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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 11, 1983

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Kerr-McGee v. Watt

Myles Flint of the Department of Justice, Lands Division, called me on July 7 to advise me that a demand for documents in the Executive Office of the President had arisen in connection with the above-referenced litigation. The case concerns phosphate mining in the Osceola National Forest, and is linked to the President's decision to veto H.R. 9 earlier this year. I requested that Flint forward copies of the pertinent papers to our office, and told him that someone from our office would be in touch with him to coordinate a response. The whole package is submitted to you for appropriate staffing.

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
KERR-McGEE CORPORATION,)	
et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 83-0322
)	
JAMES G. WATT, et al.,)	
)	
Defendants.)	
_____)	

PLAINTIFFS' SECOND SET
OF INTERROGATORIES

Plaintiffs request that the United States, the President of the United States, the White House Staff, the Council on Environmental Quality, the Office of Management and Budget, and the Environmental Protection Agency answer the following interrogatories under oath pursuant to F.R.C.P. 33, and that the answers be served on attorneys for plaintiffs within 30 days.

Instructions

"Identify," with respect to an individual, means to state that person's name, title and office address both at the time in question (i.e., when the person wrote a document, assisted in an analysis, or participated in a decision) and at present.

Interrogatories

1. Identify all of the persons who participated on behalf of the United States in:

- (a) any evaluation or analysis of whether Kerr-McGee has discovered a valuable deposit of phosphate in the Osceola National Forest, or whether there is reason to believe that phosphate in the Osceola National Forest can be mined profitably (and state as to each, the date of such evaluation or analysis and the conclusion reached by such individual at that time);
- (b) the review of Kerr-McGee's initial showing;
- (c) the review of Kerr-McGee's final showing;
- (d) the preparation of the 1983 Environmental Assessment;
- (e) the formulation of a recommendation to the President with respect to H.R. 9;
- (f) the decision to release the 1983 Environmental Assessment in final form without affording lease applicants an opportunity to comment on a draft assessment;
- (g) the decision by the President to withhold approval of H.R. 9;

- (h) the decision to deny Kerr-McGee's applications for leases to mine phosphate in the Osceola National Forest;
- (i) the decision to announce the President's decision to withhold approval of H.R. 9 and Secretary Watt's decision to deny Kerr-McGee's application for leases on the same day; and
- (j) the communication of the President's decision concerning H.R. 9 and Secretary Watt's decision concerning lease applications to representatives of environmental organizations and the State of Florida prior to any announcement to the applicants or the public.

2. Describe in detail the nature of the participation by all of the individuals identified in response to ¶ 1(a)-(j) in the matters set out in ¶ 1(a)-(j).

3. Identify the individuals who participated in the preparation of the responses to these interrogatories (and

state as to each such individual the questions that he or she helped to answer).

Respectfully submitted,

William P. Skinner
Peter J. Nickles
William P. Skinner

Covington & Burling
1201 Pennsylvania Ave., N. W.
P. O. Box 7566
Washington, D. C. 20044
(202) 662-5394

Attorneys for Kerr-McGee
Corporation

Of Counsel:

Thomas R. Cochran, Esq.
Kerr-McGee Corporation
Kerr-McGee Center
123 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73125

Date: July 6, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
KERR-McGEE CORPORATION, <u>et al.</u> ;)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 83-0322
)	
JAMES G. WATT, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

PLAINTIFF'S SECOND REQUEST FOR THE
PRODUCTION OF DOCUMENTS

This is a request for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure.

Instructions *

A. "Document" means any and all written or printed matter of any kind, including the originals and all non-identical copies, whether different from the original by reason of any notes made on such copies or otherwise, including without limitation, correspondence, memoranda, reports, notes, publications, drafts, studies, surveys, analyses, projections, drawings, maps, photographs, diagrams, charts, testimony, affidavits, transcripts, statements, speeches, statistics, minutes, agendas, interoffice and intraoffice communications, notations of any sort of conversation (including, without limitation, telephone conversations or meetings), computer programs and printouts, work sheets, microfilm, phonographic

recordings, machine readable data bases (computerized information), and any other data compilation from which information can be obtained.

B. "Your" means the President of the United States, the Executive Office of the President, the White House Staff, the Council on Environmental Quality, the Office of Management and Budget, the Environmental Protection Agency, the Secretary of Agriculture, the Department of Agriculture, the Secretary of the Interior, the Department of the Interior, and all bureaus, divisions, offices, branches, agents, representatives, and employees of the foregoing wherever located, including without limitation counsel.

C. Documents should be produced for inspection and copying at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044, on Friday July 1, 1983.

D. Organize and label all documents produced in response to this request so as to clearly identify the specific request, or requests, to which each document is responsive. See F.R.C.P. 34(b).

E. With respect to each document that is produced, identify the individual in whose file the document was found or, if the document was not found in the file of an individual, the office in which it was found.

F. "Kerr-McGee" means Kerr-McGee Corporation, its subsidiaries, and affiliates.

G. If any responsive document is withheld from production on grounds of privilege, work product immunity, or for any other reason: (1) identify the document with sufficient particularity to allow the matter to be brought before the Court, including a description of the document's type (e.g., letter, memorandum, notes, report), subject matter, number of pages, date, author(s), addressee(s), the person(s) who is its custodian, that person's business address, and the request(s) to which the document is responsive; and (2) explain the nature and the basis for each claim of privilege, work product immunity, or other reason for withholding the document.

Requests

1. Produce all documents (or portions of documents) in your possession, custody, or control that have not already been produced to counsel for Kerr-McGee (in response to a Freedom of Information Act Request or otherwise) that discuss, refer, or relate to: */

*/ No documents have been produced by the President, or the White House Staff. The Department of Agriculture is preparing a list of documents, or portions of documents, that were withheld under the Freedom of Information Act. Similar lists were prepared by CEQ, OMB, and EPA. Counsel for Kerr-McGee will provide counsel for the Government Defendants with copies of those lists, if necessary to assist them in responding to this request.

- (a) applications for leases to mine phosphate in the Osceola National Forest in Florida; or
- (b) legislation to prohibit phosphate mining in the Osceola National Forest, including without limitation, H.R. 9, 97th Cong. 2d Sess.

2. Produce copies of all decisions by the Department of the Interior approving preference right lease applications after January 1, 1970.

3. Produce copies of all valuable deposit or commercial quantities evaluations or analyses made by the Department of the Interior in connection with the decisions described in ¶ 2.

4. Produce copies of all stipulations prepared by the Department of Agriculture for inclusion in leases or permits to conduct surface mining operations on national forests.

5. Produce copies of all leases issued by the Department of the Interior for surface mining in national forests.

6. Produce a complete set of current (or the most current available) maps for the Osceola National Forest sufficient to show:

- (a) current uses of different portions of the Forest;
- (b) the topography of the Forest;
- (c) the vegetation of different portions of the Forest;
- (d) the location of red-cockaded woodpecker nests;
- (e) wetlands (and swamps) in the Forest;
- (f) flood plains in the Forest; and
- (g) other information about the Forest that is available on maps prepared by or for the Forest Service.

7. Produce documents sufficient to describe in detail the purposes for which the Osceola National Forest is being administered, and the prior, current, and expected future uses of the Forest including without limitation a description of the number of acres in the Forest that have been used during each of the past ten years, and are expected to be used during each of the next ten years for:

- (a) clearcutting for timber or other reasons;
- (b) thinning for timber or other reasons;
- (c) other timber harvesting methods (i.e., other than (a) or (b)), if applicable;
- (d) burning to control the growth of underbrush, or for other reasons;

- (e) spraying with chemicals to control the growth of brush or for other reasons;
- (f) sand and gravel mining;
- (g) other mineral development; and
- (h) range for cattle or other livestock.

8. Produce a copy of all hypothetical mining plans prepared in connection with or relied upon in the 1983 Environmental Assessment, the 1979 Supplement to the Final Environmental Impact Statement, or the 1974 Environmental Impact Statement.

9. Produce copies of all timber management plans, other management plans, statements of goals or objectives, environmental analyses and environmental impact statements prepared for, or in connection with, the Osceola National

Forest in the last ten years (including copies of drafts of any of the foregoing).

Respectfully submitted,



Peter J. Nickles
William J. Skinner

Covington & Burling
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P.O. Box 7566
Washington, D.C. 20044
(202) 662-5394

Attorneys for Kerr-McGee
Corporation

Of Counsel:

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THE WHITE HOUSE

WASHINGTON

February 18, 1983

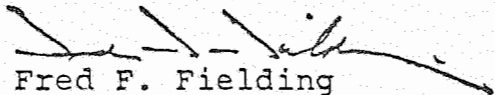
Dear Messrs. Nickles and Skinner:

This is in response to your request, pursuant to the Freedom of Information Act, for copies of all documents in the possession, custody or control of the "Executive Office of the President" that relate to applications for leases to mine phosphate in the Osceola National Forest and legislation to prohibit phosphate mining in the Osceola National Forest.

The "Executive Office of the President" is a designation used to describe a group of separate offices or units which, in a number of respects, function independently of each other. Some of the offices or units within the Executive Office of the President are "agencies" within the meaning of the Freedom of Information Act, but others, particularly the White House Office, "whose sole function is to advise and assist the President," are not. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980).

Accordingly, I recommend that you contact directly those offices within the Executive Office of the President which are subject to the Act.

Sincerely,


Fred F. Fielding
Counsel to the President

Peter J. Nickles, Esquire
William P. Skinner, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KERR-McGEE CORPORATION;)
)
and)
)
KERR-McGEE CHEMICAL)
CORPORATION)
Kerr-McGee Center)
123 Robert S. Kerr Avenue)
Oklahoma City, Oklahoma 73125)
(405) 270-2877)
)
Plaintiffs,)
)
v.) Civil Action No. 83-0322
)
JAMES G. WATT,)
Secretary of the Interior;)
)
DEPARTMENT OF THE INTERIOR)
18th & C Streets, N.W.)
Washington, D.C. 20230)
(202) 343-7351)
)
JOHN R. BLOCK)
Secretary of Agriculture)
)
DEPARTMENT OF AGRICULTURE)
Independence and 14th St., S.W.)
Washington, D.C. 20250)
(202) 447-3631)
)
and)
)
UNITED STATES OF AMERICA)
)
Defendants.)
)

AMENDED COMPLAINT FOR DECLARATORY,
MANDATORY AND INJUNCTIVE RELIEF

1. This suit seeks declaratory, mandatory, and injunctive relief to compel the Secretary of the Interior to issue preference right mining leases to Kerr-McGee Corporation for mining phosphate in the Osceola National Forest in Florida.

Jurisdiction and Venue

2. The Court has jurisdiction of this action under 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331, 1361, and 2201-2202. There exists between the parties an actual case and controversy, justiciable in character.

3. Venue is appropriate in this district under 28 U.S.C. § 1391.

Parties

4. Plaintiff Kerr-McGee Corporation is a corporation incorporated under the laws of Delaware that has its principal place of business in Oklahoma City, Oklahoma. Plaintiff Kerr-McGee Chemical Corporation is a corporation that also is incorporated under the laws of Delaware, and has its principal place of business in Oklahoma City, Oklahoma. Kerr-McGee Chemical Corporation is a wholly owned subsidiary of Kerr-McGee Corporation. Kerr-McGee Corporation applied for the leases that are the subject of this complaint. Kerr-McGee Chemical Corporation would carry out the mining operations under such leases. Both corporations are hereafter referred to collectively as "Kerr-McGee."

5. Defendant James G. Watt is the Secretary of the Interior, and is sued in his official capacity. His official residence is in Washington, D.C. Defendant Department of the Interior is an agency of the United States, which is being sued by its official title pursuant to 5 U.S.C. § 703. The headquarters of the Department is located in Washington, D.C.

all
family
6

(A)

6. Defendant John R. Block is the Secretary of Agriculture, and his sued in his official capacity. His official residence is in Washington, D.C. Defendant Department of Agriculture is an agency of the United States, which is being sued by its official title pursuant to 5 U.S.C. § 703. The headquarters of the Department is located in Washington, D.C. The United States of America is being sued pursuant to 5 U.S.C. § 703.

The Requirements of the Mineral Leasing Act and Applicable Regulations

7. The Mineral Lands Leasing Act, 30 U.S.C. § 181, et seq., provides for the issuance of phosphate prospecting permits "[w]here prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area" 30 U.S.C. § 211(b).

8. Under the prospecting permit procedure, private companies make application for such permits to the Bureau of Land Management, as designee of the Secretary of the Interior, pursuant to the phosphate leasing statute, 30 U.S.C. § 211(b).

9. Prior to the issuance of permits, the Secretary of the Interior considers whether the public interest would be served by issuing permits. Furthermore, if, as is the case here, the land embraced in the permit is subject to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359, the Secretary of the Interior secures the consent of the department or instrumentality having jurisdiction over the

lands, and that department may subject the permits to environmental stipulations.

10. If the department or instrumentality having jurisdiction over the lands consents and the Secretary of the Interior determines that issuing the permits would be in the public interest, the Bureau of Land Management, as designee of the Secretary of the Interior, issues prospecting permits to the applicant. The permits give the applicant the exclusive right to prospect for phosphate deposits for a period of two years; the Secretary of the Interior may extend the permits for an additional period not in excess of four years.

11. If the permittee makes a discovery of valuable phosphate deposits on the permit land prior to the expiration of the permits, the permittee applies to the Bureau of Land Management for a preference right mining lease. The phosphate leasing statute, 30 U.S.C. § 211(b), and the regulations of the Department of the Interior, require that a lease be granted, if the designated officials of the Department conclude that a valuable deposit has been discovered.

12. After the lease is issued, the lessee conducts further tests and exploration in order to prepare a mining plan. When these tests are completed, the plan is submitted to the Secretary for his approval. The Secretary of the Interior considers the proposed plan and consults with other agencies involved in the administration of the permit land in order properly to evaluate, and thereby mitigate, the environmental consequences of the proposed mining operations. Hence,

before the mining plan is approved, it contains a detailed description of measures to control or prevent pollution to ground waters and damage to wildlife and other natural resources, in addition to a proposed method of operation, and a proposed plan of reclamation. In addition, if the implementation of the mining plan is a major federal action significantly affecting the quality of the environment, the Secretary of the Interior may supplement any existing environmental impact statement respecting phosphate mining on the permit lands or prepare a new impact statement specifically dealing with the mining plan. Until the Secretary of the Interior or his designee approves all aspects of the plan, including the measures to protect the environment, and reclaim mined-over lands, government regulations specifically forbid mining operations. 30 C.F.R. § 231.10.

Kerr-McGee's Application
for Prospecting Permits

13. On September 11, 1964, Kerr-McGee filed with the Department of the Interior, Bureau of Land Management, five applications for phosphate prospecting permits covering acquired lands in the Osceola National Forest.

14. The Secretary of the Interior determined that it would be in the public interest to grant such permits to Kerr-McGee. At the time that the Secretary made this determination, he understood that if Kerr-McGee discovered valuable deposits of phosphate on the lands embraced by the permits, it would have a vested right to obtain leases.

15. Because the lands in question are acquired lands, the Secretary of the Interior also asked the United States Forest Service, which has jurisdiction over the Forest, to evaluate each prospecting permit application, and to consent to the issuance of such permits pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352. The Forest Service did so evaluate, and gave its consent to the issuance of prospecting permits subject to certain environmental stipulations. At the time that the Forest Service consented to the permits, it understood that if Kerr-McGee discovered valuable deposits of phosphate on the lands embraced by the permits, Kerr-McGee would have a vested right to obtain leases.

what were?
formulated
at the time?

16. The Forest Service's consent to the issuance of prospecting permits was based, among other things, on its conclusion that "if phosphate resources were discovered, leading to mining, the mined lands could be restored to useful purposes." See Answers to Interrogatories Directed to the United States Department of Agriculture, ¶ 8, p. 2, served February 24, 1972 in Florida v. Morton et al., Civil Action No. 14960-71 (D.D.C. complaint filed July 22, 1971).

obtain

17. On March 1, 1965, Kerr-McGee received three prospecting permits (BLM-A-079904, BLM-A-079905 and BLM-A-079906) from the Department of the Interior, covering in excess of 4,000 acres in the Osceola National Forest. The three permits carried total rental charges of \$1,423.25 per year and were due to expire on February 28, 1967.

to point

18. On November 1, 1966, Kerr-McGee received the two remaining prospecting permits that it had applied for (BLM-A-079903 and BLM-A-079907) from the Department of the Interior covering in excess of 3,300 acres in the Osceola National Forest. These two permits carried total rental charges of \$846.57 per year and were due to expire on October 30, 1968.

19. All five permits included the environmental stipulations requested by the Forest Service.

20. On February 18, 1967, Kerr-McGee requested extensions of prospecting permits BLM-A-079904, 079905, and 079906. On February 28, 1967, it received extensions at a total rental charge of \$1,423.15 per year. The extended permits were due to expire on March 1, 1969.

21. On September 9, 1968, Kerr-McGee requested extensions of prospecting permits BLM-A-079903 and 079907. On October 30, 1968, it received extensions at a total rental charge of \$846.50 per year. These extended permits were due to expire on November 1, 1970.

22. During the years that Kerr-McGee held the permits, it paid all rental charges and expended substantial sums of money prospecting on the land covered by the permits.

Kerr-McGee's Lease Applications

23. Section 211(b) of the Mineral Leasing Act, 30 U.S.C. § 211(b) provides in part: "If prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the

area covered by the permit, the permittee shall be entitled to a lease for any or all of the lands embraced in the prospecting permit."

24. On January 20, 1969, Kerr-McGee filed applications with the Department of the Interior, Bureau of Land Management, for leases based on the discovery of valuable deposits of phosphate on the lands described in permit BLM-A-079905, and portions of the lands described in permits BLM-A-079904 and 079906. At the same time, Kerr-McGee paid to the Bureau of Land Management \$791.50, the cost of the first year's rental on said leases.

25. On August 13, 1970, Kerr-McGee filed applications with the United States Department* of the Interior, Bureau of Land Management, for preference right leases based on the discovery of valuable deposits of phosphate on the lands described in permits BLM-A-079903 and 079907. At the same time Kerr-McGee paid to the Bureau of Land Management \$846.50, the cost of the first year's rental on said leases.

Certifications by the Geological Survey

26. On March 28, 1969 and December 11, 1970, the United States Geological Survey certified that Kerr-McGee had made valid discoveries of valuable deposits of phosphate on the lands for which it had applied for leases.

27. Those certifications were based on standards and criteria that the Department of the Interior had applied to such determinations for many years.

28. Under regulations then in effect, the certifications by the Geological Survey that valuable deposits had been discovered made it mandatory that leases be issued to Kerr-McGee. 43 C.F.R. § 3520.1-1 (1974). ?

29. Under 30 U.S.C. § 211(b), Kerr-McGee's demonstration, under the standards and criteria that had been applied by the Department of the Interior for many years, that it had discovered a valuable deposit of phosphate also made it mandatory that leases be issued.

30. Notwithstanding the certifications by the Geological Survey, and the requirements of the regulations and the statute, no leases were issued.

The First Florida Suit

31. On July 22, 1971, the State of Florida filed suit in this Court against the Secretary of the Interior and other federal government officials seeking to enjoin those defendants from approving leases in the Osceola National Forest, and from further processing applications for such leases. Florida v. Morton, et al. Civil Action No. 1496-71. (D.D.C. complaint filed July 22, 1971).

32. While the complaint in that action alleged several causes of action, the principal relief sought was an injunction requiring the defendants to prepare an environmental impact statement. On October 17, 1972, the Court denied a motion by the State of Florida for a preliminary injunction on the basis of a finding, among other things, that the federal defendants had "committed themselves to taking no

final administrative action on pending or future permits or leases prior to the completion of the final Osceola NEPA statement."

33. After lengthy delays, a final environmental impact statement was issued on June 27, 1974. The statement analyzed in detail the environmental impact of phosphate mining upon all aspects of the Osceola National Forest, including the area's water supply, wildlife, and other natural resources, and examined numerous measures which the lessee could undertake to mitigate undesirable environmental effects.

The Statement included a submission by Kerr-McGee describing an improved technology for reclaiming phosphate-mined lands that had recently been developed at the Brewster Phosphate Mine in Florida. Id. pp. IX-142 to 151. Kerr-McGee is a partner in the Brewster Phosphate Partnership.

34. Thereafter, the Justice Department, on behalf of the Secretary, repeatedly represented to the District Court in Florida v. Morton that action respecting the Kerr-McGee lease applications would be taken shortly. Indeed, pursuant to the instructions of the District Court, the Justice Department informed the Court, by a letter dated November 15, 1974, that a "draft program decision option document [respecting Osceola leases] . . . was distributed to offices both inside and outside the Department of the Interior between October 15 and November 1, 1974" and that "a final decision option document will be submitted to the Secretary of the Interior sometime during the first two weeks of December [1974]."

35. On October 17, 1975, however, the Justice Department, on behalf of the Secretary, announced to the Court in Florida v. Morton that it was no longer possible to predict when a decision respecting the lease application would be made.

36. On October 24, 1975, Kerr-McGee wrote to the Department of the Interior to request that the Department state when a decision would be made concerning the pending lease applications. The letter also stated that if the Department was unable to assure Kerr-McGee "that Secretarial action will be forthcoming, Kerr-McGee will have no other alternative but to reluctantly seek an appropriate remedy in the courts."

37. On October 28, 1975 the Secretary of the Interior issued a "news release" stating that "additional information was necessary before a Department decision could properly be made on preference right lease applications within the Forest," and that the Secretary was therefore directing an "intensive two-year study" to analyze the effect of phosphate mining upon northern Florida's underground water supply and wildlife.

38. On January 16, 1975 the Department of the Interior sent a letter to Kerr-McGee stating that a decision on the pending applications would be deferred until the studies described in paragraph 37 were completed.

The First Kerr-McGee Suit

39. On April 13, 1976, Kerr-McGee Chemical Corp., a wholly owned subsidiary of Kerr-McGee, filed a complaint in this Court for an injunction to compel the Secretary of the Interior to issue leases to Kerr-McGee to mine phosphate in the Osceola National Forest. Kerr-McGee Chemical Corp. v. Thomas S. Kleppe, et al., Civil Action No. 76-0608 (D.D.C. complaint filed April 13, 1976).

40. While this suit was pending, the Department of the Interior issued new regulations on May 7, 1976 that purported to change the criteria and the procedures for determining whether a valuable deposit of phosphate had been discovered by a prospecting permittee. 41 Fed. Reg. 18845 (May 7, 1976).

41. On September 29, 1976, this Court entered a memorandum order that held that the 1969 and 1970 certifications by the Geological Survey that Kerr-McGee had discovered valuable deposits of phosphate were based on the then prevailing standards and criteria; that as a result Kerr-McGee had a vested right to the issuance of leases; and that the newly enacted 1976 regulations could not void that interest. The Court ordered the Secretary to issue leases to Kerr-McGee. Kerr-McGee Chemical Corp. v. Thomas S. Kleppe, et al., Civil Action No. 76-0602 (D.D.C. order filed September 29, 1976), Kerr-McGee Ex. 1.

42. On March 4, 1977, after receiving numerous submissions from the federal defendants concerning the prior

practice of the Department with respect to valuable deposit determinations, the Court reaffirmed its prior holding that the 1969 and 1970 certifications by the Geological Survey were made in accordance with longstanding standards and criteria of the Department. The Court again ordered the Secretary to issue leases to Kerr-McGee. Kerr-McGee Chemical Corp. v. Andrus, Civil Action No. 76-0608 (order filed March 4, 1977), Kerr-McGee Ex. 2.

43. On March 28, 1978 the United States Court of Appeals for the District of Columbia Circuit reversed the September 29, 1976 and March 4, 1977 orders of the district court per curiam on grounds that "[a]ppellee should have exhausted its administrative remedies before seeking the writ [of mandamus] or petitioning for judicial review." Kerr-McGee Chemical Corp. v. Andrus, Nos. 77-1478, and 77-1483 (D.C. Cir. order filed March 28, 1978), Kerr-McGee Ex. 3.

Supplemental Environmental Studies

44. While the litigation described in ¶¶ 39 to 43 above was pending, the United States Geological Survey issued a report on the Impact of Potential Phosphate Mining on The Hydrology of Osceola National Forest dated December, 1977. That report described in detail the effects of mining in the Forest on water. The report concluded that mining in the Forest would have minimal adverse effects on water.

45. In March 1978, the Fish and Wildlife Service issued a report titled Osceola National Forest Phosphate Extraction and Processing: Impacts on Federally Listed

Threatened or Endangered And Other Species of Concern. That report described in detail the effect of mining in the Forest on fish and wildlife. The report concluded that the effect of mining would be beneficial. According to the report, the Forest "does not now provide quality wildlife habitats, however, with proper planning, surface mining and reclamation should improve wildlife habitat for many species." Id. at p.274.

46. On October 31, 1979, the Department of Interior issued a Final Supplement To The Final Environmental Impact Statement. That report provided still further detailed analysis of every aspect of the effects of mining in the Forest.

47. The Final Supplement included a detailed discussion of reclamation technology. See, e.g., Appendix 9, Reclamation Methods: Current Technology; and Appendix 10, Possible Reestablishment of Sawtimber Production Following Mining in the Osceola National Forest.

48. The Final Supplement summarized the evidence with respect to reclamation of timber as follows:

"it is not unreasonable to expect that attempts to establish commercial sawtimber production on mined lands on the Osceola would stand a good chance of success."
p.I-6.

The study included in Appendix 10 to the Final Supplement concluded: "[t]here is a good possibility that sawtimber production could be reestablished on the Osceola National Forest," and that "phosphate mine wastes are a reasonably good substrate for tree growth." Id., pp.XII-80, and XII-86.

49. The Final Supplement also concluded that "reclamation to wooded upland and wetland communities is possible." Id., I-8.

Kerr-McGee's Initial Showing

50. On August 11, 1978, Kerr-McGee submitted additional data in support of its lease application to the United States Geological Survey in accordance with the regulations that had been newly adopted in 1976. See 43 C.F.R. § 3521.1-1(b) ("initial showing").

51. On July 29, 1980, the Bureau of Land Management requested that Kerr-McGee submit additional data in support of its "initial showing." Kerr-McGee submitted additional data on October 16, 1980, and November 17, 1980. On May 19, 1981, the Bureau of Land Management informed Kerr-McGee that its initial showing complied with the requirements of the regulations. Kerr-McGee Ex. 4.

Forest Service Stipulations

52. On October 22, 1981, the Honorable John B. Crowell, Jr., Assistant Secretary of Agriculture for Natural Resources and Environment, testified at a congressional hearing that the Department of Agriculture had concluded that current technology could adequately restore the Osceola National Forest upon completion of phosphate mining. Among other things, Mr. Crowell stated: "It's my understanding that the technology is pretty well developed for assuring restoration of the land to forest production." He also testified

*not new
but applies to general*

that the Forest Service was preparing stipulations for inclusion in any leases that were issued that would ensure that the Forest would be adequately reclaimed. Hearing Before the Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs House of Representatives, pp. 14, 16, 19, 22 (October 22, 1981).

53. At the same hearing, the Honorable Paul C. Cahill, Director, Office of Federal Activities, Environmental Protection Agency, testified: "I think with stipulations -- at least what I've seen so far and with these preliminary results -- that we could adequately protect the environment and the purposes of the national forest." Id., p. 52.

54. On December 23, 1981, the Honorable Donald P. Hodel, Undersecretary of the Department of the Interior, wrote a letter to the Honorable Lawton Chiles, United States Senator for the State of Florida, that stated in part: "It is our view that present technology gives every indication that mined land [in the Osceola National Forest] can be restored to meet . . . requirements." Kerr-McGee Ex. 5.

55. On February 3, 1982, the Forest Service issued final stipulations to be included in leases to mitigate any adverse effects from mining in the Forest. Kerr-McGee Ex. 6.

56. In preparing these stipulations, the Forest Service considered the reclamation requirements of the Forest and available reclamation technologies.

57. The stipulations specify, among other things,

that:

[T]he soil medium shall be reestablished to support forest tree growth by: (a) providing a ratio of clay to sand in a mixture that will retain sufficient moisture and nutrients in the root zones of forest trees making up the vegetative community; (b) by returning overburden, including topsoil, over the clay and sand mixture. Kerr-McGee Ex. 6, stipulation ¶ 4.

58. The administrative record demonstrates that there is technology available today that can accomplish these results. The technology has been demonstrated successfully at the Brewster Phosphate Mine in Florida, and at other locations in Florida.

59. On March 11, 1982, the Honorable John R. Block, Secretary of Agriculture, wrote a letter to the Honorable Lawton Chiles that stated that the Department of Agriculture was "confident" that the stipulations prepared by the Forest Service would "provide the protection needed to the stream and swamp wildlife habitats [of the Osceola National Forest]." Secretary Block also stated: "We believe the present stipulations (with those to be added in mining and reclamation plans if and when leases are issued) will assure long term uses and management consistent with the purposes for which the lands were acquired or are being administered, while also permitting the substantial values represented by the phosphate deposits to be realized." Kerr-McGee Ex. 7.

Kerr-McGee's Final Showing

60. . On March 9, 1982, the Bureau of Land Management directed Kerr-McGee to submit a "final showing" under the 1976 regulations based on the Forest Service stipulations, the 1974 Final Environmental Impact Statement, and the 1979 Supplement To The Final Environmental Impact Statement. See 43 C.F.R. § 3521.1-1(c). Kerr-McGee submitted its "final showing" on March 25, 1982. Kerr-McGee submitted additional data in support of its final showing on April 20, 1982.

61. Officials of the Department of the Interior have repeatedly stated that Kerr-McGee's "final showing" contains all of the information required to comply with the requirements of the 1976 regulations. Upon information and belief, officials in the Department of the Interior responsible for reviewing Kerr-McGee's "final showing" concluded that it confirms that Kerr-McGee has made a valid discovery of valuable deposits of phosphate in areas of the Osceola National Forest covered by its lease applications.

62. Under 30 U.S.C. § 211(b), Kerr-McGee's discovery of valuable deposits of phosphate makes it mandatory that leases be issued.

Proposed Amendments To The Regulations

63. On March 30, 1982, the Department of the Interior published in the Federal Register a notice of proposed rulemaking. 47 Fed.Reg. 13472 (March 30, 1982), Kerr-McGee Ex. 8. The proposed rules would amend the regulations that

were adopted in 1976 concerning the standards and procedures to be applied to preference right lease applications.

64. The proposed amendments reflect the Department's recognition that the standards embodied in the 1976 regulations were more stringent than Congress had intended.

65. The amended standards set forth in the proposed regulations are intended by the Department to be substantially the same as the criteria that the Department had used for many years prior to 1976 in evaluating preference right lease applications.

66. As pointed out above, the United States Geological Survey certified in 1969 and 1970 that Kerr-McGee's discovery qualified as a valuable deposit under the criteria that the Department had historically applied prior to 1976.

67. The time for filing comments on the proposed regulations expired in the Spring of 1982. Upon information and belief, final regulations will be adopted that are substantially the same as the proposed regulations.

The Second Florida Suit

68. On May 3, 1982, Senators Lawton Chiles and Paula Hawkins, the State of Florida, and six environmental groups filed complaints in the United States District Court for the Middle District of Florida attempting to enjoin the further processing of pending applications to mine phosphate in the Osceola National Forest. Florida, et al v. Watt, et

al. Civil Action No. 82-421, (M.D. Fla. complaint filed May 3, 1982); and Chiles, et al v. Watt, et al. Civil Action No. 82-423, (M.D. Fla. complaint filed May 3, 1982).

69. On May 5, 1982, the Department of the Interior wrote a letter to the Honorable Lawton Chiles, United States Senator for the State of Florida, assuring him that the Department would not make a final decision concerning the issuance of leases until the session of Congress that was then pending had adjourned. The stated reason for the delay was to give Congress an opportunity to adopt a legislative solution to the questions raised by the pending lease applications. Kerr-McGee Ex. 9.

70. On May 18, 1982, Kerr-McGee filed a motion to intervene in the Florida action. That motion was granted on June 3, 1982.

71. On November 5, 1982, the United States District Court for the Middle District of Florida dismissed both actions on grounds that the issues were not ripe for judicial review. Kerr-McGee Ex. 10.

Proposed Environmental Assessment

72. On November 15, 1982, the Department of the Interior announced that it would prepare an Environmental Assessment to provide further detail regarding reclamation techniques on phosphate mined lands in Florida, and their application in the Osceola National Forest. The assessment

was scheduled to be completed in February, 1983. 47 Fed. Reg. 51475 (November 15, 1982). Kerr-McGee Ex. 11.

73. Responsible officials of the Department of the Interior continued to represent that the Department was satisfied that current technology could reclaim the Forest adequately. Upon information and belief, those officials also continued to believe that Kerr-McGee had established that it had discovered a valuable deposits.

74. Officials of the Department of the Interior also repeatedly promised Kerr-McGee that Kerr-McGee would have an opportunity to submit comments concerning the Environmental Assessment.

Congressional Legislation

75. In May, 1980, then Secretary of the Interior Cecil D. Andrus announced that he would support legislation that would prohibit mineral development of the Osceola National Forest but provide compensation for lease applicants who were entitled to leases under existing law. Kerr-McGee Ex. 12. Congress, thereafter, considered enacting such legislation.

76. In the closing days of 1982, Congress passed H.R.9, a bill that would have prohibited phosphate mining in the Osceola National Forest, but compensated lease applicants, including Kerr-McGee, for the value of the leases that they would otherwise have received. Kerr-McGee Ex. 13.

77. Upon information and belief, the Department of the Interior, the Department of Agriculture, and the Office of Management and Budget recommended that H.R.9 be vetoed for reasons unrelated to the merits of Kerr-McGee's lease applications. A major concern of the Administration was that it might cost the Federal Government as much as \$200 million to compensate lease applicants, including Kerr-McGee, for the value of their rights.

78. Upon information and belief, the Administration was concerned that a veto of H.R.9 would have adverse political consequences. There is considerable political opposition in Florida to phosphate mining in the Osceola National Forest. The Florida delegation to the United States Congress unanimously supported the passage of H.R.9. The Governor of Florida, and other state officials have repeatedly made clear their adamant opposition to mining in the Forest. As pointed out above, the State of Florida has twice sued the Department of the Interior in an effort to prevent the issuance of leases.

79. Upon information and belief, the Administration decided that the anticipated adverse political consequences of a veto of H.R.9 could be avoided if Secretary Watt denied the pending lease applications.

80. Upon information and belief, Secretary Watt decided to deny Kerr-McGee's lease applications for political reasons, notwithstanding the Department's determination that Kerr-McGee had discovered valuable deposits of phosphate.

The Decision To Veto H.R.9
and Deny the Lease Applications

81. On January 14, 1983, President Reagan announced that he would veto H.R.9, and that Secretary Watt would deny the pending lease applications. Kerr-McGee Ex. 14.

82. Shortly after this announcement, the Department of the Interior released a one-page decision, dated January 10, 1983, denying Kerr-McGee's lease applications. Kerr-McGee Ex. 15. The decision states in part:

"The Forest Service . . . has established reclamation stipulations which were used in processing your phosphate preference right lease applications. The Department of Interior has performed studies which indicate current technology is not capable of meeting the prescribed reclamation standards. The fact that no reclamation technology exists which can reclaim these lands precludes the possibility that this phosphate deposit could meet the valuable deposit test."

83. Contrary to the statement in the Secretary's decision, the administrative record demonstrates that adequate reclamation of the Forest is technologically feasible and economically practicable using techniques that are available today.

84. Contrary to the statement in the Secretary's decision, the administrative record demonstrates that Kerr-McGee has satisfied the valuable deposit test for obtaining a lease under 30 U.S.C. § 211(b).

Environmental Assessment

85. After the decision denying the lease application was announced, the Department also released the Environmental Assessment, dated January 7, 1983, upon which the quoted portion of the Secretary's decision purports to be based.

86. Kerr-McGee was informed on January 3, 1983 that a draft of this document had been prepared. Kerr-McGee promptly requested a copy of the draft, and an opportunity to submit comments. On January 7, 1983, Kerr-McGee was informed by an attorney in the Solicitor's office that the draft environmental assessment was being revised, and that it probably would be released for public comment after the revisions were finished. Other officials of the Department of the Interior had previously represented to Kerr-McGee that there would be an opportunity to submit comments on the draft Environmental Assessment before it became final.

87. Notwithstanding these representations by the Department, Kerr-McGee had no opportunity to review the Environmental Assessment, or to submit comments before it became final and the Secretary denied the pending lease applications.

88. The stated overall conclusion of the Environmental Assessment is that:

"sufficient technological capabilities do not exist to ensure a reasonable likelihood of successful reclamation of mined acres consistent with requirements established for mining the Osceola NF."

89. The analysis set forth in the Environmental Assessment demonstrates that the stated conclusion is contrary to fact.

90. The Assessment assumes that 18,552 acres would be mined if leases were granted. Of this total, the Assessment concludes that there is a moderate to high probability that 13,800 acres (74%) could be reclaimed to slash high pineland and longleaf pine flatwoods; 3,258 acres (18%) could be reclaimed to marshes and pastures; and 1,478 acres (8%) could be reclaimed to lakes. Id., p.ii, and 2-16. The total acreage that can be reclaimed according to the Assessment is therefore 100% of all mined land.

91. Pine forests, marshes, pastures, and lakes are all existing uses of the Forest. Technology that can reclaim 100% of all mined lands to a pre-existing use of the Forest is clearly adequate.

92. Moreover, the Environmental Assessment grossly underestimates the extent to which pre-existing uses of the Forest can be reclaimed.

93. The Assessment arbitrarily assumes, without any basis in fact, that the advanced sand/clay reclamation technologies that have been successfully demonstrated elsewhere in Florida, and that are expressly required by the Forest Service stipulations, will not be suitable for use in the Forest.

94. The Assessment is based on a hypothetical mining plan that differs in important respects from the preliminary conceptual mining plan that Kerr-McGee submitted

in support of its "final showing." Unlike the plan submitted by Kerr-McGee, the hypothetical plan assumes:

- (a) that beneficiation plants would be located in the Forest (Kerr-McGee plans to put its plant on private land);
- (b) that sand tailings and clay slimes will be stored in the Forest (Kerr-McGee plans to store them temporarily on private lands);
- (c) that permanent slime ponds will be required (Kerr-McGee plans to use a sand/clay technology that eliminates the need for such ponds); and
- (d) that a railroad spur will be needed in the Forest (Kerr-McGee plans to put its spur on private land).

95. In addition, the Assessment fails adequately to distinguish between those portions of the prospective lease areas that existing technology clearly can reclaim, and those portions where reclamation may be more difficult.

96. Some of the lands in the Forest covered by the phosphate lease applications are easier to reclaim than other lands.

97. There is no doubt that most, if not all, of the lands covered by Kerr-McGee's application can be adequately reclaimed. At a minimum, Kerr-McGee is entitled to leases to mine valuable deposits of phosphate located in such lands.

Exhaustion of Administrative Remedies

98. The Secretary's January 10, 1983 decision states that it "constitutes the final decision of the Department and therefore no administrative appeal is granted."

99. Plaintiff has exhausted all available administrative remedies.

100. Plaintiff has no adequate remedy at law.

COUNT I

101. Paragraphs 1-100 are incorporated by reference.

102. Upon information and belief, the Department of the Interior has concluded that Kerr-McGee has discovered valuable deposits of phosphate in the Osceola National Forest.

103. Under 30 U.S.C. §211(b), the Department is required to issue leases to Kerr-McGee.

COUNT II

104. Paragraphs 1-100 are incorporated by reference.

105. Upon information and belief, Secretary Watt's decision to deny Kerr-McGee's lease applications was improperly based on political considerations rather than the merits of the applications.

106. The failure of the Secretary of the Interior to evaluate Kerr-McGee's application on the merits violates the regulations of the Department, 30 U.S.C. § 211(b), the Administrative Procedure Act, and the Fifth Amendment to the Constitution.

COUNT III

107. Paragraphs 1-100 are incorporated by reference.

108. Kerr-McGee has a right to leases based on the certifications that were made by the United States Geological Survey on March 28, 1969, and December 11, 1970.

109. Kerr-McGee has exhausted its administrative remedies pursuant to the March 28, 1978 order of the United States Court of Appeals for the D.C. Circuit. Kerr-McGee Ex. 3.

110. The Court should therefore order the Secretary of the Interior to issue leases for the reasons set forth in the orders entered by this Court on September 29, 1976, and March 4, 1977. Kerr-McGee Exs. 1, and 2.

COUNT IV

111. Paragraphs 1-100 are incorporated by reference.

112. Kerr-McGee has discovered valuable deposits of phosphate in the Osceola National Forest.

113. Under the regulations of the Department, and 30 U.S.C. § 211(b), Kerr-McGee is entitled to leases.

114. The Secretary of the Interiors' denial of Kerr-McGee's lease application is:

- (a) contrary to fact and law;
- (b) arbitrary and capricious; and
- (c) unsupported by substantive evidence.

COUNT V

115. Paragraphs 1-100 are incorporated by reference.

116. The Secretary of the Interior's failure to provide an opportunity for Kerr-McGee to submit comments on the Environmental Assessment dated January 7, 1983:

- (a) is arbitrary and capricious;
- (b) violates applicable regulations;

- (c) violates the Administrative Procedure Act;
and
- (d) violates Kerr-McGee's right to procedural
due process under the Fifth Amendment to
the Constitution.

COUNT VII

117. Paragraphs 1-100 are incorporated by reference.

118. The Secretary of the Interior's conclusion that
the Forest cannot be reclaimed adequately is:

- (a) contrary to fact and law;
- (b) arbitrary and capricious; and
- (c) unsupported by substantial evidence.

COUNT VIII

119. Paragraphs 1-100 are incorporated by reference.

120. The Secretary of the Interior's conclusion that
the valuable deposit test cannot be satisfied with respect to
deposits in the Forest is:

- (a) contrary to fact and law;
- (b) arbitrary and capricious; and
- (c) unsupported by substantial evidence.

COUNT IX

121. Paragraphs 1-100 are incorporated by reference.

122. An applicant for a preference right phosphate
lease may not lawfully be required to make a detailed showing
of precisely how lands will be mined and reclaimed, or of how
mining and reclamation will cost.

123. Such detailed information cannot be compiled until after leases have been issued and further studies are performed to prepare a mining and reclamation plan for submission to the Department of the Interior for review and approval in accordance with regulations. See 30 C.F.R. § 231.10.

124. In this case, the Department of the Interior has required Kerr-McGee to satisfy at the lease issuance stage a burden of proof that would be appropriate, if at all, only at the mine plan approval stage.

125. Accordingly, the Secretary of the Interior's decision to deny Kerr-McGee's lease application is:

- (a) contrary to fact and law;
- (b) arbitrary and capricious; and
- (c) unsupported by substantial evidence.

COUNT X

126. Paragraph 1-100 are incorporated by reference.

127. Under 30 U.S.C. § 352, the Secretary of Agriculture has the authority to prescribe conditions for leasing the Osceola National Forest to insure "adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered."

128. The primary purposes for which the Osceola National Forest was acquired, or is being administered include outdoor recreation, range, timber, watershed, wildlife and fish purposes, and mineral development. See, e.g., 16 U.S.C. § 528.

MCC

129. There is technology available today that can restore the Osceola National Forest upon completion of phosphate mining so that the land can be used for a mix of recreation, range, timber, watershed, and fish and wildlife purposes. Such restoration is "adequate" under 30 U.S.C. § 352.

130. To the extent that the stipulations issued by the Forest Service require a greater degree of restoration, and can be interpreted as either exceeding the capabilities of existing technology or supporting a conclusion that no valuable deposits of phosphate have been discovered within the meaning of 30 U.S.C. § 211(b), such stipulations are:

- (a) contrary to fact and law;
- (b) arbitrary and capricious;
- (c) unsupported by substantial evidence; and
- (d) a taking of a vested property right without compensation in violation of the Fifth Amendment to the Constitution.

WHEREFORE, plaintiff respectfully requests that the Court:

A. Hold that the Secretary of the Interior's January 10, 1983 decision is unlawful, and set it aside.

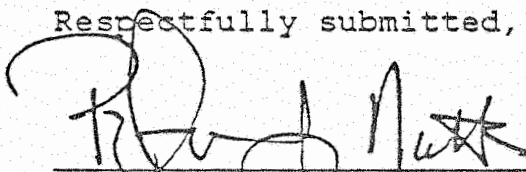
B. Declare that Kerr-McGee is entitled under 30 U.S.C. § 211(b) to the issuance of leases to mine phosphate in the Osceola National Forest;

C. Enjoin the Secretary of the Interior from persisting in his refusal to issue leases, and order him to issue leases promptly;

D. Award plaintiff attorneys fees, and costs; and

E. Award plaintiff such other and further relief as may be just and proper.

Respectfully submitted,



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May 3, 1983

CERTIFICATE OF SERVICE

I, William P. Skinner, hereby certify that on this 3rd day of May, 1983, I have directed that copies of the foregoing Amended Complaint for Declaratory, Mandatory and Injunctive Relief be served as follows:

by messenger to:

Gerald Fish, Esq.
Department of Justice
10th and Pennsylvania Avenue, N. W.
Room 1718
Washington, D. C.

Thomas D. Lustig
National Wildlife Federation
1412 - 16th Street, N. W.
Washington, D. C. 20036

and by Express Mail to:

Bruce Barkett, Esq.
Department of Legal Affairs
Attorney General of Florida
Room 1501, State Capitol
Apalachee Parkway and N. Monroe St.
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