

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Robert Pitofsky, Chairman**
 Sheila F. Anthony
 Mozelle W. Thompson
 Orson Swindle
 Thomas B. Leary

In the Matter of)
)
Agrium, Inc.,)
 a corporation, and)
)
Union Oil Company of California)
and Unocal Corporation,)
 corporations.)
_____)

Docket No. C -3981

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the acquisition by Respondent Agrium, Inc. (“Agrium”) of assets held by Respondents Union Oil Company of California (“Union Oil”) and Unocal Corporation (“Unocal”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the

receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

- a. Respondent Agrium, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, T2J7E8, Canada. For the purposes of this matter, Agrium, Inc. acquires all assets through its wholly owned subsidiary RSI Acquisition, Inc., a California company with its principal place of business located at 4582 S. Ulster St., Suite 1400, Denver, Colorado 80237.
2. Respondent Union Oil Company of California, a wholly owned subsidiary of Unocal Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.
- c. Respondent Unocal Corporation is a corporation organized, existing, and doing

representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Unocal Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- D. “Respondents” means Agrium, Union Oil, and Unocal, individually and collectively.
- E. “Simplot” means J.R. Simplot Company, a Nevada corporation with its principal place of business at 999 Main Street, Suite 1300, Boise, Idaho 83605.
- F. “Commission” means the Federal Trade Commission.
- G. “Alternate Acquirer” means the entity or entities to whom the Divestiture Assets, as defined in Paragraph I.L., may be divested by the Respondents pursuant to Paragraph II. of this Decision and Order or by the trustee pursuant to Paragraph V. of this Decision and Order, as applicable.
- H. “Divestiture Agreement” means the July 12, 2000, Purchase and Sale Agreement and the August 3, 2000, Amendment to that Agreement (and all Exhibits attached to either) between Simplot and Agrium whereby Simplot acquires the Divestiture Assets from Agrium. All references in this Decision and Order to Exhibits are to the Exhibits of the Divestiture Agreement, unless otherwise specified.
- I. “Rivergate” means the terminal facility that has “tidewater” access and is located in Portland, Oregon, as defined in Exhibit A.
- J. “Hedges” means the terminal facility located in Kennewick, Washington, as defined in Exhibit C.
- K. “Apportioned Hedges” means the divested terminal facility comprised of a 600 x 700 foot block in the east south east corner of Hedges and a 200 foot wide corridor along the south east property line of Hedges, as illustrated in Exhibit B.
- L. “Divestiture Assets” means all of Agrium’s right, title, and interest acquired from Union Oil and Unocal pursuant to the Acquisition in all assets described in the Divestiture Agreement, including, without limitation, the following:
 - 1. The real property Rivergate together with all rights, interests, improvements, and appurtenances pertaining thereto, including but not limited to the following assets:
 - a. All fertilizer terminal related assets such as the “tidewater” piers, ship unloading systems, warehousing facilities, machinery, fixtures, equipment, technology, know-how, specifications, designs, drawings, processes, quality control data, vehicles, transportation and storage facilities,

- furniture, tools, supplies, stores, spare parts, and any tangible personal property defined in Exhibit E;
- b. Any adjacent strips and gores between the property and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley, or right-of-way, open or proposed, in, on, across, abutting, or adjacent to the property;
 - c. All certificates for appropriation of water and other water rights generally that relate to the property;
 - d. All right, title, interest in and to the contracts listed in Exhibit D;
 - e. All rights under warranties and guarantees, express or implied, wherever located;
 - f. All dedicated management information systems and information contained in management information systems, and all separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located;
 - g. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located;
 - h. All items of prepaid expense;
 - i. Services of one to four Crane Operators at any given time for a period of (12) twelve months following the Closing Date, according to the terms of the Crane Operator Labor Agreement set out in Exhibit J; and
 - j. Any additional assets defined in the Divestiture Agreement.
2. The real property Apportioned Hedges together with all rights, interests, improvements, and appurtenances pertaining thereto, including but not limited to the following assets:
- a. A 10,000 short ton dry warehouse, related loading and unloading equipment, machinery, fixtures, equipment, designs, drawings, and transportation and storage facilities;
 - b. Any adjacent strips and gores between the property and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley, or right-

of-way, open or proposed, in, on, across, abutting, or adjacent to the property;

- c. A lease for transfer, storage, and handling of up to 20,000 short tons of anhydrous ammonia at the ammonia facilities at Hedges for a period of ten years with an option to extend the lease for another ten years, according to the terms of the Transfer, Storage, and Handling Agreement set out in Exhibit I;
- d. A perpetual, non-exclusive easement granting to Simplot or the Alternate Acquirer, as applicable, the right-of-way to pass and repass, and to install and/or maintain utilities to or from Apportioned Hedges over and along the private roadway and the rail track spur (as identified in Exhibit A of the Easement Agreement), according to the terms of the Easement Agreement set out in Exhibit L;
- e. An irrevocable, non-exclusive license to access the Pier (as identified in Exhibit A of the Easement Agreement) for the purposes of barge unloading and loading of dry fertilizer products, according to the terms of the Easement Agreement set out in Exhibit L;
- f. Truck and rail car scale services, according to the terms of the Easement Agreement set forth in Exhibit L;
- g. For five (5) years, either a commercially reasonable lease for ammonia barge services or, if an agreement cannot be reached, an unconditional option to purchase one barge at its independently appraised value, according to the terms of the Divestiture Agreement;
- h. Right of First Refusal on the non-divested portion of the Hedges site, according to the terms of the Right of First Refusal Agreement set out in Exhibit G;
- i. All rights under warranties and guarantees, express or implied, wherever located;
- j. All separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located;
- k. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located;
- l. All items of prepaid expense; and

- m. Any additional assets defined in the Divestiture Agreement.
- 3. Agrium storage and handling lease for the Tidewater Terminal Co., Inc. terminal at East Pasco, Washington (defined as “Lease” in the Divestiture Agreement), and Pro dica leases for the Tidewater Terminal Co., Inc. terminals at Vancouver and Wilma, Washington (as listed in Exhibit D) .

PROVIDED, HOWEVER, Divestiture Assets do not include the following assets:

- (1) Product inventory located at either Rivergate or Apportioned Hedges;
- (2) The non-divested, western portion (approximately 29 acres) of Hedges including the pier and related ammonia truck and barge handling equipment systems and sites (as illustrated in Exhibit B);
- (3) The assets and facilities known as the N-Phuric Production Facility, as illustrated by Exhibit B; and
- (4) Any additional assets excluded in the Divestiture Agreement.

- M. “Nitrogen-Based Fertilizers” means urea, UAN 32% solution, and anhydrous ammonia.
- N. “Acquisition” means the proposed acquisition by Agrium of Unocal’s Agricultural Products Business as described in the January 19, 2000, Purchase and Sale Agreement between RSI Acquisition, Inc., and Union Oil.
- O. “Agricultural Products Business” means the assets of Pro dica LLC, a Delaware limited liability company, and the assets of Alaska Nitrogen Products LLC, an Alaska limited liability company, both with their principal places of business at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245. Pro dica LLC and Alaska Nitrogen Products LLC are wholly owned subsidiaries of Respondent Union Oil.
- P. “Acquisition Agreement” means the January 19, 2000, Purchase and Sale Agreement between RSI Acquisition, Inc., and Union Oil.
- Q. “Closing Date” means the date, as defined in the Divestiture Agreement, when the parties have fully consummated the transfer of assets contemplated in the Divestiture Agreement.
- R. “Northwest” means the State of Washington and any and all land and territorial waters subject to the jurisdiction of the State of Washington; the State of Oregon and any and all land and territorial waters subject to the jurisdiction of the State of Oregon; and the State of Idaho and any and all land subject to the jurisdiction of the State of Idaho.
- S. “Third Party Approvals” means all consents or waivers from private entities, and local, state and federal regulatory bodies, or other consents or waivers from partners or

- T. “Unocal Employees” means all employees currently employed by Unocal who work primarily at the Rivergate facility, including but not limited to (a) individuals executing the duties generally performed by executive managers, managers, and supervisors, (b) all “Employees” as that term is defined and used in the Divestiture Agreement, and (c) all other personnel necessary and beneficial to maintaining Rivergate as an ongoing facility.
- U. “Crane Operators” means qualified, state certified crane operators of the type currently utilized at Rivergate.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested to Simplot, or to the Alternate Acquirer if applicable, absolutely and in good faith, at no minimum price, the Divestiture Assets as ongoing facilities in the distribution and wholesale sale of Nitrogen-Based Fertilizers.
- B.
 - 1. The divestiture shall be made immediately after Respondent Agrium consummates the Acquisition, and shall be pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Decision and Order). Failure to comply with the Divestiture Agreement shall constitute a failure to comply with this Decision and Order.
 - 2. PROVIDED, HOWEVER, that if Respondents have divested the Divestiture Assets to Simplot prior to the date the Decision and Order becomes final, and if, at the time the Commission determines to make the Decision and Order final, the Commission notifies Respondents that Simplot is not an acceptable acquirer or that the Divestiture Agreement specifies an unacceptable manner of divestiture, then Respondents shall immediately rescind the transaction with Simplot and shall divest the Divestiture Assets within four (4) months of the date the Decision and Order becomes final. Respondents shall divest the Divestiture Assets only to an Alternate Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- C. Respondents shall secure all Third-Party Approvals prior to the Closing Date.
- D. The purpose of the divestiture of the Divestiture Assets is to ensure the continued use of the Divestiture Assets in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

- E. Respondents shall waive and not exercise any preferential right, right of first refusal, back-in right, or any contractual option that would permit Respondents, as a result of the divestiture to Simplot or Alternate Acquirer, as applicable, to acquire any interest in any Divestiture Asset acquired pursuant to this Decision and Order by Simplot or Alternate Acquirer, as applicable.

III.

IT IS FURTHER ORDERED that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Divestiture Assets, and shall not cause the wasting or deterioration of the Divestiture Assets, nor shall they cause the Divestiture Assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Divestiture Assets. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Divestiture Assets pursuant to the terms of this Decision and Order. Respondents shall conduct or cause to be conducted the business of the Divestiture Assets in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the

and otherwise pay all liabilities and satisfy all obligations associated with any Divestiture Asset, in each case in a manner consistent with past practice.

IV.

IT IS FURTHER ORDERED that:

- A. From the date Respondents sign the Consent Agreement until the divestiture is completed pursuant to the terms of this Decision and Order, Respondents shall take, or cause to be taken, reasonable steps, including implementing appropriate incentive plans (such as vesting or crediting of all current and accrued benefits and pensions, to which Unocal Employees are entitled) and paying bonuses, to cause the Unocal Employees to accept offers of employment from Simplot or the Alternate Acquirer, as applicable.
- B. For a period of two (2) years following the date Respondents sign the Consent Agreement, Respondents shall not solicit for employment any Unocal Employee employed by Simplot or the Alternate Acquirer, as applicable, unless and until such employee's employment by Simplot or the Alternate Acquirer, as applicable, has been terminated.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested or have not caused to be divested, absolutely and in good faith the Divestiture Assets to Simplot or the Alternate Acquirer, as applicable, within the time period required by Paragraph II. of this Decision and Order, the Commission may appoint a trustee to divest or cause to be divested the Divestiture Assets.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Decision and Order.
- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.A. of this Decision and Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest or cause to be divested, respectively, the Divestiture Assets.
3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture and obtain the consents required by this Decision and Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph V.C.3. to accomplish the divestiture and obtain the consents, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time or that consents can be obtained in a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to the personnel, books, records and facilities related to the Divestiture Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestiture shall be made only to an acquirer that receives the prior approval of the Commission, and the divestiture

and consents shall be accomplished only in a manner that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving written notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Divestiture Assets.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph V.A. of this Decision and Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Decision and Order.
11. In the event that the trustee determines that he or she is unable to divest or cause to be divested the Divestiture Assets in a manner consistent with the Commission's purpose as described in Paragraph II., the trustee may divest assets similar and

corresponding to the Divestiture Assets of Respondents as necessary to achieve the remedial purposes of this Decision and Order.

12. The trustee shall have no obligation or authority to operate or maintain the Divestiture Assets.
13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture and to obtain the necessary consents.

VI.

IT IS FURTHER ORDERED that, for a period commencing on the date this Decision and Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in (a) any of the Divestiture Assets required to be divested pursuant to Paragraph II. of this Decision

Paragraphs II. through IV. of this Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. through IV. of this Decision and Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through IV. of the Decision and Order, including a description of all substantive contacts or negotiations relating to the divestitures and the approvals. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approvals. The final compliance report required by this Paragraph VII. A. shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents that may affect compliance obligations arising out of this Decision and Order, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Decision and Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Decision and Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

X.

IT IS FURTHER ORDERED that this Decision and Order shall terminate:

- A. With respect to Respondent Agrium, on November 13, 2010.
- B. With respect to Respondents Unocal and Union Oil, when the transfer of the Divestiture Assets to Respondent Agrium has been completed pursuant to the Acquisition Agreement.

By the Commission, Commissioner Swindle not participating.

Donald S. Clark
Secretary

SEAL

ISSUED: November 13, 2000

[Confidential Appendix I Redacted From Public Record Version]