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Prepayment Challenges to the Assessment of Abandoned Mine Land Fees: *United States v. Gorman Fuel, Inc.*

Timothy L. Wells
University of Kentucky

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Congress established the Abandoned Mine Reclamation Fund[1] as part of the Surface Mining Control and Reclamation Act of 1977 (SMCRA),[2] with the intent that monies from the fund be used for the "reclamation and restoration of land and water resources adversely affected by past coal mining."[3] The Secretary of the Interior collects those monies through a production-based fee imposed upon all coal operators.[4] As with any other section of SMCRA, the substantive provisions of the AML program have been a frequent subject of litigation, with judicial opinions being written upon such things as the definition of a "surface mining operation;"[5] upon the appropriate distribution of particular AML monies;[6] and upon the imposition of the fee in several other unusual situations.[7] A recent ruling involving AML liti-

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[1] 30 U.S.C. §§ 1231-1243 (1982).

[2] 30 U.S.C. §§ 1201-1328 (1982).

[3] 30 U.S.C. § 1231(c) (1982); *see also*, Comment, *The Surface Mining Control and Reclamation Act of 1977: Its Background and Its Effects*, 89 W. VA. L. REV. 655 (1987).

[4] 30 U.S.C. § 1232(a) (1982). This section provides that:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining, or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

[5] *See* United States v. Kennedy, 806 F.2d 111 (7th Cir. 1985)(hauling of refuse pile coal constitutes surface mine operation subject to AML fee).

[6] *See* State of Montana v. Clark, 749 F.2d 740 (D.C. Cir. 1984)(fees collected from mines owned by or for Indians are distributed to tribe rather than to state).

[7] *E.g.*, United States v. Tri-No Enterprises, 819 F.2d 154 (7th Cir. 1987)(company which purchased stockpiled coal was liable for AML fees); United States v. Beaird Coal Co., 825 F.2d 1471 (11th Cir. 1987)(company liable for fees on coal produced at clay mine); United States v. Brook Contracting Corp., 759 F.2d 320 (3rd Cir. 1985)(reclamation fee applies only to combustible coal).

gation procedure,[8] however, may prove the most beneficial precedent for those wishing to contest their liability for Abandoned Mine Land or other similar fees.

Nearly all litigation involving AML fee liability has arisen in one of the following procedural contexts: (1) collection actions initiated by the United States for the recovery of delinquent AML fees,[9] or (2) refund actions by coal operators.[10] In fact, in only one instance prior to 1988 did a coal operator seek a prepayment determination as to its obligation to pay an assessed AML fee.[11] When a Kentucky corporation became the second party to seek declaratory and injunctive relief in regard to AML fee liability,[12] the United States, while apparently having raised no such objection in the *Amerikohl Mining* case,[13] asserted that such actions were barred[14] under the Anti-Injunction[15] and Declaratory Judgment[16] Acts.

This Comment will first introduce the issues which arise in determining whether the Anti-Injuntion Act applies to actions involving AML fees.[17] Next, the relationship of the Declaratory Judgment Act to the Anti-Injunction Act will be addressed.[18]

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[8] *See* United States v. Gorman Fuel, 716 F. Supp. 991 (E.D. Ky. 1989). The Court held that the prohibitions of the Anti-Injunction and Declaratory Judgment Acts did not bar plaintiff's action seeking (1) a declaration that it was not responsible for the payment of certain AML fees, and (2) an injunction against the collection of those fees. *Id.* at 993.

[9] *See e.g.*, *Tri-no Enterprises*, 819 F.2d at 154; *Beaird Coal*, 825 F.2d 1471; U.S. v. E & C Coal Co., 647 F. Supp. 268 (W.D. Va. 1986).

[10] *See e.g.*, *Amerikohl Mining*, 16 Cl. Ct. at 623.

[11] UGI Corp. v. Clark, 747 F.2d 893 (3d Cir. 1984). UGI's action for judgment declaring that it did not owe reclamation fees was consolidated with a subsequently filed governmental action for collection of those fees.

[12] Gorman Fuel, Inc. v. Gentile, Civil Action No. 88-57 (E.D. Ky.). Gorman Fuel initiated Civil Action No. 88-57, requesting declaratory and injunctive relief regarding its liability for AML fees. The United States then filed Civil Action No. 88-173 for collection of those fees. These two actions were consolidated under Civil Action No. 88-173. *See* United States v. Gorman Fuel, 716 F. Supp. 991 (E.D. Ky. 1989).

[13] *See supra*, note 10.

[14] *See* Brief, *Gorman Fuel*, 716 F. Supp. 991 (E.D. Ky. 1989)(No. 88-173).

[15] 26 U.S.C. § 7421(a) (1982), which provides in relevant part that: "no suit for the purpose of restraining the assessment or collection of any *tax* shall be maintained in any court by any person. . . ." (emphasis added)

[16] 28 U.S.C. § 2201 (1982), which provides in relevant part that: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (emphasis added)

[17] *See infra* notes 21-32 and accompanying text.

[18] *See infra* notes 33-38 and accompanying text.

The manner in which these two statutes were interpreted in *Gorman Fuel* will then be analyzed.[19] The Comment will close by discussing the implications of *Gorman Fuel* for those desiring a pre-emptive remedy against the collection of AML-type fees or taxes.[20]

I. THE ANTI-INJUNCTION ACT

The express language of the Anti-Injunction Act limits its applicability to actions involving the assessment or collection of federal taxes.[21] The United States Supreme Court recognizes that the purposes of the Act are to permit the Government to assess and collect taxes alleged due without the burden of judicial interference, and to require that legal rights to disputed sums be determined in a refund suit.[22] Thus, regarding whether the Anti-Injunction Act applies in any particular instance, the first question to arise is whether the disputed sum (e.g., an AML "fee") can be characterized as a "tax."

In *National Cable Television Ass'n. v. United States*,[23] the Supreme Court identified some of the differing characteristics of taxes and fees. A tax is a compelled exaction for the public welfare, while a fee is generally the result of a voluntary act which entitles an individual to a particular benefit.[24] Considering the expressly stated public purposes for which AML fees are exacted,[25] in addition to the various judicial[26] and legislative[27] pronouncements on the subject, it seems well settled that the

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[19] *See infra* notes 39-79 and accompanying text.

[20] *See infra* notes 80-90 and accompanying text.

[21] *See supra* note 15; *see generally*, Annotation, Supreme Court's Construction and Application of Anti-Injunction Act (26 U.S.C. § 7421(a)) Prohibiting Suits to Restrain Assessment or Collection of Federal Taxes, 46 L.Ed.2d 932.

[22] Enochs v. Williams Packing and Navigation Co., 370 U.S. 1; *see also* Dietrich v. Alexander, 427 F. Supp. 135 (E.D. Pa. 1977).

[23] 415 U.S. 336 (1974).

[24] *Id.* at 340-41. *See also* United States v. River Coal Co., 748 F.2d 1103 (6th Cir. 1984), in which the Court concluded that AML fees were taxes due to the public purposes for which the monies are used. The Court also noted, in contrast, that permit fees were not in the nature of taxes, since these fees merely give one individual the right to mine.

[25] *See supra* note 3 and accompanying text.

[26] *See e.g., River Coal,* 748 F.2d at 1106 ("[W]e conclude it is a tax for the purposes of sec. 17 of the [Bankruptcy] Act"); United States v. Tri-No Enterprises, 819 F.2d 154, 159 (7th Cir. 1987)(AML fees are a form of excise tax); United States v. Devil's Hole, Inc., 548 F. Supp. 451 (1982), *aff'd*, 747 F.2d 1103 (3d Cir. 1984).

[27] *See e.g.*, Act of August 3, 1977, Pub. L. No. 95-87, U.S. Code Cong. and Admin. News (95 Stat.) 593; 123 Cong. Rec. 12655-61 (1975).

AML "fees" are, in reality, AML "taxes." However, while precedent establishes that the fees are taxes for some purposes,[28] no case prior to *United States v. Gorman Fuel*[29] had decided whether they were taxes within the ambit of the Anti-Injunction Act.

In addition to requiring that a federal tax be involved, the plain language of Title 26 of the United States Code suggests that the Anti-Injunction Act applies only to those taxes imposed under the Internal Revenue Code.[30] Specifically, the Code states that the provisions of Subtitle F,[31] of which the Anti-Injunction Act is a part, "shall take effect on the day after the date of the enactment of this title and *shall be applicable with respect to any tax imposed by this title.*"[32] (emphasis added)

II. THE DECLARATORY JUDGMENT ACT

The Declaratory Judgment Act[33] originally contained no limitations with respect to federal taxes.[34] This omission allowed taxpayers to seek declaratory relief in federal tax matters,[35] even though an injunction would have been unavailable.[36] Congress then amended the Act so as to bar declaratory relief in tax controversies.[37] The legislative history of the Act thus suggests that Congress intended it to apply to any action in which the Anti-Injunction Act would also apply.[38]

III. THE *GORMAN FUEL* DECISION

United States v. Gorman Fuel[39] consolidated three actions: (1) an action for injunctive and declaratory relief by Gorman

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[28] *See supra* note 26; *see also* Matter of C.M.& C. Coal Co., 33 B.R. 358 (N.D. Ala. 1983); In Re King, 19 B.R. 936 (E.D. Tenn. 1982).

[29] 716 F. Supp. 991 (E.D. Ky. 1989).

[30] *See* 26 U.S.C. § 7851(a)(6)(A) (1982).

[31] 26 U.S.C. § 6001-7873 (1982).

[32] 26 U.S.C. § 7851(a)(6)(A) (1982).

[33] 28 U.S.C. § 2201 (1982).

[34] *See* Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278, 1285 n.11 (D.C. Cir. 1974).

[35] *Id.*

[36] *See supra* note 21 and accompanying text.

[37] *Simon*, 506 F.2d at 1285 n.11; *see also* S. REP. No. 1240, 74th Cong., 1st Sess. 11 (1939-1 Cum. Bull. (Part 2) 651, 657).

[38] *See generally*, E. BORCHARD, DECLARATORY JUDGMENTS, 850-57 (2nd Ed. 1941).

[39] 716 F. Supp. 991 (E.D. Ky. 1989).

Fuel regarding its liability for unpaid AML fees; (2) an action by the United States for collection of those fees; and (3) an action by Gorman Fuel pursuant to the citizen suit provision of SMCRA.[40] The United States moved to dismiss Gorman Fuel's action for declaratory and injunctive relief,[41] asserting that such actions attempt to restrain the collection of Federal taxes, and are therefore prohibited by both the Anti-Injunction[42] and Declaratory Judgment[43] Acts. Federal District Judge Eugene Siler denied this motion, holding that (A) although AML fees are federal taxes, (B) the Anti-Injunction Act applies only to those taxes imposed under Title 26 of the United States Code, and (C) the Declaratory Judgment Act is coterminous with the Anti-Injunction Act.[44] Since Abandoned Mine Land fees are imposed under Title 30,[45] rather than under Title 26, the Anti-Injunction and Declaratory Judgment Acts were found to be inapplicable.[46]

A.

Judge Siler first addressed the question of whether the AML "fee" was really an AML "tax." He quickly dispensed with this issue by citing the uncontested line of authority which holds that the fees are taxes for purposes of Bankruptcy proceedings.[47] This question appears to be closed for argument, given the bankruptcy decisions,[48] the Supreme Court's definition of a tax,[49] and the public purposes for which AML fees are collected.[50]

B.

Despite having determined that AML fees are taxes, Judge Siler nevertheless held that they were not the type of taxes to

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[40] *See id.* at 993. 30 U.S.C. § 1270(1982).

[41] *Id.*

[42] 26 U.S.C. § 7421 (1982).

[43] 28 U.S.C. § 2201 (1982).

[44] *Gorman Fuel*, 716 F. Supp. at 993.

[45] *See* 30 U.S.C. § 1232(a) (1982).

[46] United States v. Gorman Fuel, 716 F. Supp. 991, 993 (E.D. Ky. 1989).

[47] *Id.* at 992.

[48] *See e.g.*, United States v. River Coal Co., 748 F.2d 1103, 1106 (6th Cir. 1984); United States v. Devil's Hole, Inc., 747 F.2d 895, 898 (3rd Cir.1984); Matter of C. M. & C. Coal Co., 33 B.R. 358 (N.D. Ala. 1983); In Re King, 19 B.R. 936 (E.D. Tenn. 1982).

[49] *See supra* notes 23-24 and accompanying text.

[50] *See supra* notes 3 & 25 and accompanying text.

which the Anti-Injunction Act applies.[51] This ruling seems consistent with the express language of the Anti-Injunction Act itself[52] and with those provisions of Title 26 detailing the scope of the Act.[53]

The United States Supreme Court, in apparently its only discussion of the question, has also intimated that the Act applies only to those taxes assessed pursuant to the Internal Revenue Code.[54] Faced with a challenge by various plaintiffs to the imposition of licensing fees on imported petroleum, the Court, although not presented the question, declared in a footnote that the Anti-Injunction Act did not bar the action.[55] Having quoted from this footnote, Judge Siler stated: "While it is true the Supreme Court did not squarely address the issue of the applicability of the Anti-Injunction Act to taxes outside Title 26, the language in the quoted passage is explicit, and this Court will follow it."[56]

Ironically, the Supreme Court footnote in *Algonquin SNG*[57] may have been prompted by a brief[58] filed on behalf of the United States by then Solicitor General Robert H. Bork. In this brief the United States also took the position that the Anti-Injunction Act applies only to those taxes imposed under Title 26 of the United States Code.[59] This position was based on earlier Supreme Court decisions holding that the Act applied only to assessments of taxes made by Internal Revenue officers charged with the general jurisdiction of assessing taxes.[60] Given this construction, AML fee litigation would not be affected by the Anti-Injunction Act since the fees are not collected by an

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[51] *Gorman Fuel*, 716 F. Supp. at 993.

[52] *See supra* notes 15 & 21.

[53] *See supra* notes 30-32 and accompanying text.

[54] Federal Energy Admin. v. Algonquin SNG, 426 U.S. 548 n.9 (1976).

[55] *Id.* In the Court's language:

> The Anti-Injunction Act applies to suits brought to restrain assessment of taxes assessable under the Internal Revenue Codes of 1954 and 1939. The license fees in this case are assessed under neither Code but rather under the authority conferred on the President by the Trade Expansion Act of 1962, as amended by the Trade Act of 1974. The fees are therefore not "taxes" within the scope of the Anti-Injunction Act. (citation omitted)

[56] *Gorman Fuel*, 716 F. Supp. at 993.

[57] 426 U.S. 548 n.9 (1976).

[58] Brief for Petitioners, *Algonquin SNG*, 49 L.Ed.2d 1273 (1976).

[59] *Id.* at 1273.

[60] *See e.g.*, Snyder v. Marks, 109 U.S. 189 (1883); Pacific Steam Whaling Co. v. United States, 187 U.S. 447 (1903).

Internal Revenue officer, but rather by the Secretary of the Interior.[61]

Additionally, the United States has taken the position that the statute of limitations applicable to the collection of excise taxes[62] does not apply to the collection of AML fees since these fees are not assessed under the Internal Revenue Code.[63] This statute of limitations, in language similar to that defining the scope of the Anti-Injunction Act,[64] is limited to excise taxes imposed under Subtitle D of the Internal Revenue Code.[65] With but one exception,[66] United States Courts have agreed with the federal government that the collection of AML fees is not governed by this limitations period.[67] The United States Court of Appeals for the 7th Circuit stated the reasoning of these holdings in the following manner: "[R]eclamation fees are a form of excise tax. But the fees are imposed by SMCRA, not by Subtitle D of the Internal Revenue Code. Therefore, 26 U.S.C. § 6501(e)(3) is inapplicable to actions to collect delinquent fees."[68] Thus, the apparent position of the United States is that AML fees are taxes within the purview of some sections of Title 26, but are not governed by other sections of the same title.

Although statutory language[69] and Supreme Court interpretation[70] of the Anti-Injunction Act indicate that it applies only to Internal Revenue Code taxes, it must be noted that the Act has previously been used as a bar to actions involving taxes

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[61] 30 U.S.C. § 1232(a) (1982).

[62] 26 U.S.C. § 6501(e)(3) (1982).

[63] *See e.g.*, United States v. Tri-No Enterprises, 819 F.2d 154 (7th Cir. 1987); United States v. Hawk Contracting, 649 F. Supp. 1 (W.D. Pa. 1985); United States v. Gary Bridges Logging and Coal Co., 570 F. Supp. 531 (E.D. Tenn. 1983).

[64] *See supra* notes 31-32 and accompanying text.

[65] 26 U.S.C. § 6501(e)(3) (1982); *see also Tri-No Enterprises*, 819 F.2d at 157.

[66] *See* United States v. Gary Bridges Logging and Coal Co., 570 F. Supp. 531 (E.D. Tenn. 1983). Here the Court held that AML fees were excise taxes governed by the limitations period of 26 U.S.C. § 6501(e)(3). This decision was based upon the requirement of 30 C.F.R. § 870.16(d) that coal operators maintain records for a six year period. *Id.* at 533.

[67] *See e.g.*, *Tri-No Enterprises*, 819 F.2d 154 (7th Cir. 1987); United States v. E & C Coal Co., 647 F. Supp. 268 (W.D. Va. 1986), *aff'd in part, rev'd in part*, 846 F.2d 247 (6th Cir. 1987); United States v. Hawk Contracting, 649 F. Supp. 1 (W.D. Pa. 1985).

[68] *Tri-No Enterprises*, 819 F.2d at 159.

[69] *See supra* notes 31-32 and accompanying text.

[70] *See supra* notes 55-56 and accompanying text.

assessed outside of the Code.[71] However, this Commentator can find no instance in which the Court, applying the Act, addressed the meaning of the statute's limiting language and the Supreme Court's footnote reference to that language.

C.

Judge Siler further ruled that Gorman Fuel was not barred under the Declaratory Judgment Act[72] from relief in respect to AML fee assessments.[73] In so ruling Judge Siler adhered to the dominant view that the Declaratory Judgment Act was intended to be coterminous with the Anti-Injunction Act.[74] That is, if a suit is allowed under the Anti-Injunction Act, then the Declaratory Judgment Act cannot act as a bar.[75] The Courts which have declared the two Acts to be coterminous interpreted this construction to be the intent of Congress[76] in amending the Declaratory Judgment Act.[77] The United States Supreme Court, however, has yet to offer an opinion on the subject of coterminancy. In *Alexander v. Americans United*[78] the Court stated: "While we take no position on this issue, it is in any event clear that the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act."[79]

CONCLUSION

United States v. Gorman Fuel[80] raises a question of first impression: Do the Anti-Injunction[81] and Declaratory Judgment[82]

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[71] *See e.g.*, Cottman Co. v. Dailey, 94 F.2d 85 (4th Cir. 1938)(Title 19 import duties are taxes subject to Anti-Injunction Act); Moon v. Freeman, 245 F. Supp. 837 (E.D. Wash. 1965)(Duty on wheat exports under Title 7 is a tax within meaning of Act); Horton v. Humphrey, 146 F. Supp. 819 (D.C. 1956)(Title 19 dumping duty subject to Act).

[72] 28 U.S.C. § 2201 (1982).

[73] *Gorman Fuel*, 716 F. Supp. at 993.

[74] *See e.g.*, Perlowin v. Sassi, 711 F.2d 910 (9th Cir. 1983); Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976); Jules Hairstylists of Maryland v. United States, 268 F. Supp. 511 (D. Md. 1967), *aff'd*, 389 F.2d 808 (4th Cir. 1968), *cert.denied*, 391 U.S. 934 (1968); Tomlinson v. Smith, 128 F.2d 808 (7th Cir. 1942).

[75] *Perlowin*, 711 F.2d at 911; *see also Eastern Kentucky Welfare Rights Org.*, 506 F.2d at 1285.

[76] *See Eastern Kentucky Welfare Rights Org.*, 506 F.2d at 1285 n.11; *see also*, S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1939-1 Cum. Bull. (Part 2) 651, 657).

[77] *See supra* notes 33-38 and accompanying text.

[78] 416 U.S. 752 (1974).

[79] *Id.* at note 9.

[80] 716 F. Supp. 993 (E.D. Ky. 1989).

[81] 26 U.S.C. § 7421 (1982).

Acts prohibit prepayment challenges to the assessment of Abandoned Mine Land fees pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[83] The plain language[84] and judicial interpretations[85] of the Anti-Injunction Act, as well as arguments advanced by the United States government,[86] counsel that the Act does not apply to the collection of AML fees. The Declaratory Judgment Act likewise should not apply, since it appears to be identical in scope to the Anti-Injunction Act.[87] Consequently, coal operators who wish to challenge the assessment of AML fees appear to have the choice of initiating action before payment.

Although this Comment has been limited to a discussion of whether the Anti-Injunction and Declaratory Judgment statutes prohibit pre-emptive challenges to AML fee collection, Judge Siler's opinion was based entirely[88] upon the plain language of Title 26[89] and the *Algonquin SNG* footnote.[90] Since the opinion did not turn upon any particular aspect of SMCRA, it should be useful precedent not only for those with AML fee disputes, but also for those challenging any assessment not made pursuant to the Internal Revenue Code.

Timothy L. Wells

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[81] 26 U.S.C. § 7421 (1982).

[82] 28 U.S.C. § 2201 (1982).

[83] 30 U.S.C. § 1201 et seq. (1982).

[84] *See supra* notes 21, 30-32 and accompanying text.

[85] *See supra* notes 54-56, 66-68 and accompanying text.

[86] *See supra* notes 58-63 and accompanying text.

[87] *See supra* notes 33-38, 72-79 and accompanying text.

[88] *See Gorman Fuel*, 716 F. Supp. at 993 (Judge Siler cited no authority other than 26 U.S.C. 6501(e)(3) and the *Algonquin SNG* footnote in support of his holding).

[89] 26 U.S.C. § 7851(a); *see also supra* notes 30-32 and accompanying text.

[90] 426 U.S. 548 n.9 (1976); *see also supra* notes 54-56 and accompanying text.