

Guidelines for Establishing a Long-Term Funding Mechanism

The regulations at 43 CFR 3809.552(c) allow the BLM to require an operator to establish a trust fund or other funding mechanism available to the BLM to ensure the continuation of any long-term, post-mining treatment or maintenance requirements. The BLM district/field manager responsibilities include determining the need for a long-term funding mechanism, identifying the specific long-term corrective actions, verifying the operator's cost estimate to carry out those corrective actions, establishing the amount of funds needed in the long-term funding mechanism, and, once established, monitoring the terms, conditions and performance of the long-term funding mechanism. The district/field manager is the BLM official who establishes the agreement with the operator covering the funding mechanism.

When the district/field manager identifies a need through the process outlined below, the operator must establish an acceptable trust fund or other funding mechanism that meets the requirements of the regulations. The fund must be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure.

Long-Term Funding Requirement

The purpose of a trust fund or other long-term funding mechanism is to guarantee the continuation of post-reclamation treatment to achieve water quality objectives and for other long-term, post-mining maintenance requirements. The district/field manager decides whether a trust fund is needed on a case-by-case basis. In determining whether a trust fund or other funding mechanism will be required, the manager should consider the following factors:

- The anticipated post-reclamation obligations (PRO) as identified in the environmental document, record of decision, and/or approved Plan of Operations.
- The reasonable degree of certainty that the obligations will occur based on accepted scientific evidence and/or models.
- The operator's financial responsibility for those obligations.
- The feasibility, practicality, and/or desirability of requiring a financial guarantee for those anticipated long-term PRO using an individual financial guarantee [43 CFR 3809.552(a)], blanket financial guarantee [43 CFR 3809.560(a)] or State approved financial guarantee [43 CFR 3809.570].

The determination that a trust fund or other funding mechanism is needed and/or the amount needed in the fund may occur during review of the proposed Plan of Operations or later. Identification of the need for such a fund after the Plan of Operations has been approved does not necessarily require the district/field manager to revisit the original decision authorizing the operation; however, the operator may be required to modify the Plan per 43 CFR 3809.431(c).

For example, as part of a requested release of a financial guarantee under 43 CFR 3809.590, the district/field manager may condition final release of the individual, blanket or state-approved financial guarantee for a portion of the project area on the operator establishing a trust fund to pay for ongoing treatment of effluent discharged from that area [43 CFR 3809.591(c)(2)].

As part of ongoing monitoring and inspection activities, the BLM may identify the need for such a funding mechanism after the Plan of Operations has been reviewed and approved.

Water Quality Issues – If the environmental document and/or plan approval for an operation identifies long-term water treatment of acid rock drainage (ARD), leach solutions, a pit lake, or similar issues that would require long-term water treatment, the district/field manager must require a financial guarantee to address those PRO. The establishment of a trust fund or other funding mechanism may be the most practical means to guarantee the future long-term costs of those obligations.

Other Post-Mining Obligations – The BLM’s use of the provisions at 43 CFR 3809.552(c) is not limited to long-term water treatment. If the BLM has identified other PRO identified and the district/field manager determines that the financial responsibility for those obligations rests with the operator, the use of a trust fund or other funding mechanism may also be appropriate. For example, if the Plan approval requires the construction and maintenance of a permanent safety fence to limit public access to a highwall after mine closure, the most practical way to guarantee the funding of the maintenance and replacement costs for that fence may be through a trust fund or similar funding mechanism.

Unanticipated Events – The district/field managers should not use 43 CFR 3809.552(c) to require an operator to establish a fund to address unanticipated events, such as accidents, failures or spills, or for worst-case scenarios. If an event occurs that creates a new reclamation obligation, the BLM will require the operator to adjust the financial guarantee upward accordingly to cover the new obligation. Moreover, these events have a low probability of occurrence and are best addressed by a thorough review of the Plan of Operations and the development of contingency measures, and an active inspection program.

Reclamation Plan

Any PRO covered by the long-term funding mechanism must be described in the approved Plan of Operations. If the district/field manager determines the operator is responsible for PRO not described in the original reclamation plan, the manager will direct the operator to submit a modification to the Plan of Operations covering those obligations. The manager must review and approve the Plan of Operations to ensure all reclamation and closure obligations and corrective actions are adequately addressed.

Cost Estimate

When a trust fund or other funding mechanism is required to guarantee PRO, the operator must provide the district/field office with a cost estimate for the monitoring, construction, operation, maintenance, replacement or other activities for those required facilities, treatment or other post-reclamation needs documented in the Plan of Operations. The operator's estimate must also project when the cost obligations will occur, and for reoccurring costs, such as maintenance of a water treatment facility, the frequency, timing, and duration of the obligation should be estimated for each cost component.

Coverage – The operator's cost estimate must cover all anticipated costs, including the BLM's administration costs, as if the BLM were hiring a contractor to perform the work after the operator has vacated the project area. In addition to the operational, maintenance, and administrative costs, the operator must estimate any other costs associated with maintaining the long-term funding mechanism, including trust management or administration fees and any taxes that may come due. The amount of the estimated trust management fees must reflect the BLM's cost to obtain those services. The long-term funding mechanism must be sufficiently funded to cover all trust management fees, any applicable taxes and any other costs that may be identified or become applicable should the operator not be available to pay these costs.

Review – The BLM will review cost estimates for the PRO in the same manner and detail that is used in estimating financial guarantees for reclamation obligations. The cost estimates for the PRO must be acceptable to the district/field manager.

Present Value Determination – To establish the amount of funds that need to be invested, the future operational, maintenance, and administrative costs must be stated as a present value for the year the account will be established and start growing in value. To do this calculation, a standard present value analysis needs to be performed. Attachment 3 – *Guidelines for a Present Value Determination* provides guidance to aid in estimating the amount of funds that need to be deposited to meet the estimated future costs.

Trust Fund Agreement

Once the district/field manager determines that a trust fund is necessary and has reviewed the cost estimate, the district/field manager directs the operator to prepare the documents needed to establish the trust fund or other funding mechanism to ensure the funds are available to the BLM to meet all identified PRO should the operator fail to perform the required monitoring, construction, operation, maintenance, replacement, or other activities. The agreement establishing the fund must provide that its purpose is to assure that PRO identified in the Plan of Operations are satisfied, that the funding mechanism is under the BLM's control, including approval of any disbursement of funds from the trust fund, approval of the types of investments used, and approval of the fund management entity, and that the fund is isolated from the effects of any potential operator bankruptcy. Any such agreement must be enforceable by the BLM as a regulatory obligation under 43 CFR 3809.

Release of Funds – In setting up the funding mechanism, the agreement must address the BLM’s authorizing release of funds to reimburse the operator when the operator performs the PRO identified in the reclamation plan. Where the operator performs the construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure required in the reclamation plan for the approved Plan of Operations, funds held in the funding mechanism for those specific tasks may be released to the operator. Any release of funds to the operator based on work performed must be supported by written documentation of costs being presented to the BLM, and the district/field manager’s approval of such costs as reasonable. However, no such release shall be allowed if the remaining funds are insufficient to fully cover future PRO.

The agreement must provide the district/field manager with the flexibility to decide when the fund is no longer needed or that the amount in the fund may be reduced. Also, the agreement must include provisions allowing for the return of funds to the operator should the manager make such a determination.

Release of Liability – Creation of a trust fund or other funding mechanism to guarantee certain long-term post-mining responsibilities are performed does not relieve or release the operator from its responsibilities to perform those treatment or maintenance obligations identified in the BLM decision document approving the operation. As long as the long-term funding mechanism is in place to satisfy PRO, the Plan of Operations remains in effect. As required by 43 CFR 3809.424(b), the operator’s reclamation and closure obligations continue until satisfied, and a statement to that effect must be placed in the agreement.

Solicitor Review – The responsible district/field manager and/or state director will submit the draft agreement to the field or regional solicitor’s office for a legal review to ensure the government’s and public’s interests are protected before any decision is made.

Establish the Agreement – The district/field manager must be the official signing the trust fund agreement for the BLM.

Funding the Account

The district/field manager may require the trust fund or other fund mechanism to be fully funded to meet all future obligations when the operation is authorized. If so required, the amount needed in the fund must equal the present value of all future costs to be covered by the fund. The manager may also allow the fund to be established with the operator depositing, over a period of time, the funds needed to address the PRO. Where the activity that creates the long-term liability is allowed to proceed before the long-term funding mechanism is fully funded, the agreement must specify the funds or securities that must be deposited on an annual basis to ensure the fund will be fully funded within the timeframe established in the agreement. In addition, the operator will be required to guarantee the funding of these phased payments through establishment of a surety bond or other financial instrument. The long-term funding mechanism must, however, be fully funded by the time the post-mining effects of the mining activity are expected to occur.

Acceptable Financial Instruments

The regulations at 43 CFR 3809.555 define what individual financial guarantees are acceptable as financial instruments under 43 CFR 3809.552(a), but does not govern funding mechanisms under 43 CFR 3809.552(c). The state director may limit the allowable financial instrument for a trust fund or other financial mechanism established under 43 CFR 3809.552(c) to those listed under 43 CFR 3809.555, or may choose to allow other financial instruments to be used.

If the state director allows the use of other financial instruments not listed under 43 CFR 3809.555, he/she must document and make available to the public the decision and criteria used for accepting financial instruments not listed under 43 CFR 3809.555. An example of a financial instrument that may be deemed appropriate by the state director for a long-term funding mechanism is equities. This might include individual company stocks, stock funds, or stock index funds. However, under no circumstance may the long-term funding mechanism include direct investments in the operator's or the parent company's stock, or assets of the operator or parent company, or affiliates thereof. In addition, the asset mix of the funding mechanism may not include real property, equipment, or other assets not easily convertible into cash.

Monitoring the Fund

Although the establishment of a trust fund or other funding mechanism under 43 CFR 3809 may only be required to ensure the continuation of post-mining treatment, maintenance and other requirements that are anticipated, those obligations are in the future and may change significantly over the course of developing and reclaiming the operation. Any decision concerning the need for the fund and/or the amount of money in the fund must reflect the best available information and management practices at that time. When conditions change, the district/field manager has a responsibility to promptly take corrective actions, including reviewing the decision to establish the fund, adjusting the amount of money required in the fund, and the assumptions concerning growth of the fund.

Periodic Review – As part of the periodic review of the reclamation cost estimate required by 43 CFR 3809.552(b), the district/field manager must ensure the adequacy of any funding mechanism established under 43 CFR 3809.552(c). Monitoring the operation, specifically the extent, nature, and cost to address anticipated PRO, is a critical aspect of any long-term funding mechanism. The district/field office must conduct, at least every 3 years, a thorough review of the cost estimates and other assumptions used in determining the amount of funds needed in the long-term funding mechanism.

The district/field office must also monitor the growth of the fund. At least once per year the responsible district/field office must review the financial statements to ensure that growth of the fund is keeping pace with the assumptions used to determine the amount needed in the fund.

Insufficient Funds – Where a deficiency is identified in the adequacy of the fund to meet future obligations, the district/field manager must take the necessary actions, including issuing a decision revising the amount required in the fund. Should the operator fail or refuse to make additional payments to cover the deficiency, the district/field manager will take enforcement actions under 43 CFR 3809.601 and 3809.602, to ensure adequate funds are available to guarantee those future obligations will be performed.

Unneeded Funds – If the review of the cost estimate and fund performance demonstrates that all or a part of the fund may be released, the district/field manager, following the procedures set forth in the trust fund agreement, must take the necessary steps to have all funds in excess of that needed to address all PRO released to the operator.