

**UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT**

Arizona State Office
222 North Central Avenue
Phoenix, Arizona 85004
www.az.blm.gov

In Reply Refer To:
3809 (AZ-932) P

June 9, 2003

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Instruction Memorandum No. AZ-2003-020
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To: All Field Managers

From: State Director

Subject: Processing Notices, Plans of Operation and Financial Guarantees under 43 CFR 3809

Program Area: Mining Law Administration, Surface Management

Purpose: This Instruction Memorandum (IM) provides interim guidance for Arizona Bureau of Land Management (BLM) Field Offices (FO) to process Notices, Plans of Operation and financial guarantees under 43 CFR 3809. It is subject to change pending subsequent guidance now under review at the BLM national level.

Policy/Action: 43 CFR 3809.500 requires operators of mining operations on public lands at either the notice level or plan level of mining activity to post a financial guarantee to ensure the reclamation of public lands. To assist operators in furnishing a financial guarantee, a handout (Attachment 3) titled "Operator Information for Casual Use, Notice and Plan Level Operations and for Providing a Financial Guarantee as Required by 43 CFR 3809" is provided with this IM. This handout contains a Microsoft Excel spreadsheet that will allow operators to develop reclamation cost estimates for their operations. This spreadsheet can also be used by FO personnel to estimate the cost for reclaiming operations when the operator has not provided a bond and will not complete the required reclamation. Estimates for the reclamation of these operations are an essential part of future budget submissions.

Processing Notices

Processing notice level operations involves a 15-day timeframe (See 43 CFR 3809.311). During this timeframe the FO must analyze the notice to determine:

1. If the notice is complete and contains all of the information required under 43 CFR 3809.301.
2. If the operations proposed will not cause Unnecessary or Undue degradation.

3. Establish the amount of the financial guarantee required under 43 CFR 3809.500.

Note that the collection and adjudication of the financial guarantee amount falls outside of the 15 day timeframe and further processing of the notice is dependent upon the operator furnishing the financial guarantee. Also, pursuant to 43 CFR 3809.312(c) an operator cannot begin operations until a financial guarantee is posted and accepted through a written decision by BLM.

When an operator files a notice with a FO, that office must respond to the operator within 15 days. This should be viewed as high priority work. Within that time frame, the office must respond using the guidance provided by 43 CFR 3809.313 or formally acknowledge the notice as provided by 43 CFR 3809.312(a). Attachment 1 provides a template for acknowledging a notice.

If the operator has not supplied a financial guarantee within 60 days from his/her receipt of the acknowledgement of the notice and he/she has not maintained contact with the FO during that period, the FO will consider the notice withdrawn and update LR2000 records accordingly.

Processing Plans

The procedures for processing a plan are similar in nature to those for processing a notice. Of course, a plan requires review under the National Environmental Policy Act (NEPA) and a formal decision approving the plan before operations begin. However, at the conclusion of the NEPA process, if the plan is approved, a formal decision must be sent by the FO formally stating the mitigation outlined in the Record of Decision (ROD) and the amount of the financial guarantee required. The ROD should not contain the amount of the financial guarantee required. This decision should follow a similar format to Attachment 1. In this respect, the processing of a plan and a notice are similar.

Determination of Financial Guarantee Amount

The determination of the amount of the financial guarantee required for an operation is developed from the Reclamation Cost Estimate required of the operator under either 43 CFR 3809.301(b)(4) or 43 CFR 3809.401(d). FO personnel are required to review the estimate provided by the operator to determine the adequacy and accuracy of the estimate provided. FO personnel can request additional information from the operator as necessary to make this determination.

The amount of the financial guarantee is dependent on, and restricted to, the anticipated cost to reclaim the impact of the mining operation. Occasionally, small mining operations may be combined with recreational activities involving hiking and camping. When it is determined that these activities are solely attributable to recreation and are not authorized under the Mining Law of 1872, the impacts of such activities are not to be included when calculating the amount of the financial guarantee for the mining operation itself. When the recreational activity of camping

extends beyond 14 days in a 90 day period, it becomes an occupancy under 43 CFR 3715 and, if all necessary conditions are met, could be authorized under the Mining Law.

As an aid to calculating the value of the financial guarantee required by an operator, BLM Arizona has developed a financial guarantee handout and estimator. Both the handout and estimator are available for download at the BLM external website and are included as Attachment 3 in this document and via e-mail. Hard copies of the handout with a CD of the estimator are available from AZ-932; contact Ralph Costa for more information.

If an operator should elect to use this estimator to prepare a financial guarantee, generally BLM Arizona will accept the calculation pending verification of the inputs to the estimator. If an operator elects not to use the estimator, it will be the responsibility of the operator to demonstrate to BLM's satisfaction that his estimate is more accurate than the estimate derived from the estimator, based on a separate Reclamation Cost Estimate. Generally, BLM will accept the results of the estimator (pending verification of inputs) for all notice and plan level activities that do not require an Aquifer Protection Permit (APP) issued by the Arizona Department of Environmental Quality (ADEQ). ADEQ has provided BLM with a checklist that operators may complete to determine if their operations would likely require an APP.

Operations that are conducted under an APP are often complex and beyond the scope of the simple assumptions used in the estimator. In these situations, FO personnel must request a copy of the complete APP permit application as an aid in establishing the full amount of the financial guarantee. Note that bonds held by the State for the APP permit do not meet the requirements for a financial guarantee under 43 CFR 3809.

A financial guarantee must cover all aspects of the operation that are planned by the operator, but does not necessarily cover any pre-existing disturbance. An operator's responsibility for any pre-existing disturbance is tied directly to his use or exploitation of that disturbance. For example, if an excavation is on a mining claim and it predates the current operator, that operator is not responsible for the remediation or reclamation of the excavation if the excavation is not used *in any way* by the operator. If, however, the operator uses the excavation or would object to BLM reclaiming or remediating the excavation, then the cost for reclamation or remediation would be included in the financial guarantee.

The reclamation of mining claim access also presents another example of pre-existing disturbance that may or may not be included in the financial guarantee. If the access clearly predates the existence of the operation and the operator does not or would not object to BLM blocking, removing or reclaiming the access, then the operator would not be responsible for reclaiming the access and it should not be included in the determination of the financial guarantee. If the operator constructs access to the operation or improves existing access, and BLM determines that this access is important to maintain, BLM may elect to retain this access after the mining operation ends. In this case, the reclamation of the access would not be included in the financial guarantee, but the decision to retain the road by BLM would have to be documented and must be

consistent with the approved land-use plan. If an operator constructs access or uses existing access for an operation and would object to BLM blocking, removing or reclaiming that access, then the operator must post a financial guarantee that covers the reclamation of the access.

Operator Liabilities

Operators are encouraged to conduct a thorough inventory of the proposed operations area to determine the full extent of any preexisting disturbance. This could include pictures taken “before” and “after” the operation demonstrating the level and nature of any preexisting disturbance.

FO personnel must work closely with operators to determine, on a case-by-case basis, the existence of any preexisting disturbance and the extent to which an operator may be held responsible for the reclamation of that disturbance.

While BLM will not specifically conduct routine inspections to determine the extent of any hazardous materials present, FO personnel must inform operators that if preexisting disturbance involves violations of either the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environmental Response, Compensation Liability Act (CERCLA) the operators may be held responsible under those laws for the remediation of these violations, even if they are not considered part of the financial guarantee held under 43 CFR 3809.500.

Posting a financial guarantee for an operation does not in any way limit the extent of an operator’s liability for reclamation. If reclamation is complete, the financial guarantee is released, if reclamation subsequently fails, the operator is still responsible to ensure the successful reclamation of the site (See 43 CFR 3809.592). If the amount of the financial guarantee is less than the cost to reclaim, the operator is still held responsible (See 43 CFR 3809.598).

Processing Financial Guarantees

Once the amount of the financial guarantee is determined by FO personnel, the FO must notify the operator of the final amount (See Attachment 1). When the operator provides a financial guarantee for the stated amount, the FO receipts and deposits payments in the form of cash, check or credit card. Other forms of payment such as certificates of deposit, insurance, and negotiable securities are forwarded directly to the State Office (SO) for processing. The FO must forward the financial instrument rendered (or receipt for cash, checks or credit cards), together with a transmittal memo stating the required amount of the financial guarantee and all other documents provided by the operator to the SO (AZ-95454 Public Information and Records Services-Accounts) (See Attachment 2).

Field Offices are allowed to collect cash, checks or other forms of financial guarantees in any amount, but the Treasury Department must be notified prior to accepting a financial guarantee of

\$50 million or more. Credit cards cannot be used for an amount of \$100,000 or more. When a credit card is used for an amount larger than \$100,000, the transaction must be split into two unequal amounts. When dealing with cash, checks or credit cards, the FO must deposit the cash or check or process the credit card and forward a copy of the deposit receipt to AZ-95454 together with any other documents supplied by the operator. Cash, checks and credit cards should not be sent through the mail. In cases involving cash, checks or credit cards, the FO will be responsible for inputting the transactions into the Collection and Billing System and insuring the monies are placed into suspense. The FO will maintain a copy of all documents sent to SO in the FO file. Caution should be exercised in handling documents relating to financial guarantees as many of these documents may involve confidential information.

When forwarding the financial instrument to AZ-95454, all applicable documents will be sent via hand-delivery, courier service or certified mail, return receipt requested. Attachment 2 provides the required format for the cover memo that must be used when forwarding financial guarantees to the SO.

AZ-95454 will then, within three business days, forward copies of all documents received to AZ-933 (Lands and Minerals Adjudication and Withdrawals). The original documents will be maintained by AZ-95454. AZ-933 will then review the copies of the submitted financial instrument, together with all necessary forms, to ensure that they conform to the requirements of 43 CFR 3809.555.

AZ-933 will deal directly with the operator during adjudication of the financial guarantee and will issue a formal decision (copy to FO and AZ-95454 with supporting documents) accepting or rejecting the instrument submitted. AZ-933 will be responsible for updating both LR2000 and the Bond and Surety systems as actions concerning the financial guarantee are taken. The FO will still be responsible for updating LR2000 for all non-bonding 3809 actions.

Forms of Financial Guarantees

BLM Arizona will accept any of the forms of financial guarantees listed in 43 CFR 3809.555 (a-f) but will *not* accept a State-approved financial guarantee under 43 CFR 3809.570. The form of financial guarantee best suited for an operator is a decision that each operator must make for themselves. AZ-933 will work directly with operators on an individual basis to ensure that the form of the financial guarantee provided meets the requirements of 43 CFR 3809.555 but will not intervene on the behalf of any operator to secure a financial guarantee or advise an operator concerning the availability of sources that can provide financial guarantees. The availability of sources that can provide financial guarantees varies with the credit rating and financial status of the operator. BLM cannot predict or advise an operator on who could likely provide the operator a financial guarantee.

Release of Financial Guarantees

The release of financial guarantees is regulated by 43 CFR 3809.590. At or near the end of an active operation, BLM must begin consultations with the operator to monitor the progress of required reclamation. As reclamation proceeds, the financial guarantee would be released in accordance with the regulations. Under the regulations, 60 percent of the reclamation bond would be released when all applicable reclamation involving earthwork, except revegetation has been completed. The remaining 40 percent of the bond will be released by BLM Arizona when those areas of the reclaimed lands slated for revegetation are meeting or making significant progress toward meeting the Standards for Rangeland Health (available at www.az.blm.gov) and the reclaimed operation conforms with the requirements of 43 CFR 3809.591(c)(2). The already established procedures for establishing rangeland health should be employed for cases involving mining reclamation and a written determination of rangeland health must be present in the case file before the financial guarantee can be released.

The FO does not release the financial guarantee. Instead, the FO will issue a formal decision, with full right to appeal, reducing the amount of the financial guarantee (copy to AZ-933). This decision may be a partial reduction in the amount of the financial guarantee or a full reduction. Once the decision has been issued and all appeals have been settled, AZ-933 will issue a formal decision to release, or amend the financial instruments held by BLM for the financial guarantee. Any refund or release will be sent by AZ-95454 directly to the operator and/or the appropriate financial institution with a copy sent to the FO and AZ-933 will either close or update the file.

Seizure of Financial Guarantees

In cases where the operator has failed to do necessary reclamation, BLM will begin by contacting the operator to discuss the operator's responsibility to complete reclamation. If this contact does not produce the required reclamation, BLM will advance the case by issuing an enforcement order under 43 CFR 3715 and/or 43 CFR 3809. If the operator does not comply with the order, BLM Arizona will initiate forfeiture of the financial guarantee pursuant to the procedures specified at 43 CFR 3809.596. BLM Arizona will not initiate forfeiture of a financial guarantee without first taking an appropriate enforcement action under either 43 CFR 3715 or 43 CFR 3809.

Time frame: This policy is effective upon receipt.

Budget Impact: There will be a budget impact, but the amount is undetermined at this time.

Background: The requirements found at 43 CFR 3809.333 allow operators to extend their existing notices for a period of two years. This extension is granted upon the operator submitting a financial guarantee for the reclamation of their operation. BLM Arizona has 85 such notices that will immediately be subject to the provisions of this IM.

Manual/Handbook Sections Affected: Bureau Manual Section 3809.

Coordination: AZ-954-54, AZ-932, AZ-933

Contact: If you have any questions concerning this Instruction Memorandum, contact Ralph Costa at (602) 417-9349 or Ivy Garcia at (602) 417-9351.

SIGNED BY:
Carl Rountree
for Elaine Y. Zielinski

AUTHENTICATED BY:
Susan Williams
Staff Assistant

Attachments:

- 1 - Notice Acknowledgement & Determination of Financial Guarantee (3 pp.)
- 2 - Example Transmittal Memo (1 pp.)
- 3 - Operator Information for Casual Use, Notice and Plan Level Operations and for Providing a Financial Guarantee as Required by 43 CFR 3809 (41 pp.)

Attachment 1
3809 (Office Code)
Case File Number

Date

CERTIFIED MAIL, RETURN RECEIPT REQUESTED:
(or hand delivered)

Acknowledgement of Notice

Operators Name : 43 CFR 3809
Address :
:

This is your formal notification that your proposed notice level operations under 43 CFR 3809.300 may begin once the following conditions have been met:

1. You have obtained all necessary federal and state environmental permits before beginning, as required under 43 CFR 3809. (See 43 CFR 3715.5(b) and 43 CFR 3809.420). While it is not necessary for you to forward any permits you obtain to the Bureau of Land Management (BLM) at this time, you may be asked for them during subsequent surface management inspections of your operation.
2. You post a financial guarantee as required under 43 CFR 3809.500.

You must not begin any level of surface disturbance greater than “Casual Use” before these conditions have been met.

If you do not supply a financial guarantee within 60 days from your receipt of this letter and you have not maintained contact with BLM during that period, BLM will consider your notice withdrawn and update our records accordingly.

Decision – Determination of the Amount of Financial Guarantee

Operators Name : 43 CFR 3809
 Address :
 :

Upon review of your reclamation cost estimate as required under 43 CFR 3809.301(4), the BLM **Field Office name here** has determined that you must post a financial guarantee in the amount of **\$xx.xx. Note that financial guarantees for notices must be rounded up to the nearest \$1 and for plans to the nearest \$100.**

The amount of the financial guarantee required is based on the following reclamation measures:

List any special reclamation stipulations here such as special seed mix, etc.

Should your reclamation procedures fail to incorporate these measures you may be required to submit an increased financial guarantee or you may be subject to enforcement actions under 43 CFR 3809.

The amount calculated for your financial guarantee has been determined by BLM to be sufficient to cover the cost of completing the reclamation of your operation should you fail to do so. It does not in any way limit your liabilities under any law or regulation including, but not limited to, the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act. You may also be held responsible for mining related damages to the public lands that occur outside the scope of your operations. It is necessary for you to inspect your operations frequently and notify BLM immediately of any disturbance caused by a third-party outside your control.

You may appeal the amount of the financial guarantee under 43 CFR 3809.800. If you elect to appeal, you may post a financial guarantee in the amount shown in this decision to begin operations. If you elect to appeal and do not post a financial guarantee in the amount stated in this decision, you must not begin operations until advised by the Interior Board of Land Appeals (IBLA) or the Arizona State Director of the Bureau of Land Management.

Pursuant to 43 CFR 3809.800 (a), you may ask the Arizona State Director to review this decision. If you request State Director review of this decision, your written request must be a single package that includes a brief written statement explaining why BLM should change its decision and any documents that support your written statement (See 43 CFR 3809.805 (a)). This decision will remain in effect during the period of State Director review unless a stay is granted by the State Director (See 43 CFR 3809.808 (a)). Requests for State Director Review must be sent to the Bureau of Land Management, State Director Review, C/O **FIELD OFFICE ADDRESS**. When you submit your request for State Director review, you may also request a meeting with the State Director (See 43 CFR 3809.805 (b)).

If you have requested a State Director review, you may terminate this review by filing an appeal with the IBLA during the 30 days immediately following the date of receipt of the original decision. If you have requested a State Director review and the State Director decides not to review the decision in your case, you may appeal to IBLA. An appeal to IBLA must be taken during the 30 day period following the date the State Director decides not to review the decision.

If the State Director does not make a decision within 21 days of your request, you should consider your request for State Director review declined and you have 30 days following that 21 day period in which you may appeal the original decision to IBLA (See 43 CFR 3809.806). You may also appeal an unfavorable decision resulting from the State Director review. If appealing an unfavorable decision from a State Director's review, you have 30 days from the date you receive or are notified of that decision to appeal to IBLA.

You may also file an appeal directly to IBLA and bypass completely the State Director review (See 43 CFR 3809.800 (b)). If you wish to bypass State Director review and appeal directly to IBLA, your appeal must be filed within 30 days of the date you received this decision.

Any appeal taken with IBLA must be in accordance with 43 CFR 4.400 et seq. If you decide to appeal, your Notice of Appeal (NOA), must be filed in writing and in accordance with Form 1842-1 (enclosed) at the FIELD OFFICE NAME AND ADDRESS, and with Office of the Solicitor (Department of the Interior, Office of the Field Solicitor, Sandra Day O'Connor U.S. Court House #404, 401 W. Washington Street SPC44, Phoenix, AZ 85003-2151).

The required Statement of Reasons (SOR; See 43 CFR 4.412) may be filed with the NOA or, if not, it must be filed with the IBLA, Office of hearings and Appeals, U.S. Department of the Interior, MS 300-QC, Arlington, VA 22203, within 30 days after the NOA was filed (See also required service at 43 CFR 4.413).

The decision, signed by the Field Office Manager, will remain in effect during the appeal unless a stay is granted. If you wish to file a petition pursuant to regulations 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, or for a stay pursuant to 43 CFR 3809.808 (b) during a State Director review, the petition for a stay must accompany your notice of appeal or with your package requesting State Director review. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision shall show sufficient justification based on the following standards:

Standards for Obtaining a Stay

1. The relative harm to the parties if the stay is granted or denied,
2. The likelihood of the appellant's success on the merits,
3. The likelihood of immediate and irreparable harm if the stay is not granted, and
4. Whether the public interest favors granting the stay.

Attachment 2

3809 (Office Code)

Case File Number

Date

CERTIFIED MAIL, RETURN RECEIPT REQUESTED:

(or hand delivered)

To: AZ954, Public Information and Records Services – **Accounts**

From: Field Office Manager, AZ-**XXX**

Subject: Transmittal of Financial Guarantee for Case File AZA- **XXX**

Type of Financial Guarantee:

Individual _____

Statewide _____

Nationwide _____

After review of the 43 CFR 3809 actions proposed, we have determined that a financial guarantee in the amount of \$XX.XX is required to meet the requirements of 43 CFR 3809. In response to this determination, the operator for the proposed action has provided the following documents that are being forwarded for AZ 933 adjudication. Please find included the following documents:

Include here an itemized list of the documents included in the transmittal.

The review of these documents constitutes the final step in our approval of the subject 43 CFR 3809 action. Once AZ933 determines that the financial documents are acceptable, please provide written notification to the claimant/operator and send a copy to this office.

If AZ933 does not find the submitted financial documents acceptable or if further information is required, AZ933 should contact the operator directly at:

Name and address here

If AZ933 is unable to obtain an acceptable financial guarantee, please provide the operator a formal decision to that effect with a copy to this office. If you have any questions concerning this memo, please contact **Name, Phone**.