

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 8 COAL MINING
PART 35 VALID EXISTING RIGHTS

19.8.35.1 ISSUING AGENCY: New Mexico Coal Surface Mining Commission.
[19.8.35.1 NMAC - N, 1-15-2002]

19.8.35.2 SCOPE: All persons subject to the New Mexico Surface Mining Act, NMSA 1978, Sections 69-25A-1 et. Seq. (1979).
[19.8.35.2 NMAC - N, 1-15-2002]

19.8.35.3 STATUTORY AUTHORITY: NMSA 1978, Sections 69-25A-1 et. seq. (1979).
[19.8.35.3 NMAC - N, 1-15-2002]

19.8.35.4 DURATION: Permanent.
[19.8.35.4 NMAC - N, 1-15-2002]

19.8.35.5 EFFECTIVE DATE: January 15, 2002, unless a later date is cited at the end of a section.
[19.8.35.5 NMAC - N, 1-15-2002]

19.8.35.6 OBJECTIVE: The objective of Parts 1 - 35 of Chapter 8 is to establish regulations to implement the New Mexico Surface Mining Act as directed in NMSA 1978, Section 69-25A-5 (1979). These regulations are intended to ensure proper reclamation through permitting for operations subject to the New Mexico Surface Mining Act, in accordance with provisions and standards outlined in the New Mexico Surface Mining Act.
[19.8.35.6 NMAC - N, 1-15-2002]

19.8.35.7 DEFINITIONS:

A. VALID EXISTING RIGHTS (VER) means a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where 19.8.2.201 NMAC would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of 19.8.2.201 NMAC. A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the act, 19.8 NMAC and SMCRA.

(1) Property rights demonstration. Except as provided in Subsection D of 19.8.35.7 NMAC, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended. This right must exist at the time that the land came under the protection of 19.8.2.201 NMAC. Other applicable state statutory or case law will govern interpretation of documents relied upon to establish property rights, unless federal law provides otherwise.

(2) Except as provided in Subsection D of 19.8.35.7 NMAC, a person claiming valid existing rights also must demonstrate compliance with one of the following standards:

B. GOOD FAITH/ALL PERMITS STANDARD. All permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of 19.8.2.201 NMAC. At a minimum, an application must have been submitted for any permit required under 19.8 NMAC.

C. NEED FOR AND ADJACENT STANDARD. The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith attempt to obtain all permits and authorizations had been made, before the land came under the protection of 19.8.2.201 NMAC. To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 19.8.2.201 NMAC. Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of 19.8.2.201 NMAC when the permit for the original operation was issued by the director or when the good faith effort to obtain all necessary permits for the original operation was made. The director may consider the following factors when evaluating whether a person meets this standard:

(1) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of 19.8.2.201 NMAC depend upon use of that land for surface coal mining operations.

(2) The extent to which plans used to obtain financing for the operation before the land came under the protection of 19.8.2.201 NMAC rely upon use of that land for surface coal mining operations.

(3) The extent to which investments in the operation before the land came under the protection of 19.8.2.201 NMAC rely upon use of that land for surface coal mining operations.

(4) Whether the land lies within the area identified on the life-of-mine map submitted under Subsection C of 19.8.8.812 NMAC before the land came under the protection of 19.8.2.201 NMAC.

D. ROADS. A person who claims valid existing rights to use or construct a road across the surface of lands protected by 19.8.2.201 NMAC must demonstrate that one or more of the following circumstances exist if the road is included within the definition of "surface coal mining operations" in Paragraph (20) of Subsection S of 19.8.1.7 NMAC:

(1) the road existed when the land upon which it is located came under the protection of 19.8.2.201 NMAC, and the person has a legal right to use the road for surface coal mining operations;

(2) a properly recorded right of way or easement for a road in that location existed when the land came under the protection of 19.8.2.201 NMAC, and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations;

(3) a valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 19.8.2.201 NMAC;

(4) a valid existing right exists under Paragraphs (1) and (2) of Subsection A of 19.8.35.7 NMAC. [19.8.35.7 NMAC - N, 1-15-2002]

19.8.35.8 SUBMISSION AND PROCESSING OF REQUESTS FOR VER DETERMINATIONS:

A. The director will be responsible for making a determination on valid and existing rights for lands protected under 19.8.2.201 NMAC, with the exception of federal lands in protected features listed in Subsection F of 19.8.2.201 NMAC. A determination on valid existing rights not subject to the review of the director would be the responsibility of OSM.

B. A request for a valid and existing right must be submitted to the director, consistent with the provisions of Subsection A of 19.8.35.8 NMAC, if the request concerns the operation of a surface coal mine on the basis of valid existing rights under 19.8.2.201 NMAC or wish to confirm the right to do so. This request may be submitted before preparing and submitting an application for a permit or boundary revision for the land. [19.8.35.8 NMAC - N, 1-15-2002]

19.8.35.9 REQUIREMENTS FOR A VER PROPERTY RIGHTS DEMONSTRATION:

A. A demonstration of property rights under the definition of valid existing rights in Paragraph (1) of Subsection A of 19.8.35.7 NMAC must be provided to the director if the request relies upon the good faith/all permits standard or the needed for and adjacent standard identified in Paragraph (2) of Subsection A of 19.8.35.7 NMAC. This demonstration must include the following:

(1) a legal description of the land to which the request pertains;

(2) complete documentation of the character and extent of the current interests in the surface and mineral estates of the land to which the request pertains;

(3) a complete chain of title for the surface and mineral estates of the land to which the request pertains;

(4) a description of the nature and effect of each title instrument that forms the basis for the request, including any provision pertaining to the type or method of mining or mining-related surface disturbances and facilities;

(5) a description of the type and extent of surface coal mining operations that the requester claim the right to conduct, including the method of mining, any mining-related surface activities and facilities, and an explanation of how those operations would be consistent with New Mexico property law;

(6) complete documentation of the nature and ownership, as of the date that the land came under the protection of 19.8.2.201 NMAC, of all property rights for the surface and mineral estates of the land to which the request pertains;

(7) names and addresses of the current owners of the surface and mineral estates of the land to which the request pertains;

(8) if the coal interests have been severed from other property interests, it must be documented that the owners of other property interests in the land to which the request pertains have been notified and provided reasonable opportunity to comment on the validity of the property rights claims;

(9) any comments received in response to the notification provided under Paragraph (8) of Subsection A of 19.8.35.9 NMAC.

B. Requirements for good faith/all permits standard. If a request relies upon the good faith/all permits standard in Subsection B of 19.8.35.7 NMAC, a submittal must include information required by Subsection A of 19.8.35.8 NMAC. The following information about permits, licenses, and authorizations for surface coal mining operations on the land to which the request pertains must also be submitted:

(1) approval and issuance dates and identification numbers for any permits, licenses, and authorizations that the requester for VER or a predecessor in interest obtained before the land came under the protection of 19.8.2.201 NMAC;

(2) application dates and identification numbers for any permits, licenses, and authorizations for which the requester or a predecessor in interest submitted a request before the land came under the protection of 19.8.2.201 NMAC;

(3) an explanation of any other good faith effort that the person making the VER or a predecessor in interest made to obtain the necessary permits, licenses, and authorizations as of the date that the land came under the protection of 19.8.2.201 NMAC.

C. Requirements for needed for and adjacent standard. If a request relies upon the needed for and adjacent standard in Subsection C of 19.8.35.7 NMAC, the information required under Subsection A of 19.8.35.9 NMAC must be submitted. In addition, the requester must explain how and why the land is needed for and immediately adjacent to the operation upon which the request is based, including a demonstration that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of 19.8.2.201 NMAC.

D. Requirements for standards for mine roads. If a request relies upon one of the standards for roads in Paragraphs (1) through (3) of Subsection D of 19.8.35.7 NMAC, the requester must submit satisfactory documentation that:

(1) the road existed when the land upon which it is located came under the protection of 19.8.2.201 NMAC, and the person making the VER request has a legal right to use the road for surface coal mining operations;

(2) a properly recorded right of way or easement for a road in that location existed when the land came under the protection of 19.8.2.201 NMAC, and, under the document creating the right of way or easement, and under any subsequent conveyances, the person making the VER request has a legal right to use or construct a road across that right of way or easement to conduct surface coal mining operations; or

(3) a valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of 19.8.2.201 NMAC.

[19.8.35.9 NMAC - N, 1-15-2002]

19.8.35.10 INITIAL REVIEW OF A VER REQUEST:

A. The director must conduct an initial review to determine whether a VER request includes all applicable components of the submission requirements of 19.8.35.9 NMAC. This review pertains only to the completeness of the request, not the legal or technical adequacy of the materials submitted.

B. If a request does not include all applicable components of the submission requirements of 19.8.35.9 NMAC, the director must notify the applicant and establish a reasonable time for submission of the missing information.

C. When a request includes all applicable components of the submission requirements of 19.8.35.9 NMAC, the director must implement the notice and comment requirements of 19.8.35.11 NMAC.

D. If the person making the VER does not provide information that the director requests under Subsection B of 19.8.35.10 NMAC within the time specified or as subsequently extended, the director must issue a determination that the requester has not demonstrated valid existing rights, as provided in Subsection D of 19.8.35.12 NMAC.

[19.8.35.10 NMAC - N, 1-15-2002]

19.8.35.11 NOTICE AND COMMENT REQUIREMENTS AND PROCEDURES VER REQUEST:

A. When the person making the VER request satisfies the completeness requirements of 19.8.35.10 NMAC, the person requesting the VER must publish a notice for two consecutive weeks in a newspaper of general

circulation in the county in which the land is located. An affidavit of publication will be provided to the director after the notice has been published. Each notice must include:

- (1) the location of the land to which the request pertains;
- (2) a description of the type of surface coal mining operations planned;
- (3) a reference to and brief description of the applicable standard(s) under the definition of valid existing rights in 19.8.2.102 NMAC;

(a) if the request relies upon the good faith/all permits standard or the needed for and adjacent standard in Paragraph (2) of Subsection A of 19.8.35.7 NMAC, the notice also must include a description of the property rights that the person making the VER claims and the basis for the claim;

(b) if a request relies upon the standard in Paragraph (1) of Subsection D of 19.8.35.7 NMAC, the notice also must include a description of the basis by which the person making the VER request claims that the road existed when the land came under the protection of 19.8.2.201 NMAC; in addition, the notice must include a description of the basis of the claim by which the person making the VER request has a legal right to use that road for surface coal mining operations;

(c) if a request relies upon the standard in Paragraph (2) of Subsection D of 19.8.35.7 NMAC, the notice also must include a description of the basis for the claim that a properly recorded right of way or easement for a road in that location existed when the land came under the protection of 19.8.2.201 NMAC; in addition, the notice must include a description of the basis for the claim that, under the document creating the right of way or easement, and under any subsequent conveyances, the person making the VER request has a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations;

(4) if a request relies upon one or more of the standards in Paragraph (2) of Subsections A of 19.8.35.7 NMAC, and Paragraphs (1) and (2) of Subsection D of 19.8.35.7 NMAC, a statement that the director will not make a decision on the merits of a request if, by the close of the comment period under this notice or the notice required by Subsection C of 19.8.35.12 NMAC, a person with a legal interest in the land initiates appropriate legal action in the proper venue to resolve any differences concerning the validity or interpretation of the deed, lease, easement, or other documents that form the basis of a claim;

(5) a description of the procedures that the director will follow in processing a request;

(6) the closing date of the comment period, which must be a minimum of 30 days after the publication date of the notice;

(7) a statement that interested persons may obtain a 30-day extension of the comment period upon request;

(8) the name and address of the director's office where a copy of the request is available for public inspection and to which comments and requests for extension of the comment period should be sent.

B. The director must promptly provide a copy of the notice required under Subsection A of 19.8.35.11 NMAC to:

(1) all reasonably locatable owners of surface and mineral estates in the land included in a request;

(2) the owner of the feature causing the land to come under the protection of 19.8.2.201 NMAC, and, when applicable, the agency with primary jurisdiction over the feature with respect to the values causing the land to come under the protection of 19.8.2.201 NMAC. For example, both the landowner and the state historic preservation officer must be notified if surface coal mining operations would adversely impact any site listed on the national register of historic places. As another example, both the surface owner and the national park service must be notified if the request includes non-federal lands within the authorized boundaries of a unit of the national park system.

C. The letter transmitting the notice required under Subsection B of 19.8.35.11 NMAC must provide a 30-day comment period, starting from the date of service of the letter, and specify that another 30 days are available upon request. The director may grant additional time for good cause upon request. The director need not consider comments received after the closing date of the comment period.

[19.8.35.11 NMAC - N, 1-15-2002]

19.8.35.12 HOW A DECISION ON A VER REQUEST WILL BE MADE:

A. The director must review the materials submitted under 19.8.35.8 NMAC, comments received under 19.8.35.11 NMAC, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. If not, the director must notify the requester in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the director deems necessary to remedy the inadequacy.

B. Once the record is complete and adequate, the director must determine whether the requester has demonstrated valid existing rights. The decision document must explain how the requester has satisfied or has not satisfied all applicable elements of the definition of valid existing rights in 19.8.35.7 NMAC. It must contain findings of fact and conclusions, and it must specify the reasons for the conclusions.

C. Impact of property rights disagreements. This subsection applies only when a request relies upon one or more of the standards in Paragraph (2) of Subsection A of 19.8.35.7 NMAC, or Paragraphs (1) and (2) of Subsection D of 19.8.35.7 NMAC.

(1) The director must issue a determination that the requester has not demonstrated valid existing rights if the requester's property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. The director will make this determination without prejudice, meaning that the requester may resubmit the request once the property rights dispute is finally adjudicated. This paragraph applies only to situations in which legal action has been initiated as of the closing date of the comment period under Subsection A of 19.8.35.11 NMAC or Subsection B of 19.8.35.11 NMAC.

(2) If the record indicates disagreement as to the accuracy of the requester's property rights claims, but this disagreement is not the subject of pending litigation in a court or administrative agency of competent jurisdiction, the agency must evaluate the merits of the information in the record and determine whether the requester has demonstrated that the requisite property rights exist under Paragraph (1) of Subsection A of 19.8.35.7 NMAC, or Paragraphs (1) or (2) of Subsection D of 19.8.35.7 NMAC of the definition of valid existing rights as appropriate. The director must then proceed with the decision process under 19.8.35.12 NMAC.

D. The director must issue a determination that the requester has not demonstrated valid existing rights if the requester does not submit information that the director requests under Subsection B of 19.8.35.10 NMAC or Subsection A of 19.8.35.12 NMAC within the time specified or as subsequently extended. The director will make this determination without prejudice, meaning that the requester may file a revised request at any time.

E. After making a determination, the director must:

(1) provide a copy of the determination, together with an explanation of appeal rights and procedures, to the requester, to the owner or owners of the land to which the determination applies, to the owner of the feature causing the land to come under the protection of 19.8.2.201 NMAC, and, when applicable, to the director with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of 19.8.2.201 NMAC;

(2) the director will publish a notice of the determination in a newspaper of general circulation in the county in which the land is located; OSM will publish the determination, together with an explanation of appeal rights and procedures, in the federal register if the determination includes federal lands within an area listed in 19.8.2.201 NMAC.

[19.8.35.12 NMAC - N, 1-15-2002; A, 12-31-2007]

19.8.35.13 ADMINISTRATIVE AND JUDICIAL REVIEW OF A VER DETERMINATION: A determination that the requester has or does not have valid existing rights is subject to administrative and judicial review under 19.8.12.1200 NMAC and 19.8.12.1202 NMAC.

[19.8.35.13 NMAC - N, 1-15-2002; A, 08-31-2010]

19.8.35.14 AVAILABILITY OF RECORDS FOR VER REQUESTS AND DETERMINATIONS: The director must make a copy of the VER request available to the public under Subsection E of 19.8.11.1100 NMAC. In addition, the director must make records associated with the VER request, and any subsequent determination under 19.8.35.12 NMAC, available to the public in accordance with the requirements and procedures of New Mexico Inspection of Public Records Act NMSA 1978 14-2 et seq.

[19.8.35.14 NMAC - N, 1-15-2002; A, 12-31-2007]

HISTORY OF 19.8.35 NMAC: [RESERVED]