limited to the issue of whether EPA had a reasonable basis to perfect its lien. This Recommended Decision does not compel the perfection of the CERCLA lien on the Site; it merely establishes that there is a reasonable basis in law and fact for doing so. The final decision regarding the perfection of the CERCLA lien on the Parcels rests with the Associate Regional Counsel for Enforcement. *See* Region 8 Federal Lien Delegation 14-026. This Recommended Decision does not preclude EPA or the Companies from raising any claims or defenses in any later proceedings. It is not a binding determination of liability. This Recommended Decision has no preclusive effect and shall not be given any deference and shall not otherwise constitute evidence in subsequent proceedings.

STEPHANIE TALBERT

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Date: 2022.04.26 13:06:01 -06'00'

Stephanie J. Talbert
Acting Regional Judicial and Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the attached **RECOMMENDED DECISION** in the matter of **1045-1049, 1103 South Santa Fe Avenue, City of Pueblo, Colorado; DOCKET NO.: CERCLA-08-2022-0003 was** sent via certified receipt email on April 26, 2022, to:

Respondent

Connie King
Law Firm of Connie H. King, LLC
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EPA Region 8

Sarah Rae
Enforcement Attorney
Office of Regional Counsel

April 26, 2022

KATHERINE TRIBBETT
Digitally signed by KATHERINE TRIBBETT
Date: 2022.04.26 13:09:57 -06'00'

Kate Tribbett
Acting Regional Hearing Clerk