UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	)	
	)	
Frontenac Mining Ltd.,	)	**Proceedings Under Section 107,**
and Charles Carlson,	)	**42 U.S.C. § 9607, of the Comprehensive**
General Partner.	)	**Environmental Response and**
	)	**Compensation Act (CERCLA)**
Respondents	)	
	)	

RECOMMENDED DECISION

I. INTRODUCTION

On December 14, 2004, the undersigned conducted an informal administrative hearing[1], via telephone, to determine if the United States Environmental Protection Agency, Region 8 Office ("U.S. EPA", "EPA", "the Agency", "United States", or "Complainant"), has a reasonable basis to perfect a lien, pursuant to Sections 107(*a*) and (*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Re-authorization Act of 1986, Pub. L. No. 99-499 (1986), ("CERCLA", "the Act", or "Superfund"), 42 U.S.C. §§ 9607(*a*) and (*l*), on property owned by Frontenac Mining, Ltd., in which Charles Carlson is the general partner ("Respondent", Partnership", "Frontenac", "the Druid Mine Site", or "the Site"). Participants included:

Alfred C. Smith	Regional Judicial Officer	303-312-6574
Tina Artemis	Regional Hearing Clerk	303-312-6765
Katherine L. Bradford	EPA's Attorney	303-312-6641

[1] Hearing conducted pursuant to: (1) Guidance on Superfund Liens", MEMO: From Thomas Adams dated Sept. 22, 1987. (2) "Supplemental Guidance on Federal Superfund Liens", OSWER DIRECTIVE NO. 9832.12-1A.

Mike Holmes	EPA Enforcement Specialist	303-312-6332
Charles Carlson	General Partner	406-752-0567

Based on information presented at this hearing, and the entire administrative record including, but not limited to, the Lien Filing Record ("LFR") and hearing transcript, I find that the EPA has established a reasonable basis to believe that it has satisfied the statutory elements for perfecting a lien on the subject property, owned by Frontenac Mining Ltd., as set forth in section 107 of CERCLA, 42 U.S.C. § 9607, and explained below:

II. STATUTORY/REGULATORY FRAMEWORK

(1) Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides that:

"the owner and operator of . . . a facility . . . , from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance, 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 the [Act]."

(2) Section 107(*l*) of the CERCLA, 42 U.S.C. § 9607(*l*), provides that:

"All costs and damages for which a person is liable to the United States under subsection (a) of this section . . . shall constitute a lien in favor of the United States upon all real property which- (A) belongs to such person and; (B) are subject to or affected by a removal or remedial action."

(3) Guidance.

- MEMO: "Guidance on Federal Superfund Liens", September 22, 1987.
- MEMO: "Supplemental Guidance on Federal Superfund Liens", OSWER DIRECTIVE NUMBER 9832.12-1a, July 29, 1993.

III. ISSUE

The only issue to be decided in this matter is whether the EPA has a reasonable basis to believe that it has satisfied the statutory elements for perfection of a lien? The Agency satisfies the statutory elements if it establishes that: (1) Respondents have been provided written notice of potential liability under section 107(a) of CERCLA, 42 U.S.C. §9607(a); (2) Respondents own a facility from which there is a release or threatened release of a hazardous substance and is thereby subject to CERCLA; (3) the property is subject to a removal/remedial action and; (4) the United States has incurred costs with respect to a response action under CERCLA.

IV. DISCUSSION

The Clear Creek watershed was placed on the national priority list (NPL) in 1983, and is commonly know as the Clear Creek Superfund Site. The Druid Mine properties owned by Frontenac Mining Ltd., are contained within the Clear Creek Site. According to the Respondent, the Druid Mine Site was mined near the end of the 19th century, again in the World War I era, and finally in the late 1930s through 1941[2]. Deep mining at the Site resulted in substantial waste rock piles on the surface, and acid mine drainage. Acid mine drainage contains toxic amounts of heavy metals and has a low pH (high acid concentration). The release of acid mine drainage, over time, denuded the surface around and down gradient of the Site. The Respondent further related that the Frontenac mine group of properties were leased to Solution Gold Ltd., in about 1987. Solution Gold conducted a leaching operation on the properties from approximately 1988 - 1992. The leaching operation allegedly extracted heavy metals from dumps already existing on the property.

Once a site is classified as a Superfund site, the task of selecting the best, most appropriate clean-up method(s) begins. The Remedial Investigation and Feasibility Study (RI/FS) process is a series of comprehensive investigations and studies to determine both the

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[2] See Exhibit #2, Response to Interrogatories #11.

amount and type of environmental problem or contaminants present (the "RI" part), and the best way to clean up the environmental pollution on the site (the "FS" part). A remedial investigation of the Druid Mine Site, owned by Frontenac Mining Ltd., determined that conditions at the Site met the criteria for initiating a removal action under the National Contingency Plan ("NCP"), 40 C.F.R. § 300.415(b)(2).

On May 5, 2004, EPA sent Frontenac Mining Ltd., and its general partner Charles E. Carlson, a letter notifying them that they may be liable under section 106(a) and 107(a) cleanup costs for remedial and removal actions taken under CERCLA, at the Site[3].

On August 5, 2004, the United States Environmental Protection Agency (EPA) sent Frontenac Mining, Ltd., and its general partner Charles E. Carlson, letter, pursuant to Section 107(*l*) of CERCLA, notifying it of EPA's intent to Perfect a lien on certain properties in the Clear Creek Watershed, including the Druid Mine Site[4]. On September 9, 2004, the Respondent filed a request for a hearing in this matter. This matter was subsequently submitted to the undersigned, pursuant to EPA guidance (Supplemental Guidance on Federal Superfund Liens, OSWER Directive Number 9832.12 - la, July 29, 1993, at 7, hereinafter, "Supplemental Guidance"), as the Regional Official designated to conduct an informal hearing and issue a Recommended Decision in this matter.

On December 8, 2004, the undersigned sent the Respondent a letter confirming an informal hearing in this matter for 10:00 A.M., Tuesday, December 14, 2004[5]. The letter stated

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[3] LFR, Exhibit #8

[4] LFR, Exhibit #9

[5] LFR, Exhibit # 14.

that the sole issue to be determined at the hearing is whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. It further identified the following as factors to be considered in determining this issue:

- Whether the property owner was sent notice of potential liability by certified mail;
- Whether the property is owned by a person who is potentially liable under CERCLA;
- Whether the property is subject to or affected by a removal or remedial action;
- Whether the United States has incurred costs with respect to a response action under CERCLA; and
- Whether the record contains any other information which is sufficient to show that the lien should not be perfected.

The December 14, 2004, informal hearing was transcribed by a Court Reporter. The transcript of the hearing is included in the LFR[6], and incorporated herein by reference. At the December 14, 2004, informal hearing EPA presented evidence to support its claim that it has a reasonable basis to believe that it satisfied all of the statutory elements for perfecting a lien, on property owned by the Respondents. The Respondent objected to a lien being placed on his property and submitted a pre-hearing brief in rebuttal to EPA's claim that there is probable cause to perfect a lien on the Respondent's properties. Below we consider the specific facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien, on property owned by the Respondent:

- ***The property owner was sent notice of potential liability by certified mail.***

The first statutory element considered is, whether EPA provided the property owner with written notice of potential liability. An examination of the lien filing record reveals that on May 5, 2004, Frontenac Mining Ltd., and its general partner, Charles Carlson, were sent notice of

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[6] LFR, Exhibit # 23.

potential liability, under CERCLA, by Certified Mail, Return Receipt Requested[7]. At the December 14, 2004 telephone hearing, Ms. Bradford reaffirmed that the Respondent was sent notice of potential liability on May 5, 2004[8]. The Respondent acknowledged receipt of this notice. I therefore find that the Respondent appropriately received written notice of potential liability, under CERCLA, from EPA.

- ***The property is owned by a person who is potentially liable under CERCLA.***

Pursuant to Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), the term ***"person"*** . . . "means an individual, firm, corporation, association, ***partnership***, (emphasis ours) consortium, joint venture, commercial entity, etc." The property at issue consists of a number of mining claims (collectively referred to herein as "the Druid Mine Site", or "the Site"). Each of the mining claims is specifically identified in the Notice of Intent to Perfect a Superfund Lien[9] (which is incorporated herein by reference), sent to the Respondent. In his Response to Interrogatories[10], Mr. Carlson identifies himself as the sole general partner of the Front Range Royalties, Ltd, a Colorado limited Partnership. He further identifies Front Range Royalties, Ltd. as the sole general partner of Frontenac Mining, Ltd., another Colorado Limited Partnership.

A Real Estate Appraisal Report on the Church Placer & Surrounding Lode Claims, Gilpin County, Colorado, by Hunsperger & Weston, Ltd., completed August, 2002, surveyed properties

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[7] See Exhibit #8, LFR.

[8] See Transcript, p. 8.

[9] Exhibit #9 of the LFR.

[10] LFR, Exhibit 2, page 9, Responses 27 and 29

in the area including, but not limited to, those owned by the Respondent[11]. The Complainant included this report in the LFR to specifically identify those properties owned by the Respondent, from their tax certificates[12]. These tax certificates are incorporated herein by reference.

In the Response to Interrogatories[13], Mr. Carlson admits one hundred percent (100%) ownership of all but three of the mining claims at issue. See Mr. Carlson's response to interrogatories, LFR, Exhibit # 2(5)(a), which is incorporated herein by reference. The Complainant established ownership of the three disputed mining claims by Tax Certificates from Gilpin county for the year 2001[14]. These tax certificates for the year 2001 are corroborated by the tax certificates for the year 2004, which indicate that Frontenac Mining, Ltd. still owns 100% of the three mine claims at issue. This identification was accomplished from the property tax records (See LFR, Exhibit # 2). The three 2004 tax certificates are Exhibits 17, 18 and 19, in the LFR[15]. I therefore find that the subject mining claims listed in 5(a) of the Respondent's response to interrogatories and Complainant's "Notice of Intent to Perfect a Lien"[16] are owned by Frontenac Mining Ltd., and its general partner, Charles Carlson.

- ***The property is subject to or affected by a removal or remedial action.***

Section 107(a) of CERCLA, 42 U.S.C. § 9507(a), provides that: "the owner and operator

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[11] LFR, Exhibit #7.

[12] LFR, Exhibit #3, Tab - B

[13] Exhibit 2 of the Lien Filing Record, Response 5(a)

[14] See Attachment B, Exhibit 3 of the LFR.

[15] Ms. Bradford clarified the issue of owning at the hearing. See Transcript, pp. 9-16.

[16] LFR, Exhibit # 9.

of . . . a facility . . . from which there is **a release** or a threatened **release** which causes the incurrence of **response costs**, of a hazardous substance, shall be liable for . . . . (A) all costs of **removal or remedial** action incurred by the United States Government, or a **"State"**, . . . not inconsistent 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 (emphasis ours) . . . .**"

In part, the terms **"remove, or removal"** mean " . . . such actions as may be necessary to ***monitor, assess, and evaluate*** the **release** or **threat of release** of hazardous substances, ..."[17] The terms **"respond", or "response"**means **remove, removal, remedy, remedial action**;, all such terms (including the terms **"removal" and remedial"** action), including enforcement activities related thereto."[18]

Consistent with the preceding definitions, EPA/State conducted a Remedial Investigation (RI) and Feasibility Study (FS)[19] in 1999 to evaluate clean-up options at the Site know as Operable Unit (OU) # 4, focusing on the North Clear Creek basin. Operable Unit #4 contains the Druid Mine Site, owned by Frontenac Mining Ltd. For OU # 4, the contaminates of primary concern to the environment are Zinc and Copper, with Cadmium, Iron, Manganese and Aluminum being of secondary concern. For human health the primary contaminates are Lead and Arsenic. All of the above are constituents normally present in acid mine drainage in toxic amounts.

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[17] Section 101(23) of CERCLA, 42 U.S.C. § 6901(23).

[18] Section 101(25) of CERCLA, 42 U.S.C. §6901(25).

[19] Clear Creek/Central City Superfund Site, Operable Unit #4, Remedial Investigation (RI) and Feasibility Study (FS). See Attachment to Exhibit # 8, LFR.

The dominant pathway for contaminate movement in the North Clear Creek basin is via surface water. The impacts on the environment and stream system are more severe than the potential impacts to human health.

North Clear Creek is heavily contaminated and has high metals concentrations due to discharging mine tunnels, mine tailings and waste rock piles, and mine wastes in the stream channel are toxic to any fishery. The RI/FS indicated that the South Willis Gulch drainage to the North Fork of Clear Creek from the Druid Mine Site, contributes to this drainage. The Report also finds high potential for contamination by acid mine drainage and runoff[20](release of hazardous materials to the environment). I therefore find that the Druid Mine Site. owned by Frontenac Mining Ltd., and its general partner, Carlson, is subject to a removal and remedial action within the meaning of CERCLA.

- ***The United States has Incurred Costs with Respect to a Response Action.***

At the hearing Ms. Bradford presented evidence from the LFR to corroborate costs incurred by the United States with respect to a response action[21]. First, the Complainant cited Exhibit #4 of the LFR, which is costing information for the entire Operable Unit #4. I find that Exhibit # 4 fails to identify those costs specifically related to actions taken on properties owned by Frontenac Mining Ltd. Therefore, this Exhibit was not considered in arriving at a decision in this matter. The Complainant also presented additional costing information from the LFR to support its claim - Exhibits ##5, 6 and 7. I find that these costs, which are related to the Druid Mine Site, are relevant to the subject issue: of costs incurred by the United States, with respect to this matter.

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[20] See Clear Creek/Central City Superfund Site, Operable Unit 4, RI/FS; LFR, Ex. #8.

[21] Hearing Transcript, pp. 19 -20.

Exhibit #5 of the LFR is a summary of costs for the "Golder Report". The cost of the contract with Golder was given as $79,559.00. Mr. Carlson included a part of the Golder Report" in his pre-hearing brief, which acknowledges his awareness of this report and its contents[22]. In addition, Exhibit #6 is an invoice for $1,000.00, for a Title Report on mining properties owned by Frontenac Mining Ltd., in the Clear Creek watershed. Exhibit # 7 from the LFR, is an Invoice for $7,800.00 from Hunsperger & Weston, Ltd., for its report on Frontenac Mining Ltd. claims, in Gilpin County, Colorado. This report includes tax certificates identifying Frontenac as the owner of the mining claims which are this subject of this action. I find that Exhibits ## 5, 6 and 7, in the LFR, document costs incurred by the United States with respect to response actions under CERCLA, on mining claims owned by Frontenac Mining Ltd., as identified above herein.

- **Other Information Contained in the Administrative Record**

The Respondent, Charles Carlson, objects to this action to perfect a lien on the subject property[23]. His objections in his pre-hearing brief, as in the December 14, 2004 hearing, focused on Mr. Holmes Affidavit; sampling; costs incurred by EPA for response actions; and whether his property is subject to a removal/remedial action. The fact that Frontenac Mining Ltd., and its general partner, Charles Carlson, own the Druid Mine Site, which is the subject of this action, is not disputed by the Respondent. Several other issues which the Respondent raised are discussed below.

First concerning costs, Mr. Carlson questioned the Complainant as to the physical

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[22] LFR, Exhibit # 16.

[23] See Exhibit # 16, LFR.

boundaries of Operable Unit #4[24]. His concern appeared to be that: costs related to OU #4, LFR, Exhibit #4, pertained to the entire Clear Creek Superfund site, not just the Druid Mine Site. The Complainant admitted that this was the case, but this is a moot point since this tribunal did not consider information contained in Exhibit #4 in finding that the United States has incurred costs with respect to the subject response action. The costs considered, by this tribunal, are those documented by Exhibits ##5, 6 and 7 in the LFR, which specifically relate to the Druid Mine Site (see above).

Second, the Respondent entered into an extensive discussion pertaining to sampling in the Hearing[25]. It appears his concern is: whether the property is subject to a removal or remedial action. Sampling could be, but is not necessarily, an element in a Remedial Investigation to determine the type of environmental problem or contaminates present on the Site. The history of the Site is important: the geology of the Site can provide valuable information; photographs and visual observations are important. All of this data must be evaluated to make a Site assessment. An assessment is a response action within the meaning of CERCLA. As noted above, such an assessment was made in this case as part of the RI/FS.

Third, the Respondent alleges that the State of Colorado, not EPA paid for the various reports contained in the LFR, that EPA used to show that it incurred costs with respect to the subject response action. This allegation is without merit. The State of Colorado and EPA are partners in responding to conditions at the Clear Creek Superfund site. Under contract, EPA pays for the State's actions at this Superfund Site. This is provided for by CERCLA and regulations

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[24] See Transcript - pp. 24 -28.

[25] See Hearing Transcript - pp. 29-35.

promulgated pursuant thereto by EPA.

Finally, in its pre-hearing brief, the Respondent focused on the Affidavit of Michael Holmes. Mr. Holmes' Affidavit was not considered by this tribunal, as it was not factual. All of the issues pertinent to this proceeding were decided on other factual information in the administrative record, including the LFR and the Hearing Transcript, as set forth above.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

- Pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607 (a)(1)-(4), "the owner or operator of . . . a facility . . ., from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance, 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 the [Act]."

- Section 107(*l*) of CERCLA, 42 U.S.C. §9607(*l*), further provides that " All costs and damages for which a person is liable to the United States under subsection (a) of this section . . . shall constitute a lien in favor of the United States upon all real property which - (A) belongs to such person; and (B) are subject to or affected by a removal or remedial action.

- The Druid Mining Site is within the Clear Creek Superfund Site area and is a "facility" within the meaning of Section 107(9) of CERCLA, 42 U.S.C. § 9607(9),

- Pursuant to Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A), "the term "owner or operator" means . . . in the case of an onshore facility . . . , any person owning or operating such facility, ... Frontenac Mining, Ltd., and its general partner Charles Carlson, are owners and operators of the facility, within the meaning of the CERCLA.

- The term "person" means an **individual,** firm, corporation, association, **partnership**, consortium, joint venture, commercial entity, United States government, State, municipality, commission, political subdivision of a State, or any interstate body. See Section 101(21) of CERCLA, 42 U.S.C. §9601(21).

Charles Carlson, an individual, and Frontenac Mining, Ltd., a partnership, are persons within the meaning of the Act.

- On May 5, 2004, EPA sent Frontenac Mining Ltd., the owner of the Druid Mine Site, and its general partner, Charles Carlson, Notice of Potential Liability, under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607 for the costs of removal and remedial actions taken at the subject Site.

- On August 5, 2004, EPA sent Frontenac Mining, Ltd., and its general partner, Charles Carlson, a Notice of Intent to Perfect a Superfund Lien, under Section 107(*l*) of CERCLA, 42 U.S.C. § 9607(l), on the Druid Mine Site. See, "Lien Filing Record", Ex. # 9.

- In conducting a Remedial Investigation and Feasibility at the Druid Mine Site, the United States incurred costs in this matter.

- An examination of the entire administrative record finds no information sufficient to show that the lien should not be perfected.

Considering the above, and the entire administrative record including, but not limited to, the Lien Filing Record and transcript of the December 14, 2004, hearing, I find: that EPA has provided notice to Frontenac Mining Ltd., and its general partner, Charles Carlson, of potential liability under CERCLA, and notice of its intent to perfect a lien on the property, known as the Druid Mine Site, in Gilpin County, Colorado; that said property is owned by Frontenac Mining Ltd., and its general partner, Charles Carlson; that the property is contaminated by heavy metals and has the potential to release acid mine drainage and other hazardous materials into the environment; that the property is subject to a removal/remedial action under section 107 of CERCLA, 42 U.S.C. § 9607; that the United States has incurred costs with respect to a response action under CERCLA, with respect to the property and; that there is no information in the administrative record sufficient to show that a lien should not be perfected on the subject property.

VI. SCOPE OF REVIEW

The scope of review of an EPA proposal to file a notice of lien is necessarily narrow. The review is limited to determining whether the administrative record shows that the EPA has a reasonable basis to believe that the statutory prerequisites to filing a lien have been met. The scope of the review is discussed in **Reardon v. United States,** 947 F.2d 1509m 1522-23 (1st Cir. 1991) and in EPA's Supplemental Guidance. The review cannot focus on the selection of the remedy or other matters which are only reviewable in a cost recovery action under Section 107, or are not subject to review. See, Section 113(h), 42 U.S.C. § 9613(h).

VII. CONCLUSION

Upon review of the Lien Filing Record, including supplemental documents and the hearing transcript, as discussed above, I find that EPA has a reasonable basis to perfect its lien.

This recommended decision does not bar EPA or the property owner from raising any claims or defenses in further proceedings. It has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding; nor shall it be a binding determination of liability or non-liability.

Issued this 22th Day of April, 2005.

Alfred C. Smith
Regional Judicial Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **RECOMMENDED DECISION** in the matter of **FRONTENAC MINING LT., and CHARLES CARLSON, General Partner,** was signed on April 22, 2005.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Katherine L. Bradford, Enforcement Attorney, Sharon L. Kercher, Program Director RCRA/CERCLA Technical Enforcement Program, and Michael Risner, Director of Legal Enforcement Program, U. S. EPA – Region 8, 999 18th Street, Suite 300, Denver, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on April 22, 2005, to:

Mr. Charles Carlson, General Partner
Frontenac Mining, Ltd.
12836 N. 60th Street
Scottsdale, Arizona 85254

April 22, 2005

Tina Artemis
Regional Hearing Clerk