



COALEX STATE INQUIRY REPORT – 149
September 14, 1990

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TOPICS: HAUL ROADS AND VALID EXISTING RIGHTS

INQUIRY: Please locate any material which discusses valid existing rights (VER) with respect to haul roads. In particular, the hauling of coal on roads in existence prior to August 3, 1977.

SEARCH RESULTS: Research was conducted using the COALEX Library and the other materials available in LEXIS. No material was identified which discussed the specific issue stated in the inquiry. Little material was identified which addressed VER with respect to haul roads. The topic was discussed briefly in a 1988 OSM Directive and in the preambles to several Federal Register notices of proposed and final rules amending 30 CFR Part 761: Areas Unsuited for Mining. A copy of the Directive and excerpts from the notices are attached. Also included are three Federal Register notices of the Secretary's determination of VER for mining operations in national forests which involve haul roads and an excerpt from a recent Judge Flannery decision which involves roads.

Under the 1979 rules (30 CFR 761.5), an operator possesses valid existing rights for a haul road if that person had:

"(1) a recorded right-of-way, recorded easement, or a permit for a coal haul road recorded as of August 3, 1977, or (2) any other road in existence as of August 3, 1977."

In response to a court remand, the requirement for a good faith attempt to obtain all permits prior to August 3, 1977 ("modified all permits test") was substituted for the requirement to have obtained all permits by August 3, 1977.

No changes were proposed for the definition of haul road VER until December 27, 1988, when OSM proposed to add language "clarifying that the 'continually created VER' provision applies to haul roads" (53 FR 52374). The December 27, 1988 proposed rules were withdrawn by OSM on July 21, 1989 pending "further study" (54 FR 30557).

NOTE: References are made to VER for haul roads in two additional Federal Register notices: 47 FR 25278 (JUNE 10, 1982) Proposed rules and 48 FR 41312 (SEPTEMBER 14, 1983) Final rules. Excerpts of both notices are included.



ATTACHMENTS

- A. TEMPORARY DIRECTIVE: Subject No. 88-1, Transmittal No. 419, "Interim Procedures for Determination of Valid Existing Rights" (January 1, 1988).
- B. 54 FR 30557 (JULY 21, 1989). Withdrawal of proposed rule.
- C. Excerpts from 53 FR 52374 (DECEMBER 27, 1988). Proposed rules.
- D. Excerpts from 48 FR 41312 (SEPTEMBER 14, 1983). Final rules.
- E. Excerpts from 47 FR 25278 (JUNE 10, 1982). Proposed rules.
- F. Excerpts from 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble.
- G. 55 FR 22961 (JUNE 5, 1990). Request for Determination of Valid Existing Rights Within the Daniel Boone National Forest, Ky.
- H. 46 FR 36758 (JULY 15, 1981). Determination of Valid Existing Rights; Daniel Boone National Forest.
- I. 45 FR 61798 (SEPTEMBER 17, 1980). Determination of Valid Existing Rights Within Monongahela National Forest.
- J. Excerpts from NATIONAL WILDLIFE FEDERATION v LUJAN, 1990 U.S. Dist. LEXIS 11541 (D D C August 30, 1990).