UNPUBLISHED OPINION #363

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	
CF&I FABRICATORS OF UTAH, INC., *et. al.*,	Bankruptcy Number 90B-06721
Debtors.	[Chapter 11] (Jointly Administered)
In re:	
(CF&I Steel Corporation) (Colorado-Utah Land Company),	(Case No. 90B-06729) (Case No. 90B-06722)
Debtors.	

MEMORANDUM DECISION AND ORDER RELATED TO DEBTORS' OBJECTION DATED 10-2-92 TO CLAIM OF COLORADO MINED LAND BOARD; DEBTORS' MOTION, DATED 11-2-92, FOR ABANDONMENT OF CERTAIN PERMITTED MINING LAND IN COLORADO; COLORADO MINED LAND RECLAMATION BOARD MOTION DATE 11-4-92 FOR LEAVE TO PURSUE STATE REMEDIES TO ENSURE RECLAMATION OF MINE SITES IN COLORADO OR, IN THE ALTERNATIVE, FOR RELIEF FROM AUTOMATIC STAY; AND COLORADO MINED LAND RECLAMATION BOARD MOTION DATED 11-2-92 TO AMEND PROOF OF CLAIM

These contested matters relate to the cost of reclaiming, and the propriety of abandoning, 227.26 acres in Chaffee County, Colorado, constituting what is known as the Monarch Limestone Quarry (Quarry) and the Monarch Townsite. The issues were raised

through the following pleadings: 1) *Objection dated 10-2-92 to Claim of the Colorado Mined Land Board*, filed by CF&I Steel Corporation and Colorado-Utah Land Company, two of the chapter 11 debtors in the above-referenced, jointly administered case (collectively CF&I)[1]; 2) *Motion Dated 11-2-92 for Abandonment of Certain Permitted Mining Land in Colorado*, filed by CF&I; 3) *Colorado Mined Land Reclamation Board Motion dated November 4, 1992 for Leave to Pursue State Remedies to Ensure Reclamation of Mine Sites in Colorado or, in the Alternative, for Relief from Automatic Stay*; and 4) *Motion Dated November 2, 1992 to Amend Proof of Claim*, filed by the Colorado Mined Land Reclamation Board (Colorado).

The evidence was presented on December 9, 1992. Supplemental briefs and closing arguments were submitted thereafter in writing. The court has now weighed the evidence, considered the arguments of counsel, and made an independent review of applicable case law. Based thereon, CF&I's motion to abandon the Quarry is granted, Colorado's motion to lift the stay is granted in part and solely for the purpose of proceeding with a permit revocation and bond forfeiture hearing, and Colorado's contingent claim is determined to be an unsecured pre-petition obligation and is fixed at $222,662 less offsets representing the amounts realized from forfeiture of financial warranties in favor of Colorado.

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[1] The Official Unsecured Creditors Committee participated in these proceedings. The Committee's position is generally the same as that of CF&I and, for the purposes of this opinion, its positions are included in references to the legal and evidentiary arguments of CF&I.

BACKGROUND

CF&I Steel Corporation and a wholly owned subsidiary, Colorado-Utah Land Company, share ownership of the Quarry.[2] CF&I operated the Quarry from 1931 to 1981 to supply limestone to CF&I's plant in Pueblo, Colorado, where limestone was used in an open hearth process to produce iron and steel products. CF&I eventually converted its manufacturing process to melting scrap metal in electric arc furnaces. That process does not require large amounts of limestone and CF&I's need to operate the Quarry diminished. CF&I then leased the Quarry to an independent entity from 1981 to 1991. No mining activity has taken place at the Quarry since 1991.

The Quarry is located in a narrow valley high in the mountains of Chaffee County, Colorado, approximately 19 miles west of Salida and one mile beyond the town of Garfield. The slopes of the surrounding mountains are heavily forested, setting the steep angular cut of the mine's limestone face in stark relief against the natural landscape. The cut face of the mine, without natural protection, is exposed to the effects of wind, water and continuing erosion. The top of the Quarry sloughs downgrade to the heavily eroded base. Colorado State Highway 115, the Monarch Pass Road, winds through the bottom of the valley and climbs toward Monarch Peak. The slopes of the Monarch ski area are visible

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[2] CF&I Steel Corporation also owns the Cañon Dolomite Quarry in Fremont County, Colorado, consisting of two parcels that cover approximately 480 and 56 acres. The Court previously approved a sale of the Cañon Dolomite Quarry. The order of sale is subject to the transfer of the reclamation permit by Colorado to the purchaser. Until the permit transfer is complete, CF&I remains liable for cost of reclaiming the site. CF&I has not conducted any mining at the Cañon Dolomite Quarry since before the petition date in this case, November 7, 1990. Prior to the hearing on these related matters, Colorado conceded that the cost of reclaiming the Cañon Dolomite Quarry will be less than or equal to the $48,500 financial warranty now in place and CF&I consented to an estimated claim in the same amount.

from the mine. Running roughly parallel to the mine, a shallow fork of the South Arkansas River flows through the valley floor.

The mine itself consists of two quarries that include 216.427 acres of patented mine sites. The upper Quarry is cut out of the mountainside at 10,850 feet above sea level and the lower Quarry at 10,150 feet. Unconsolidated material slides down the high wall from the lip of the upper Quarry to the base of the high wall of the lower Quarry. The low walls associated with the lower Quarry are constructed at a steep gradient 50 to 75 feet high, and consist of rubbleized waste rock material. A slope of processing fines (finely crushed material created by crushing and screening limestone) leads toward the Arkansas River bed 150 feet below the lower Quarry. The Quarry is a hard rock surface mine; there are no underground tunnels or mine shafts. Limestone was loosened from the quarry walls by blasting, screened to size the aggregate limestone and loaded for shipment by rail or truck to the furnaces in Pueblo. No chemical mining processes were used at the Quarry.

Two unoccupied buildings stand at one end of the lower Quarry: a one-story shop office constructed of concrete block on a shallow foundation, and a rugged timber framed crusher and tipple with a metal roof. The tipple was used to load the limestone into railroad cars or trucks. Various other small outbuildings are scattered through the Quarry. A haul road provides access to the upper Quarry. The haul road zig-zags sharply through the limestone mountainside from the upper Quarry downward towards a sediment pond at

one end of the lower Quarry. The haul road, which is owned in part by the Monarch ski area and was leased to CF&I[3], has been in place at least 35 years.

ESTIMATION OF THE VALUE OF COLORADO'S CLAIMS AGAINST THE DEBTORS' ESTATE

The Quarry has not been necessary to CF&I's continued operation for almost thirteen years. Any value the Quarry might have is only a fraction of CF&I's total assets.[4] No significant personal property or removable fixtures remain on the premises. The Quarry consists of partially reclaimed land of which only the upper Quarry is potentially useful as a commercial quarry. The full appraised value of the Quarry based on an income capitalization approach is dependent on: 1) a market for limestone in the immediate area at $5.50 per ton (industrial) and $1.75 per ton (highway and road base), 2) improvements in mine safety to prevent slides from the upper to the lower Quarry, 3) acquiring an easement for the haul road to the upper Quarry, and 4) weather conditions during operation between mid-May and mid-October. CF&I was the major consumer of limestone in the area, but that need has long since ceased. No evidence of any other market for the product was introduced. Without reclamation liabilities, CF&I estimates that the site would have a value based on an income capitalization approach[5] as a limestone quarry of approximately $84,000.

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[3] CF&I rejected the haul road lease as an executory contract.

[4] CF&I's plan of reorganization confirmed by order dated February 12, 1993, provided for the sale of the majority of the estate's assets for an amount in excess of $85,000,000.

[5] Value was based on an income approach only. Availability of comparable sales for operating quarries are limited in the Monarch Pass area and the turnover rate of such properties is minimal. Comparable sales information for operating quarries is nearly impossible to find.

Sixty acres of the Quarry has potential value as recreational property. The full appraised value as a recreational development is dependent on: 1) increased vehicle traffic in the area, 2) commercial activity in surrounding ski resorts,[6] 3) finding a buyer with sufficient financial resources and an interest in developing the property, and 4) ameliorating any potential hazards of falling rock. Based on a sales comparison approach for recreational property, the estimated value of the mine site is $39,750.

Knowledgeable parties located near to the property and having a potential interest in the property were contacted by CF&I to determine any interest in making an offer to buy the Quarry. Those parties contacted indicated they were not interested in purchasing or assuming ownership of the property given the existing reclamation liabilities.

CF&I's operations at the Quarry are subject to two reclamation permits. According to Colorado, approximately 81 acres of land in the upper Quarry and 52 acres in the lower Quarry are subject to reclamation obligations. Colorado issued a Development and Extraction Mining Permit No. M-77-377 in May 1978. The application for Permit No. M-77-377 required an estimate of the costs to perform reclamation. Colorado accepted CF&I's reclamation cost estimate and financial assurance in the form of a $110,000 surety bond purchased from The American Insurance Company. In 1987, the bond was converted to a reclamation only status and a second Permit No. M-87-093 was issued to cover continued active mining in the lower Quarry. CF&I estimated the cost to perform the

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[6] Other regional ski facilities have not been financially prosperous. Monarch Recreational Corporation was purchased by a Japanese group after filing bankruptcy. Conquistador Ski Area was sold by the Small Business Administration on August 5, 1992. Cuchara Ski Area was sold by the Resolution Trust Corporation on August 12, 1992.

reclamation based on the mining plan contained in the second permit application to be $76,000. Colorado accepted CF&I's reclamation cost estimate and CF&I's irrevocable letter of credit for $76,000.

Colorado asserts that the reclamation plans overlap and that the reclamation plan included in CF&I's application for Permit No. M-87-093 specifically provides that reclamation under that permit will be consistent with the plan described in Permit No. M-77-377. Both permits require reclamation of areas disturbed within the permit boundaries consistent with the proposed plans.

The amount of the financial securities provided to Colorado should have reflected the amount it would cost Colorado to hire a contractor to perform the planned reclamation work. The bond and letter of credit are available to Colorado to apply toward the cost of reclaiming the Quarry following forfeiture of the financial warranties. CF&I has no objection to the forfeiture of the bond and letter of credit.

In the time since the mining permits were issued, both parties re-evaluated the cost of reclamation at the Quarry. Colorado's current estimate for reclamation of the Quarry totals $561,196. The estimate includes direct costs of $182,153 for demolition of the buildings, $104,145 for revegetation, $175,895 for earthwork, and $16,205 for mobilization and demobilization. Colorado estimates that indirect costs for contractor's overhead and profit, and contract administration expenses total $82,798. Colorado's estimate also reflects internal costs and is based upon direct experience and the use of the Means Site Work & Landscape Cost Data manual.

CF&I currently estimates the total cost of reclamation at $222,662. Its estimate includes contractors' profit, cost of mobilization and demobilization, and includes both direct and indirect costs. The estimate for demolition of the buildings is $78,888, $43,750 for revegetation, and $100,024 for earthwork. CF&I's estimate is based on the projections of a civil engineering consulting firm familiar with the Quarry. CF&I also utilized estimates from various local sources and the Colorado State Highway Department Cost Data Book. Based upon all the evidence and the credibility of the witnesses, and considering the accuracy of the estimated measurements of the buildings to be demolished, the availability of materials and equipment in Salida, and the amount and nature of earthwork required by the permits, the more accurate estimation of the cost of reclamation of the Quarry is $222,662.

Colorado asserts the Quarry contains several hazards to public health and safety, including a sink hole, the abandoned buildings and tipple, unstable and dangerous low walls on the lower Quarry, a silted-in sediment pond, soil possibly contaminated with oil or PCB's, and a box that possibly contained blasting caps. The proposed reclamation would eliminate any hazard from the abandoned buildings that are to be demolished and the evidence does not support a finding that there was contaminated soil or explosives on the site. Underground tanks that may have existed have been removed, as have any potentially hazardous personal property. Completion of the reclamation plans will also provide erosion control to reduce discharge of sediments into the South Arkansas River, as well as grade and fill subsiding areas.

Colorado filed proof of claim No. 1-0166 to cover reclamation costs under both permits[7] in the amount of $1,270,500 unsecured, $234,00 secured and $590 priority.[8] The claim was later amended by modifying the amount of the alleged bond shortfall to approximately $400,000. Both parties agree that this court has authority under 11 U.S.C. § 502(c)[9] to estimate the unliquidated amounts in excess of the financial warranties in place to cover Quarry reclamation costs. Based on evidence presented at the hearing, and assuming the forfeiture of the bond and letter of credit, Colorado's unsecured, non-priority claim in excess of the $186,000 in financial warranties is $36,662.[10]

CF&I'S MOTION FOR ABANDONMENT PURSUANT TO SECTION 554(a)

The next issue is whether CF&I can abandon the Quarry under § 554(a) in alleged contravention of state laws designed to protect public health and safety. Under § 544(a) "the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[11] The evidence presented at the hearing justifies abandonment under § 554.

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[7] The claim included remediation costs for a permit covering the Cañon Dolomite Quarry.

[8] Colorado now concedes that its priority claim of $590 in connection with unpaid pre-petition penalties assessed against CF&I is a general unsecured claim.

[9] Future citations are to Title 11 of the United States Code, unless otherwise noted.

[10] No deduction is made for the value of the Quarry abandoned to Colorado because, just as there is no realizable equity to CF&I as discussed in subsequent sections of this ruling, there is no evidence of realizable value to Colorado after abandonment.

[11] No trustee had been appointed in this case as of the date of the presentation of evidence, although a plan has now been confirmed. CF&I, in its capacity as debtor-in-possession, has the authority pursuant to § 1107(a) to make the decision relating to abandonment of estate property.

CF&I identifies its prima facie case as the moving party for approval of abandonment under § 554 as a showing that continued ownership of the Quarry represents a "net financial burden" to the estate. Several courts have recognized that in a chapter 7 liquidation where the estate has no equity in a property, abandonment will virtually always be appropriate, because no unsecured creditor could benefit from its administration. *In re Paolella*, 79 B.R. 607, 609-10 (Bankr. E.D. Pa. 1987), and cases cited therein. Proof that an estate lacks equity in property sets forth at least a prima facie case that the property is of inconsequential value and benefit to the estate. *Id.* at 610. "In a motion brought pursuant to section 554(b), it is the movant who must make out a prima facie case." *Id., citing In re Nat'l Smelting of New Jersey, Inc.*, 49 B.R. 1012 (Bankr. D. Colo. 1985). *Paolella* also noted in a footnote that in a reorganization case the estate may benefit from fully encumbered property, but such consideration is not relevant in chapter 7 liquidation.

CF&I, a chapter 11 debtor-in-possession at the time of this hearing, established that the Quarry, without reclamation liabilities of $222,662, might have a market value of $84,000. Colorado attempted to rebut CF&I's prima facie showing with the following calculation: 1) Colorado holds a total of $186,000 in financial warranties that may be used for site reclamation whether or not the Quarry is abandoned, 2) the unsecured portion of the reclamation cost is $36,662, therefore, 3) there is $47,338 in equity remaining in the Quarry and CF&I has not met its prima facie burden. This analysis fails because the appraisal report relied upon by the parties for the $84,000 market value conditions this valuation with the conclusion that there is no market for the property, and that valuation is conditioned upon a series of events that were not proved to have occurred. Under current

economic conditions in the region as set forth in the appraisal, and persisting concerns about geological stability at the site, it would be a practical impossibility to find a buyer for the Quarry. In fact, attempts by CF&I to interest a buyer have been futile. Regardless of the appraised value of the property, there is no realizable equity in the property available to CF&I prior to abandonment or to Colorado after abandonment.

At least one court has recognized that where reorganization is contemplated, the estate might ultimately realize some benefit from the use of fully encumbered property. *In re Beker Indus. Corp.*, 64 B.R. 900 (Bankr. S.D.N.Y. 1986), *order rev'd by*, 89 B.R. 343 (S.D.N.Y. 1988).[12] In *Beker Industries*, a chapter 11 debtor-in-possession sought to sell an important, but arguably unprofitable, asset out of the ordinary course of business prior to plan formulation and acceptance of a plan or in the alternative, to abandon the property under § 554. The court held that the debtor was not entitled to abandon a fertilizer manufacturing plant or the debtor's interest in a partnership owning and operating a phosphate mine supplying raw material for use at the plant, where there was evidence of possible return to profitability and recovery of maintenance costs. *Id.* at 910-12. The court concluded that the test announced in *Committee of Equity Security Holders v. Lionel Corp.*

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[12] In *Beker*, the bankruptcy court concluded that there was no good business reason for abandonment of estate assets in light of the overall posture of the case. The court charged the maintenance cost to the secured creditors pursuant to § 506(c) and disposed of the debtor's argument that denial of their motion would inappropriately saddle them with maintenance charges on a property in which they had no equity. The district court reversed the bankruptcy court order assessing the costs of maintaining estate assets because maintenance would not confer a direct benefit on the secured creditors. The district court did not overrule the lower court's application of the *Lionel* test to a motion to abandon property by a chapter 11 debtor-in-possession. The court disapproved of the logic employed by the lower court to reach the conclusion to pay maintenance costs from the proceeds of the sale of the assets after the motion to sale or abandon had been denied.

(In re Lionel Corp.), 722 F.2d 1063, 1070-71 (2d Cir. 1983), applies to a § 554(a) motion seeking abandonment of a major asset in a chapter 11 case.

To reach this conclusion, the court compared the policy supporting abandonment in chapter 7 cases to additional considerations in chapter 11 cases that are distinct from expeditious liquidation of estate property:

> A finding that burdensomeness or of "inconsequential value and benefit" is generally sufficient to justify abandonment in a Chapter 7 case because it serves "the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors . . . ."

Beker Indus., 64 B.R. at 908 (quoting *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection,* 474 U.S. 494, 508 (1986)(Rehnquist, J., dissenting)(citation omitted). But even in chapter 7 cases, restrictions on the trustee's power to abandon are not limited to considerations of the property's value or burdensomeness to the estate. In *Beker Industries*, abandonment of a major asset posed the danger of circumventing the plan process. In adopting application of the *Lionel* test to chapter 11 abandonment cases, Judge Buschman noted that "[j]ust as Congress could not have intended § 554(a) to swallow up environmental protection statutes and ordinances, it could not have intended § 554(a) to swallow up Chapter 11's safeguards or its purpose." *Beker Indus.*, 64 B.R. at 909.

However, chapter 11 contemplates not only business reorganization plans but liquidation plans as well. § 1123(a)(5)(D). Under the terms of the chapter 11 plan confirmed in this case shortly after the hearing on abandonment of the Quarry, CF&I made no provision for continued ownership of the Quarry. The confirmed plan liquidated the majority of CF&I's assets. As a reorganized debtor, CF&I is no longer engaged in steel

production. There is a remote and highly unlikely possibility of future benefit if CF&I retained and reclaimed the Quarry, found a buyer for the Quarry and distributed the proceeds to unsecured creditors. Even if it could be argued that the *Lionel* test should be applied to a liquidating chapter 11 case, the costs CF&I must incur to reclaim, maintain and preserve the Quarry compared to the overall liquidating posture of the case or benefit to creditors, leads to the conclusion that there is no good business reason or justification for retaining the Quarry. Realistically, retention of the Quarry will only diminish the funds that are presently available to the estate's general creditors. CF&I has met its prima facie burden for abandonment by showing the Quarry is burdensome, or that it is of inconsequential value and benefit to the estate. That showing cannot be rebutted by the speculative nature of any possible future benefit to be derived by the reorganized debtor.

Recognizing that CF&I, as the moving party, has satisfied its burden to make out a prima facie case for abandonment based on the lack of realizable equity in the Quarry, that showing may be rebutted on the basis that the abandonment would contravene state law designed to protect public health and safety from identified hazards. In *Midlantic*, Justice Powell, writing for the majority, held that: "[N]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety." *Midlantic*, 474 U.S. at 502. Contrary to Colorado's position that CF&I bears the burden of proving that there is no threat to public health and safety, the court finds that it is the burden of the party opposing abandonment to prove that abandonment is improper under the *Midlantic*

exception to the statutorily unqualified power of abandonment. *See, In re Paolella*, 79 B.R. 607, 610 (Bankr. E.D. Pa. 1987); *In re Purco*, 76 B.R. 523, 533 (Bankr. W.D. Pa. 1987).

In *Midlantic* the Supreme Court established an exception to abandonment under § 554(a) where abandonment would be in "direct contravention of state and local laws designed to protect public health and safety." *Id.* at 762. Before state environmental laws can operate to restrict the otherwise unfettered abandonment power under § 554(a), "imminent and identifiable harm" to the public health or safety must be shown. *Midlantic*, 474 U.S. at 507, n. 9.[13] Since *Midlantic*, courts have struggled with balancing a debtor's need to abandon property with the need to protect the public health and safety.

In *In Re Franklin Signal Corp.*, 65 B.R. 268 (Bankr. D. Minn. 1986), the court developed guidelines to determine under what conditions a bankruptcy court may approve abandonment of property in contravention of state law. The court rejected a strict interpretation of *Midlantic* by holding that a trustee's power of abandonment of property in contravention of state law is not restricted if conditions are formulated that will adequately protect the public health and safety. *Id.* at 271; *see also, In re Oklahoma Refining Co.*, 63 B.R. 562 (Bankr. W.D. Okla. 1986). Although conditions for abandonment must be

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[13] The bankruptcy trustee in *Midlantic* requested court approval to abandon two waste oil processing facilities that had accepted a substantial quantity of oil contaminated with PCBs. The estimated cost of cleaning-up and removing the contaminated oil substantially exceeded the value of the two sites to the estate, thus presenting a net burden to the estate. Abandonment would have been in direct contravention of state and local laws, nevertheless, the trustee moved to abandon the facilities as a burden to the estate. The Supreme Court denied the motion to abandon, stating that abandonment of the properties would be in contravention of state or local laws designed to protect public health and safety. *Midlantic* clearly indicated that the waste oil facilities posed a very serious threat to the public. The facilities contained approximately 470,000 gallons of oil contaminated with highly toxic, carcinogenic PCBs in unguarded and deteriorating containers. *Id.* at 497.

formulated on a case-by-case basis, the court identified five factors for consideration: 1) the imminence of danger to the public health and safety, 2) the extent of probable harm, 3) the amount and type of hazardous waste, 4) the cost to bring the property into compliance with environmental laws, and 5) the amount and type of funds available for cleanup. *Id.* at 272.

Colorado asserts that CF&I's abandonment of the Quarry falls within the *Midlantic* exception because abandonment would violate the provisions of the Colorado Mined Land Reclamation Act, C.R.S. § 34-32-101 et. seq., (Act) that requires mine operators to reclaim mined property.[14] Since a purpose of the Act is to protect public health and safety, Colorado argues that it follows that abandonment of the Quarry would endanger public health and safety. The express language of the Act[15] supports Colorado's claim that one of the purposes of the Act is to protect the public health and safety: the subject of the *Midlantic* exception. The bankruptcy court gives substantial deference to the expressed intent of a state legislature in implementing a statute. *See In Re Smith-Douglass, Inc.*, 856 F.2d. 12, 16 (4th Cir. 1988)(the Bankruptcy Court does not have the power to substitute its judgment for that of the state as to what constitutes a serious public health or safety risk). While the explicit legislative declaration contained in the language of the Act makes it clear that at least one purpose of the Act was to protect public health and safety,

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[14] Specifically, Colorado asserts that abandonment would violate C.R.S. § 34-32-116(1) (1992 Supp.). "Every operator to whom a permit is issued pursuant to the provisions of this article shall perform such reclamation as is prescribed by the reclamation plan adopted pursuant to this section."

[15] The legislative declaration to the Colorado Mined Land Reclamation Act states: "It is the further intent of the general assembly by the enactment of this article to conserve natural resources, ..., and to protect and promote the health, safety, and general welfare of the people of this state." C.R.S. § 34-32-102 (1992 Supp.).

it is not the sole purpose. The language of the Act does not identify any specific and identifiable harm to public health and safety that may result from inadequate reclamation of mine sites per se.

In the absence of per se harm from inadequate reclamation of mine sites, it is necessary to determine whether there are any identifiable conditions at the Quarry that present an imminent danger to public health and safety. The narrow exception to abandonment pronounced in *Midlantic* requires the bankruptcy court to determine whether there is an identifiable harm, and if so whether the risk from the harm is so imminent as to endanger public health and safety. *In re Doyle Lumber, Inc.*, 137 B.R. 197, 202 (Bankr. W.D. Va. 1992), *citing, In re FCX, Inc.*, 96 B.R. 49, 54 (Bankr. E.D.N.C. 1989)(crucial determination by bankruptcy court, not the state, is immediate danger to public health and safety). In examining the role of the bankruptcy court in light of the *Midlantic* exception, the court in *Smith-Douglass*, concluded that "[t]he bankruptcy court, . . . must determine whether the risk of imminent harm exists in reference to the design of the state law or regulation alleged to have been violated." 856 F.2d. at 16.

Colorado isolated certain conditions at the Quarry that it believes constitute identifiable harms to the public. Those conditions, however, do not represent an imminent threat to public health and safety. The evidence did not establish that toxic substances were ever used or stored at the Quarry. The only hazard on the property that will not be remedied by the reclamation plan is the general presence of unconsolidated and unstable rock. The lack of migrating hazardous or toxic substances distinguishes this case from the prior decisions that interpreted the *Midlantic* exception. Unlike the situations in prior

decisions[16] where hazardous or toxic substances threatened to contaminate surrounding properties and water supplies, any potentially hazardous conditions at the Quarry are contained within the site. In subsequent decisions examining *Midlantic*, courts focused primarily on whether there was a serious health risk from the presence of toxic and hazardous substances that presented an inevitable and imminent harm to the public. In this case, Colorado failed to provide credible evidence that similar risks exist at the Quarry.

Colorado's remaining concern is the possibility that trespassers may be harmed by entering the Quarry site. Where the hazards were merely speculative or indeterminate, prior courts did not find that the hazards or dangers were so imminent as to preclude abandonment under *Midlantic*. *See Smith-Douglass*, 856 F.2d. at 12; *Anthony Ferrante & Sons*, 119 B.R. at 49. The conditions at the Quarry do not present a risk or threat of inevitable harm or unavoidable danger to the public. The Quarry only presents a danger to someone who unlawfully trespasses onto the site and fails to take adequate notice of an obvious and potentially dangerous condition. The Quarry site is conspicuous and entirely avoidable. The chance that someone might be injured at the site in the foreseeable future is merely conjecture.

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[16] *See, In Re Smith-Douglass*, 856 F.2d. 12 (4th Cir. 1988)(court approves abandonment of fertilizer plant that had released hazardous contaminants into surrounding water supply where there was no threat of immediate harm); *In Re Anthony Ferrante & Sons, Inc.*, 119 B.R, 45 (D.N.J. 1990)(court approves abandonment of contaminated public water supply system absent showing of immediate and identifiable harm); *In Re Oklahoma Refining Co.*, 63 B.R. 562 (Bankr. W.D. Okla. 1986)(court approves abandonment of oil refinery that had dumped hazardous oil byproducts into open pits that were leaching into the surrounding underground water supply but the site did not present immediate and menacing harm); *In Re Doyle Lumber, Inc.*, 137 B.R. 197 (Bankr. W.D. Va. 1992)(court approved abandonment of sawmill and wood treatment facility site containing hazardous wastes that did not present immediate threat to public health and safety).

This case is comparable to a decision from the District of New Jersey, where the court found that there was no imminent threat to public health and safety when the public had been adequately warned of the dangers of a contaminated public water system. *Anthony Ferrante & Sons*, 119 B.R. at 45. In *Ferrante,* the court reasoned that since the public had adequate notice (over 2 years) that the water from the system was unsafe for consumption, the system's customers "possessed the means to protect themselves against any health hazard, and that fact sharply distinguishes this case from *Midlantic*." *Id.* at 49-50. In *Midlantic,* the public was unaware of the danger and lacked the necessary means to protect itself from the potential large scale contamination of water by waste oil containing a highly toxic carcinogen.

Abandonment of the Quarry under § 554(a) may even provide increased safeguards for the public. The forfeiture of the $186,000 in financial warranties provided by CF&I will provide Colorado with a significant sum of money for demolition of the buildings that present the most pressing threat to public safety. Abandonment will not aggravate the existing conditions or create peril at the Quarry. *New Jersey Dept. of Envtl. Protection v. North American Products Acquisition, Corp.*, 137 B.R. 8 (D.N.J. 1992)(bankruptcy court required to make specific finding that trustee's abandonment would not aggravate a harm to the public).

Colorado argues that CF&I may not abandon the Quarry where unencumbered assets are available to perform reclamation. Whether CF&I's estate has unencumbered funds is irrelevant to a determination of whether abandonment is permissible where Colorado failed to carry its burden of proving imminent and identifiable harm to

public health and safety. Section 554 does not limit abandonment to cases in which a debtor has no unencumbered funds. Claims of environmental agencies have no special priority or claim to a debtor's unencumbered funds. As this court previously determined, and as the substantial weight of authority indicates, pre-petition environmental liabilities are entitled to no special priority in bankruptcy. *Ohio v. Kovacs*, 105 S. Ct. 705 (1985).[17]

The availability of unencumbered funds is relevant to the issue of abandonment, if ever, only when abandonment would otherwise be improper under *Midlantic* because of the need to eliminate immediate threats to public safety. In this case, since there is no immediate threat to public health and safety, CF&I's abandonment of the Quarry will not aggravate the current situation and the bonds provide substantial funds for remediation. Conditioning CF&I's abandonment of the Quarry upon payment of estate assets to cover the entire cost of remediation is inconsistent with fair and equal treatment of other unsecured creditors.

As this court applies the factors for consideration provided in *Franklin Signal Corp.*, it finds that, under the circumstances of this case, application of the exception to abandonment pronounced in *Midlantic* is not warranted. There is no showing of a clear and imminent danger nor does there appear to be any great risk of harm or threat to public safety. There is no showing that Colorado, who will be in possession of the Quarry upon

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[17] *See also United States v. Whizco*, 841 F.2d 147 (6th Cir. 1988)(reclamation obligations relating to pre-petition mining are claims subject to discharge); *In re Kaiser Steel Corp.*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988)(liability for failure to reclaim land mined pre-petition "are clearly 'claims' within the meaning of 11 U.S.C. § 101(4) and, as such, are subject to being dealt with in a plan and discharged as part of the Debtor's plan of reorganization."); *In re Pierce Coal and Constr. Inc.*, 65 B.R. 521 (Bankr. W.D. Va. 1986)(pre-petition reclamation claims are unsecured claims); *In re N.P. Mining Co, Inc.*, 963 F.2d 1449 (11th Cir. 1992)(post-petition penalties relating to pre-petition strip mining are not entitled to administrative priority).

abandonment, does not possess significant funds available for reclamation and is not capable of any remedy that may be necessary to protect the public. The court approves CF&I's motion to abandon under § 554(a).

COLORADO'S MOTION TO AMEND ITS PROOF OF CLAIM AND FOR LIFT OF AUTOMATIC STAY

Colorado moved for permission to change the priority of its claimed bond shortfall from general unsecured to a status of administrative priority. Colorado's motion to amend its claim against CF&I attempts to convert what is clearly a pre-petition unsecured claim to a post-petition, administrative claim. *United States v. Chateaugay Corp. (In re Chateaugay Corp.)*, 112 B.R. 513, 520 (S.D.N.Y. 1990)(a claim arises under the Bankruptcy Code at the time when the acts giving rise to the alleged liability were performed), *citing In re Chateaugay Corp.*, 87 B.R. 779, 796 (S.D.N.Y. 1988).

Colorado's motion for leave to amend its proof of claim in order to assert a claim for an administrative expense for reclamation costs in excess of CF&I's financial warranties is denied. A party will only receive priority for an administrative expense where it has provided a service that is actual and necessary for the preservation of the estate, or that arises in the context of administering the estate. § 503(b)(1)(A). If Colorado reclaims the Quarry, it is not reclaiming property of the estate, but rather property which has been properly abandoned by CF&I. Colorado's claim for reclamation costs arose before the commencement of the case, since all the mining activities that created a need for reclamation occurred prior to the commencement of the case. *Chateaugay*, 112 B.R. at 520.

(United State's contingent claim for cost of cleaning up a hazardous waste site may be discharged in a bankruptcy proceeding when actions of the debtor occurred pre-petition).

In *Chateaugay*, the debtor continued to operate sites post-petition where there had been a release of hazardous waste and the debtor was under a continuing obligation to comply with environmental laws. The court held that monies spent to comply with environmental laws would be "actual and necessary costs and expenses of preserving the estate" and therefore entitled to an administrative priority. The court also granted administrative expense priority for civil penalties for post-petition violations. Conversely, in this case where all of CF&I's activities at the Quarry ceased before the petition was filed, Colorado is not entitled to an administrative expense under § 503(b)(1)(A) for cost of reclamation or pre- and post-petition civil penalties. *In re N.P. Mining Co., Inc.*, 963 F.2d 1449 (11th Cir. 1992)(penalties assessed prior to and subsequent to the filing of a bankruptcy petition for mining violations that occurred prior to the filing of a petition shall not be given administrative expense status).

Colorado is not entitled to have the stay lifted in order to create new obligations by increasing the requirements of the reclamation plan or to create new security for obligations that were unsecured on the date of the petition. Since the court will allow CF&I to abandon the Quarry, there can be no basis for claiming that ongoing activities for the benefit of that property are necessary to protect or preserve the assets of the estate and as such should be entitled to administrative claim status under § 503(b)(1)(A)[18].

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[18] No argument is raised that the costs of future reclamation constitute a tax that would have administrative priority.

Colorado already had an opportunity to estimate the amount of its contingent claim within the context of this hearing pursuant to § 502(c), rendering the request to lift the stay for the purpose of estimating the claim in a state court proceeding redundant, duplicative and moot. In light of CF&I's approved abandonment of the property, Colorado is entitled to have the stay lifted for the limited purpose of proceeding against the bond and letter of credit. Other parties are involved in that process that are not represented in this court. Further state court proceedings involving all interested parties to the bond forfeiture are appropriate.

Based upon the forgoing, it is hereby

ORDERED, that CF&I's motion to abandon the Quarry and Monarch Townsite is granted, and it is further

ORDERED, that Colorado's motion for relief from the automatic stay under § 362(d) to proceed with a termination hearing and against the financial warranties is granted, and it is further

ORDERED, that Colorado's contingent claim in this proceeding is fixed at $222,662 (the cost of reclaiming the Quarry) less the amount realized from forfeiture of the bond and letter of credit, and it is further

ORDERED, that Colorado's motion to amend the status of its claim is denied and the remaining contingent claim, if any, is a pre-petition unsecured claim.

DATED this 11 day of May, 1993.

JUDITH A. BOULDEN
United States Bankruptcy Judge

THIS ORDER/JUDGMENT
ENTERED

MAY 11 1993

DEPUTY CLERK
U.S. BANKRUPTCY COURT