



Comptroller General
of the United States

Washington, D.C. 20548

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B-229068.4

August 3, 1988

The Honorable Morris K. Udall /
Chairman, Committee on Interior
and Insular Affairs
House of Representatives

Dear Mr. Chairman:

This responds to your January 29, 1988, request for our opinion regarding payment by coal mine operators of a reclamation fee for each ton of coal produced under section 402 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). According to your letter, some mining companies have been found by the Office of Surface Mining Reclamation and Enforcement (OSMRE) of the Department of the Interior (DOI) to have underreported the amount of coal they have mined, and have claimed to be unable to pay the correct reclamation fee. In these cases, OSMRE appears to be considering a waiver of fee payment, negotiating a lower fee, or accepting "in kind" payments, such as reclamation work on land other than that disturbed by the company. Accordingly, you ask for our comments responding to the following questions:

1. Does OSMRE have the authority to negotiate the amount of the fee to be paid?
2. Does OSMRE have the authority to waive or negotiate penalties or fines and interest thereon (if any) on unpaid fees?
3. Can OSMRE accept payments in kind in lieu of the fees, fines, and/or penalties called for under SMCRA?
4. Is there any requirement that negotiated settlements above a certain monetary amount must be reviewed and/or approved by the Department of Justice or entity other than the Department of the Interior?

As explained below, we are of the opinion that OSMRE, with the approval of the DOI Solicitor's office, may, with certain exceptions, compromise a claim for \$20,000 or less.

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However, this should be done only after aggressive collection efforts have failed and after careful consideration of the factors indicated by the Claims Collection Standards issued jointly by the Department of Justice and the Comptroller General, 4 C.F.R § 101 et seq, for determining that a compromise is warranted. Claims exceeding \$20,000, not counting interest, may be compromised only by the Department of Justice. OSMRE has discretion to waive all or part of interest charges, penalties and processing and handling charges. This is to be based on the same Claims Collection Standards requirements that apply to compromises. Under certain conditions, OSMRE may accept payments in kind in settlement of claims for fees, interest, etc., against a debtor.

We requested the views of the Secretary of the Interior on these questions. A copy of the reply from the DOI Solicitor is enclosed.

The Reclamation Fee

Under section 402 of SMCRA, 30 U.S.C. § 1232, coal mine operators are to pay a reclamation fee for coal produced by surface or underground mining. The fee is deposited in the Abandoned Mine Reclamation Fund, a trust fund established by section 401 of SMCRA, 30 U.S.C. § 1231. The fee is payable no later than 30 days after the end of each calendar quarter. Any portion of the fee not properly or promptly paid under section 402 may be recovered, with statutory interest, in court.

DOI's implementing regulations, 30 C.F.R. § 870.15, provide that when a reclamation fee debt is more than 91 days overdue, a 6 percent per annum penalty shall begin to accrue on the amount owed for fees and will run until the date of payment. This is in addition to interest. Also, the debtor will be required to pay a processing and handling charge for all delinquent fees, interest, and any penalties. Neither SMCRA nor the implementing regulations suggest that DOI has any authority to waive or reduce these fees, penalties or interest.

DISCUSSION

Question 1. Does OSMRE have the authority to negotiate the amount of the fee to be paid?

Answer. The reclamation fee, itself--the amount or rate charged based on coal production or valuation--is established by 30 U.S.C. § 1232(a), and cannot be reduced by negotiation with a coal operator. DOI has adopted the

position, that these fees, if not paid, give rise to claims of the United States covered by the Claims Collection Act.^{1/}

As a preliminary matter, we must examine the applicability of both the Claims Collection Act and the Federal Claims Collection Standards (Standards) to claims arising from the non-payment of reclamation fees, since the DOI relies on the Act and its Standards as the source of its authority to compromise these claims.

It was the Solicitor himself who drew our attention to the fact that a 1984 Court of Appeals case, United States v. River Coal Company, Inc., 748 F.2d 1103, held that an abandoned mine reclamation fee is "an involuntary exaction for a public purpose The fact that Congress labeled the reclamation charge a fee rather than a tax is not controlling The reclamation fee has the essential characteristics of a tax and we conclude it is a 'tax' for the purpose of section 17 of the Act."^{2/}

The fact that the government's claim in the instant case may also be labeled a "tax" does not affect the general applicability of the Claims Collection Act to its claim. The Act has no blanket exemption for tax claims, although certain collection procedures provided by the Act may not be used in connection with claims under the Internal Revenue Code. (See, for example, 31 U.S.C. § 3711(f)(1), relating to disclosures to consumer reporting agencies.)

The applicability of the Claims Collection Standards is another matter. The Standards provide:

"Tax claims, as to which differing exemptions, administrative considerations, enforcement considerations, and statutes apply, are . . . excluded from the coverage of this chapter." 4 C.F.R. § 101.3(b).

^{1/} Standards for the collection of claims issued jointly by the Attorney General and the Comptroller General, 4 C.F.R. Parts 101-105, provide for the compromise of a claim based on inability to pay, litigation probabilities, cost of claim collection, or for more than one of these reasons. The DOI has issued standards for the compromise of claims in 344 Departmental Manual (DM) 4.1 to 4.5. These are similar to those issued jointly by the Attorney General and the Comptroller General.

^{2/}The "Act" referred to in that case was the 1978 Bankruptcy Reform Act, 11 U.S.C. § 101 et seq.

The Solicitor suggests that "as a technical matter, the Department may not be bound by the provisions of 4 C.F.R. 103.2-4 (1984)." However, "as a practical matter," there are no "differing exemptions, administrative considerations, enforcement considerations, and statutes," which could conflict with the provisions of the Standards.

The tax claims exemption language, quoted above, has been a part of the Federal Claims Collection Standards since they were first promulgated in 1966. We have been unable to find any documents explaining the scope and intent of the exclusion of tax claims from coverage under the Standards, but we concur with the Solicitor's observation that there are no conflicting provisions in other laws or regulations that would create a conflict with the provisions of the Standards. We also agree that the Secretary of the Interior has the basic authority to compromise all sorts of claims up to \$20,000, pursuant to 31 U.S.C. § 3711 (with certain exceptions not here relevant). It is unnecessary to decide whether the Standards do or do not apply to the reclamation fee claims in question, even though they may be considered to be tax claims. As long as the Secretary considers the provisions of the Standards to be reasonable and to offer useful guidance in carrying out his responsibilities under the SMCRA, he is free to adopt the Standards and to incorporate their provisions in the Departmental Manual (344 DM 4.2-4 (1984)).

Under the Standards, the government's claim for reclamation fees is subject to compromise by DOI under 31 U.S.C. § 3711(a)(2) if the claim, exclusive of interest, does not exceed \$20,000. The factors to be considered in determining that a compromise is necessary are outlined by the Standards for each of the possible grounds for compromise. (See footnote 1, supra.) As to inability to pay, section 103.2 states the factors to be taken into account by an agency before determining that a compromise is advantageous to the government.

In your letter you express concern that OSMRE is contemplating waiver of fees, penalties, fines or interest owed by mining companies that have been found to have underreported the amount of coal they have mined and that claim they are unable to pay the reclamation fee owed the government from this coal. In response to our inquiry, DOI does not assert any authority to waive fees and related charges except as a compromise, termination or limited waiver authorized under the Claims Collection Standards, nor do we have any indication that it intends to apply different standards. These standards do not permit officials operating under them to exercise the unfettered discretion normally associated with

the term "waiver." It thus would not be possible for an agency applying the standards to justify compromising, terminating, or waiving a claim against a viable commercial enterprise solely on the unsupported claim of inability to pay.

If instances of underreporting indicate fraud or misrepresentation on the part of the debtor, only the Department of Justice is authorized to compromise, suspend, or terminate collection action, regardless of the amount, unless the debt arose from an exception to the account of an accountable officer, issued by the GAO, in which case only the GAO can compromise the claim. 4 C.F.R. § 102.3.

Question 2. Does OSMRE have the authority to waive or negotiate penalties or fines and interest thereon (if any) on unpaid fees?

Answer. The collection of interest on overdue reclamation fees is authorized by 30 U.S.C. § 1232(e), and under 30 C.F.R. § 870.15, penalties and processing charges are levied on delinquent accounts. Under the Claims Collection Standards, 4 C.F.R. § 102.13(g), an agency is required to waive the collection of interest if any part of the debt is paid within 30 days after the date the interest began to accrue. This may be extended on a case-by-case basis, if the agency determines that such action is appropriate. Also, DOI may waive, or in effect, compromise, in whole or in part, the collection of interest, penalties, and administrative costs, using the criteria specified for the compromise of claims but without regard to the amount of the debt. Thus, using the criteria indicated in the Claims Collection Standards, OSMRE has the authority to waive or in effect, compromise, all or part of its claims for interest, penalties, and administrative costs.

Question 3. Can OSMRE accept payments in kind in lieu of the fees, fines, and/or penalties called for under SMCRA?

Answer. The DOI Solicitor, in his response to our request for the Secretary of the Interior's views, indicates that DOI has no actual experience in accepting the payment of goods or other property in place of money for the reclamation fees or associated charges. He notes that the Department has recently received an offer from an operator to perform additional reclamation work in lieu of paying civil penalties assessed under 30 U.S.C. § 1268 (which covers violations of surface coal mining permits or of related requirements). The offer has been referred to the Justice Department for review.

The Solicitor assumes, for the purposes of this question, that an operator who owes reclamation fees offers to convey to the government real or personal property in satisfaction of his indebtedness, leaving it to DOI to liquidate the property and deposit the receipts in the Abandoned Mine Reclamation Fund. It is further assumed that the property is of sufficient value to cover both the indebtedness (which may be reduced as a result of waiver or compromise) and increased collection costs. In this circumstance, the Solicitor sees no problem in accepting a debtor's offer. He points out that the method of payment would not differ materially from the ordinary collection remedy of attaching assets to satisfy a judgment since the fund would benefit to the same extent as if the debtor made a cash payment.

In principal, the acceptance by OSMRE of a compromise payment consisting of property belonging to a debtor, which will then be sold and the receipts deposited into the fund, appears consistent with the Claims Collection Standards where other collection efforts have failed. See 4 C.F.R. § 102.10 and § 103.9. However, care would have to be taken to assure that the property, when reduced to cash, after expenses incident to sale, would in fact provide to the government an adequate payment in compromise of the claim. The only limitation on the receipt of property in compromise of claims under the Claims Collection Standards, is that neither a percentage of the debtor's profits nor stock in a debtor corporation will be accepted in compromise of a claim. 4 C.F.R. Part § 103.9.

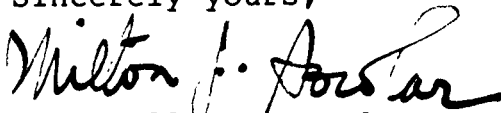
Since we do not have the details before us of a proposal of any company to provide in-kind services for the Abandoned Mine Reclamation Fund, it is difficult to form any opinion about the acceptance of services in compromise of a claim for reclamation fees and interest, penalties, and expenses. The reason for the reclamation fee is to provide a fund which is allocated under a formula established in 30 U.S.C. § 1232(g) for the purposes listed in 30 U.S.C. § 1233. Although it would appear to be theoretically possible to accept in-kind services in lieu of cash to help carry out the reclamation purpose for which the fund was established, it is not clear how those services would be valued or whether an agreement for their performance would comply with applicable procurement statutes and regulations.

Question 4. Is there any requirement that negotiated settlements above a certain monetary amount must be reviewed and/or approved by the Department of Justice or entity other than the Department of the Interior?

Answer. Yes. If the amount of the claim exceeds \$20,000, excluding interest, a compromise must be approved by the Department of Justice or by the GAO, regardless of amount, if the claim arose because of a GAO audit exception. 4 C.F.R. § 103.1(b). Under 31 U.S.C. § 3711(a)(2), DOI compromise authority is limited to claims not exceeding \$20,000 that have not been referred to our Office or to the Department of Justice. See our answer to Question 1.

After 30 days this letter will be generally available unless you release its contents earlier.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure