

Surface Mining Reclamation and Enforcement, Interior

§ 761.16

§ 761.15 Procedures for waiving the prohibition on surface coal mining operations within the buffer zone of an occupied dwelling.

- (a) This section does not apply to:
 - (1) Lands for which a person has valid existing rights, as determined under § 761.16.
 - (2) Lands within the scope of the exception for existing operations in § 761.12.
 - (3) Access or haul roads that connect with an existing public road on the side of the public road opposite the dwelling, as provided in § 761.11(e)(2).
- (b) If you propose to conduct surface coal mining operations within 300 feet, measured horizontally, of any occupied dwelling, the permit application must include a written waiver by lease, deed, or other conveyance from the owner of the dwelling. The waiver must clarify that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver will act as consent to surface coal mining operations within a closer distance of the dwelling as specified.
- (c) If you obtained a valid waiver before August 3, 1977, from the owner of

an occupied dwelling to conduct operations within 300 feet of the dwelling, you need not submit a new waiver.

(d) If you obtain a valid waiver from the owner of an occupied dwelling, that waiver will remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase. A subsequent purchaser will be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to State laws or if surface coal mining operations have entered the 300-foot zone before the date of purchase.

[64 FR 70833, Dec. 17, 1999]

§ 761.16 Submission and processing of requests for valid existing rights determinations.

(a) *Basic framework for valid existing rights determinations.* The following table identifies the agency responsible for making a valid existing rights determination and the definition that it must use, based upon which paragraph of § 761.11 applies and whether the request includes Federal lands.

Paragraph of § 761.11 that provides protection	Protected feature	Type of land to which request pertains	Agency responsible for determination	Applicable definition of valid existing rights
(a)	National parks, wildlife refuges, etc..	Federal	OSM	Federal ¹
(a)	National parks, wildlife refuges, etc..	Non-Federal	Regulatory authority	Federal ¹
(b)	Federal lands in national forests ³ .	Federal	OSM	Federal ¹
(c)	Public parks and historic places.	Does not matter	Regulatory authority	Regulatory program ²
(d)	Public roads	Does not matter	Regulatory authority	Regulatory program ²
(e)	Occupied dwellings	Does not matter	Regulatory authority	Regulatory program ²
(f)	Schools, churches, parks, etc..	Does not matter	Regulatory authority	Regulatory program ²
(g)	Cemeteries	Does not matter	Regulatory authority	Regulatory program ²

¹ Definition in 30 CFR 761.5.
² Definition in applicable State or Federal regulatory program under 30 CFR Chapter VII, Subchapter T.
³ Neither 30 U.S.C. 1272(e) nor 30 CFR 761.11 provides special protection for non-Federal lands within national forests. Therefore, this table does not include a category for those lands.

(b) *What you must submit as part of a request for a valid existing rights determination.* You must submit a request for a valid existing rights determination to the appropriate agency under paragraph (a) of this section if you intend to conduct surface coal mining operations on the basis of valid existing rights under § 761.11 or wish to confirm the right to do so. You may submit this request before preparing and submit-

ting an application for a permit or boundary revision for the land, unless the applicable regulatory program provides otherwise.

(1) *Requirements for property rights demonstration.* You must provide a property rights demonstration under paragraph (a) of the definition of valid existing rights in § 761.5 if your request relies upon the good faith/all permits standard or the needed for and adjacent

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standard in paragraph (b) of the definition of valid existing rights in §761.5. This demonstration must include the following items:

(i) A legal description of the land to which your request pertains.

(ii) Complete documentation of the character and extent of your current interests in the surface and mineral estates of the land to which your request pertains.

(iii) A complete chain of title for the surface and mineral estates of the land to which your request pertains.

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

(v) A description of the type and extent of surface coal mining operations that you 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 State property law.

(vi) Complete documentation of the nature and ownership, as of the date that the land came under the protection of §761.11 or 30 U.S.C. 1272(e), of all property rights for the surface and mineral estates of the land to which your request pertains.

(vii) Names and addresses of the current owners of the surface and mineral estates of the land to which your request pertains.

(viii) If the coal interests have been severed from other property interests, documentation that you have notified and provided reasonable opportunity for the owners of other property interests in the land to which your request pertains to comment on the validity of your property rights claims.

(ix) Any comments that you receive in response to the notification provided under paragraph (b)(1)(viii) of this section.

(2) *Requirements for good faith/all permits standard.* If your request relies upon the good faith/all permits standard in paragraph (b)(1) of the definition of valid existing rights in §761.5, you must submit the information required under paragraph (b)(1) of this section.

You also must submit the following information about permits, licenses, and authorizations for surface coal mining operations on the land to which your request pertains:

(i) Approval and issuance dates and identification numbers for any permits, licenses, and authorizations that you or a predecessor in interest obtained before the land came under the protection of §761.11 or 30 U.S.C. 1272(e).

(ii) Application dates and identification numbers for any permits, licenses, and authorizations for which you or a predecessor in interest submitted an application before the land came under the protection of §761.11 or 30 U.S.C. 1272(e).

(iii) An explanation of any other good faith effort that you 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 §761.11 or 30 U.S.C. 1272(e).

(3) *Requirements for needed for and adjacent standard.* If your request relies upon the needed for and adjacent standard in paragraph (b)(2) of the definition of valid existing rights in §761.5, you must submit the information required under paragraph (b)(1) of this section. In addition, you must explain how and why the land is needed for and immediately adjacent to the operation upon which your 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 §761.11 or 30 U.S.C. 1272(e).

(4) *Requirements for standards for mine roads.* If your request relies upon one of the standards for roads in paragraphs (c)(1) through (c)(3) of the definition of valid existing rights in §761.5, you must submit satisfactory documentation that:

(i) The road existed when the land upon which it is located came under the protection of §761.11 or 30 U.S.C. 1272(e), and you have a legal right to use the road for surface coal mining operations;

(ii) A properly recorded right of way or easement for a road in that location existed when the land came under the

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protection of §761.11 or 30 U.S.C. 1272(e), and, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across that right of way or easement to conduct surface coal mining operations; or

(iii) 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 §761.11 or 30 U.S.C. 1272(e).

(c) *Initial review of request.* (1) The agency must conduct an initial review to determine whether your request includes all applicable components of the submission requirements of paragraph (b) of this section. This review pertains only to the completeness of the request, not the legal or technical adequacy of the materials submitted.

(2) If your request does not include all applicable components of the submission requirements of paragraph (b) of this section, the agency must notify you and establish a reasonable time for submission of the missing information.

(3) When your request includes all applicable components of the submission requirements of paragraph (b) of this section, the agency must implement the notice and comment requirements of paragraph (d) of this section.

(4) If you do not provide information that the agency requests under paragraph (c)(2) of this section within the time specified or as subsequently extended, the agency must issue a determination that you have not demonstrated valid existing rights, as provided in paragraph (e)(4) of this section.

(d) *Notice and comment requirements and procedures.* (1) When your request satisfies the completeness requirements of paragraph (c) of this section, the agency must publish a notice in a newspaper of general circulation in the county in which the land is located. This notice must invite comment on the merits of the request. Alternatively, the agency may require that you publish this notice and provide the agency with a copy of the published notice. We will publish a similar notice in the FEDERAL REGISTER if your request involves Federal lands within an area

listed in §761.11(a) or (b). Each notice must include:

(i) The location of the land to which the request pertains.

(ii) A description of the type of surface coal mining operations planned.

(iii) A reference to and brief description of the applicable standard(s) under the definition of valid existing rights in §761.5.

(A) If your request relies upon the good faith/all permits standard or the needed for and adjacent standard in paragraph (b) of the definition of valid existing rights in §761.5, the notice also must include a description of the property rights that you claim and the basis for your claim.

(B) If your request relies upon the standard in paragraph (c)(1) of the definition of valid existing rights in §761.5, the notice also must include a description of the basis for your claim that the road existed when the land came under the protection of §761.11 or 30 U.S.C. 1272(e). In addition, the notice must include a description of the basis for your claim that you have a legal right to use that road for surface coal mining operations.

(C) If your request relies upon the standard in paragraph (c)(2) of the definition of valid existing rights in §761.5, the notice also must include a description of the basis for your 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 §761.11 or 30 U.S.C. 1272(e). In addition, the notice must include a description of the basis for your claim that, under the document creating the right of way or easement, and under any subsequent conveyances, you have a legal right to use or construct a road across the right of way or easement to conduct surface coal mining operations.

(iv) If your request relies upon one or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of valid existing rights in §761.5, a statement that the agency will not make a decision on the merits of your request if, by the close of the comment period under this notice or the notice required by paragraph (d)(3) of this section, 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 your claim.

(v) A description of the procedures that the agency will follow in processing your request.

(vi) The closing date of the comment period, which must be a minimum of 30 days after the publication date of the notice.

(vii) A statement that interested persons may obtain a 30-day extension of the comment period upon request.

(viii) The name and address of the agency 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.

(2) The agency must promptly provide a copy of the notice required under paragraph (d)(1) of this section to:

(i) All reasonably locatable owners of surface and mineral estates in the land included in your request.

(ii) The owner of the feature causing the land to come under the protection of §761.11, 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 §761.11. 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.

(3) The letter transmitting the notice required under paragraph (d)(2) of this section must provide a 30-day comment period, starting from the date of service of the letter, and specify that another 30 days is available upon request. At its discretion, the agency responsible for the determination of valid existing rights may grant additional time for good cause upon request. The agency need not necessarily consider comments received after the closing date of the comment period.

(e) *How a decision will be made.* (1) The agency responsible for making the determination of valid existing rights must review the materials submitted under paragraph (b) of this section, comments received under paragraph (d) of this section, 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 agency must notify you in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy.

(2) Once the record is complete and adequate, the responsible agency must determine whether you have demonstrated valid existing rights. The decision document must explain how you have or have not satisfied all applicable elements of the definition of valid existing rights in §761.5. It must contain findings of fact and conclusions, and it must specify the reasons for the conclusions.

(3) *Impact of property rights disagreements.* This paragraph applies only when your request relies upon one or more of the standards in paragraphs (b), (c)(1), and (c)(2) of the definition of valid existing rights in §761.5.

(i) The agency must issue a determination that you have not demonstrated valid existing rights if your property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. The agency will make this determination without prejudice, meaning that you may refile 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 paragraph (d)(1) or (d)(3) of this section.

(ii) If the record indicates disagreement as to the accuracy of your 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 you have demonstrated that the requisite property rights exist under paragraph (a), (c)(1), or (c)(2) of the definition of valid existing rights in § 761.5, as appropriate. The agency must then proceed with the decision process under paragraph (e)(2) of this section.

(4) The agency must issue a determination that you have not demonstrated valid existing rights if you do not submit information that the agency requests under paragraph (c)(2) or (e)(1) of this section within the time specified or as subsequently extended. The agency will make this determination without prejudice, meaning that you may refile a revised request at any time.

(5) After making a determination, the agency must:

(i) Provide a copy of the determination, together with an explanation of appeal rights and procedures, to you, 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 § 761.11, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 761.11.

(ii) Publish notice of the determination in a newspaper of general circulation in the county in which the land is located. Alternatively, the agency may require that you publish this notice and provide a copy of the published notice to the agency. We will publish the determination, together with an explanation of appeal rights and procedures, in the FEDERAL REGISTER if your request includes Federal lands within an area listed in § 761.11(a) or (b).

(f) *Administrative and judicial review.* A determination that you have or do not have valid existing rights is subject to administrative and judicial review under §§ 775.11 and 775.13 of this chapter.

(g) *Availability of records.* The agency responsible for processing a request subject to notice and comment under paragraph (d) of this section must make a copy of that request available to the public in the same manner as the agency, when acting as the regu-

latory authority, must make permit applications available to the public under § 773.13(d) of this chapter. In addition, the agency must make records associated with that request, and any subsequent determination under paragraph (e) of this section, available to the public in accordance with the requirements and procedures of § 840.14 or § 842.16 of this chapter.

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§ 761.17 Regulatory authority obligations at time of permit application review.

(a) Upon receipt of an administratively complete application for a permit for a surface coal mining operation, or an administratively complete application for revision of the boundaries of a surface coal mining operation permit, the regulatory authority must review the application to determine whether the proposed surface coal mining operation would be located on any lands protected under § 761.11.

(b) The regulatory authority must reject any portion of the application that would locate surface coal mining operations on land protected under § 761.11 unless:

(1) The site qualifies for the exception for existing operations under § 761.12;

(2) A person has valid existing rights for the land, as determined under § 761.16;

(3) The applicant obtains a waiver or exception from the prohibitions of § 761.11 in accordance with §§ 761.13 through 761.15; or

(4) For lands protected by § 761.11(c), both the regulatory authority and the agency with jurisdiction over the park or place jointly approve the proposed operation in accordance with paragraph (d) of this section.

(c) *Location verification.* If the regulatory authority has difficulty determining whether an application includes land within an area specified in § 761.11(a) or within the specified distance from a structure or feature listed in § 761.11(f) or (g), the regulatory authority must request that the Federal, State, or local governmental agency with jurisdiction over the protected land, structure, or feature verify the location.