EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 19, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

National Security Council
Office of Science & Technology Policy
Department of the Interior
Federal Communications Commission
General Services Administration
Department of State
Department of Agriculture
National Aeronautics & Space Administration
Central Intelligence Agency
Department of Transportation
Department of Defense

SUBJECT: Department of Commerce proposed report on H.R. 5155 -- Land Remote Sensing Commercialization Act of 1984 -- as passed by the House on April 9, 1984. (House Report 98-647).

(We do not plan, at this time, to clear other reports on H.R. 5155 or H.R. 4836.)

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than COB -- Thursday, April 26, 1984. Oral comments acceptable.

Questions should be referred to William A. Maxwell (395-3890), the legislative analyst in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures
cc: Scott Gudes
Mike Horowitz
Tim Sprehe
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GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

Honorable James H. Scheuer
Chairman, Subcommittee on Natural
Resources, Agriculture Research
and the Environment
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This will respond to your request for the views of this Department on legislation currently pending before your Committee -

> "To establish a system to promote the use of land remote-sensing satellite data, and for other purposes."

Although your request was in regard to H.R. 4836, a bill then under consideration by the Subcommittee, our response will be in reference to H.R. 5155, a bill subsequently introduced. Our response is on behalf of the Administration, and incorporates the views of all other interested agencies.

The goal of H.R. 5155 is to provide for the orderly transition of United States civil land remote sensing activities from the public sector to the private sector in a manner which preserves both continuity of land remote sensing data and the technological leadership of the United States in the civil land remote sensing field.

Title II of the bill provides for the marketing, by a government contractor, of data generated by the present (Landsat) system. Under the terms of title II, the government would retain ownership of the Landsat system and all data generated by it, while the contractor would be entitled to a portion of the revenue from sales of the data. Under title II, the government may contract for the operation of the system as well, if the Secretary of Commerce (the Secretary) determines that the purposes of the Act will be served thereby.

Title III of the bill provides for the Secretary to contract with a private sector party for the provision of the capability of producing remote sensing data in certain quantities and at a certain minimum level of quality for a period of six years. The contract may provide for a payment by the Secretary

to cover the capital costs of achieving such a capability, but may not provide for any guaranteed data purchases by the government. All data generated by the contract operator must be available for sale on a nondiscriminatory basis.

Title IV of the bill grants to the Secretary authority to issue licenses for the operation of remote sensing systems.

Title V of the bill provides for a continuing federal role in research and development in the field of remote sensing.

Title VI of the bill states federal policy regarding nondiscriminatory dissemination of data, provides for archiving of data by the Secretary, and contains a number of miscellaneous provisions.

The Administration supports H.R. 5155, with certain technical changes, as an appropriate framework for achieving the commercialization of civil land remote sensing from space as soon as possible, while maintaining the U.S. lead in land remote sensing, with the private sector making the major financial investment.

The Department is now in the process of carrying out what we believe to be the most thorough and exhaustive effort to date to determine the "next steps" in the Landsat program that most facilitate the transfer of land remote sensing operations to the private sector. We have issued a Request For Proposals ("RFP") for deployment of a follow-on system and the transfer of the current system to the private sector. Seven responses have been received and are being evaluated by a Source Evaluation Board established for this purpose. The Board expects to submit recommendations to the Secretary in June, 1984.

In the view of the Administration, it would be extremely unfortunate if the work of the Board and the respondents to the RFP were to be discarded or repeated. This would result in significant and costly delays in the commercialization process. Therefore, our principal concerns lie with any provisions of the bill which may or would invalidate the RFP. In addition, it is essential that agency missions currently involving or dependent upon remote sensing not be adversely affected by the legislation.

Our principal concerns are set forth as follows. Additional technical comments are enclosed.

Required Marketing. Section 201(a) of the bill may require the Secretary to contract for the marketing of data generated by the current Landsat system.

The Administration is not opposed in principle to the concept of private-sector marketing of Landsat data, and the RFP encouraged bidders to take over the operation of the Landsat system and the marketing of data generated by the system. However, there was no requirement in the RFP that a bidder do so. Thus, if the successful bidder in the RFP process does not undertake to market the data, an additional procurement action may be required for the marketing component.

The Administration is opposed to section 201(a) as currently drafted since it could pose a danger to the execution of a contract awarded as a result of the RFP process. Because the RFP did not require that respondents bid on the marketing of Landsat data, companies that were interested primarily in the marketing component likely chose not to submit a proposal. If title II were enacted in its present form, these companies -- as well as unsuccessful bidders -- may seek to invalidate the results of the RFP on the ground that it did not fully comply with the requirements of title II. Such efforts could delay implementation of the title III contract. A delay in implementation would in turn assure significant gaps in the data stream upon the demise of Landsat -- a result to be avoided at all costs.

The Administration is thus opposed to the apparent requirement of section 201(a) that a marketing procurement be undertaken. We would support a provision which grants the Secretary discretion in determining whether to carry out such a procurement. We would also support alternative provisions (1) requiring further marketing efforts if, upon conclusion of the RFP process, it becomes apparent that such effort would be in the national interest, or (2) permitting the combination of the two procurements by the Secretary in a manner consistent with that adopted by the RFP.

Term of the Title III Contract. Section 302 of the bill provides that the contract entered into by the Secretary under Title III shall reasonably assure the provision of remote sensing data for a period of six years, terminating one year after the expiration of this six-year period.

While the length of the contract will depend on a number of terms and conditions, it is our opinion that the six-year period contemplated by the bill may be overly restrictive. A

more likely period for successful conversion to full commercial operation would be approximately eight years rather than six. The eight-year period would not include the time prior to the launch of the first commercial satellite, which is likely to be two-to-four years. Thus, while the term of the contract described in Title III should be negotiable rather than being set for a prescribed period of time, we would prefer the outer limit to be at least eight years rather than six.

Title to Landsat Data. Section 202(a) of the bill provides that title to any and all data generated by the Landsat system shall remain with the government, while providing that the Title II contractor be entitled to revenues from the sale of copies of data from the system. The RFP offered bidders the opportunity to bid on the entire current Landsat system, including both the space and ground segments.

If a bidder were to propose assumption of both ownership and operation of the system, acceptance of this proposal would apparently be prohibited by the legislation as currently drafted. The requirement that the government retain title may also create copyright problems, inasmuch as the marketing contractor will undoubtedly insist on the right to restrict redistribution and sale by data purchasers.

We therefore suggest that the bill permit a transfer of title upon a determination by the Secretary that this would be in the national interest. If this recommendation is not adopted, we strongly suggest the addition of appropriate copyright provisions.

Capitalization Costs. Section 302(b)(4) of the bill provides that the contract entered into by the Secretary under Title III of the bill may provide for a payment by the Secretary to cover a portion of the capital cost of providing remote sensing capability. This payment may also be made in installments based on progress over the life of the contract.

While there will be costs associated with developing the capability required by the Title III contract, we are not persuaded that a capital payment (or payments, as the case may be) is the only acceptable financial arrangement. It may be that other financial vehicles, such as loans or loan guarantees, may be more advantageous to the government. The bill should therefore permit the Secretary greater discretion in negotiating the financial structure of the contract.

Guaranteed data purchases. Section 302(b)(6) of the bill prohibits guaranteed data purchases by the federal government. While the RFP made it clear that the government would not enter into an exclusive data purchase arrangement with any contractor, and would not necessarily agree to a proposal requiring guaranteed purchases, it is nevertheless the view of the Administration that this restriction is not in the interests of the government. It may be that some minimal level of guaranteed purchases may recommend itself as an appropriate means of compensating a contractor over the life of the contract. If so, we do not wish to preclude adoption of such a contract term.

Rebates. Section 303(b) requires that at least 5 percent of the price of data sold to the government be rebated to the Treasury. This provision unduly restricts flexibility of the bidder in structuring his bid. While rebates in connection with government purchases may be perfectly acceptable, it is not in the government's interest to require this arrangement. Such a requirement will only narrow the range of choices available to the Secretary in selecting the best deal for the Government.

Reporting. Section 502(d) of the bill provides for joint preparation and transmittal to the Congress by the Administrators of NOAA and NASA of a report containing, among other things, a unified national plan for remote sensing research and development applied to the earth and its atmosphere. Our experience with such joint reporting is that it works poorly, at best. We would recommend that the requirement for a joint report be deleted.

Frequency allocation. Section 605 of the bill encourages the allocation of government and other civil radio frequencies to license holders by the Secretary and the Federal Communications Commission. We recommend that section 605 be amended properly to reflect the primary responsibility of the Federal Communications Commission for the assignment of frequencies to nongovernmental users, and the primary responsibility of the Department of Commerce, through the National Telecommunications and Information Administration, for the allocation of governmental frequencies.

With the modifications noted above, and with further technical changes as noted in the attached materials, the Administration strongly supports H.R. 5155.

We have been advised by the Office of Management and Budget that there would be no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Irving P. Margulies
General Counsel

Enclosure

Technical Comments - S. 2292

Page 5, lines 18 - 23:

Strike this subsection and insert the following:

> "(5) "United States private entity" means any citizen of the United States, any nongovernmental entity, or any consortium of (i) nongovernmental entities, or (ii) governmental and nongovernmental entities. In the case of an entity or consortium, the term means an entity or consortium the majority of whose assets is owned by citizens of the United States, the majority of whose personnel is comprised of citizens of the United States, which (in the case of a consortium) is administered by a central, responsible person or entity designated by the consortium, and whose principal place of business is in the United States."

NOTE: The definition has been enlarged to include individual citizens, since the prohibitions of title IV must apply to individuals as well. The idea of a central, responsible management entity for consortia has been transposed from section 402(b), because it is definitional in nature.

Page 6, line 3 - page 7, line 6:

Strike this section in its entirety.

NOTE: The various components of this section are either unnecessary or undesirable.

Subsection (a) to a large extent restates existing law. In addition, however, paragraphs (1) and (2) may be interpreted as imposing upon the Secretary a higher duty with respect to the disposition of Landsat 4 and Landsat D' than the government has already undertaken pursuant to international agreement. The meaning of paragraph (3) is unclear, but probably restates existing law.

Subsection (b), the purpose of which is evidently to protect the title III operator, is unnecessary. The memoranda currently in effect may by their own terms be extended. The government will not extend its obligations under the memoranda beyond its ability to fulfill them, which will terminate upon the practical demise of the system. These memoranda are binding

only upon the government and cannot bind subsequent private sector operators of remote sensing systems.

Subsection (c) provides that the government may continue to contract out the operation of the current system. This provision restates existing law.

Subsection (c) further provides, however, that ownership of the system and the data must remain with the government. This provision is directly contrary to the terms of the Request for Proposals (RFP) issued by the government, which permits the respondents to bid on the operation and ownership of the current system. If an otherwise attractive bid contains an element providing for the assumption of title to the existing system, the government would be unable to accept this bid. As a result, the government may be forced to accept a less satisfactory bid, accept no bid; or repeat the procurement. Any of these results would be undesirable.

Page 7, line 8:

Change "202" to "201".

Page 7, line 9:

Strike the word "shall" and insert the words "is authorized".

NOTE: Section 202 requires that the Secretary contract out for the marketing of Landsat data. This requirement has two significant drawbacks:

First, if this provision is enacted, it will require that a new, separate procurement action be carried out for this marketing function. This is because the RFP does not require that bidders bid on the marketing of Landsat data, and because we anticipate that few, if any, bidders did so. The requirement that such a procurement be carried out is extremely burdensome and wasteful. By the time it is completed and the contractor commences work, there will be little - if any - life left in the system and thus the contractor's opportunities to accomplish anything

significant will be either extremely limited or nonexistent.

Second, there is the real possibility that enactment of this provision will delay or prevent execution of the title III contract, thus raising the real possibility of significant data gaps. This is because companies who did not respond to the RFP because they were not interested in the operations side may bring suit to invalidate it because they were not given an opportunity to bid on the marketing as this provision apparently requires. Litigation would undoubtedly bring the execution of the title III contract to a halt until the issues raised in the lawsuit were resolved.

The undesirability of this provision cannot be overstated.

Page 7, line 11:

Before the word "contract", add the word "to".

Page 7, lines 13-14:

Strike and insert the following:

"data collected during the useful life of the Landsat system, as determined by the Secretary. Any such contract shall provide that --".

NOTE: This change makes clear that the contract governs only data collected by the Landsat system during its useful life, and that the Secretary has discretion to determine when the useful life of the system terminates.

Page 7, lines 17-18:

Strike and insert:

"able on a nondiscriminatory basis.".

NOTE: This term has been defined.

Page 8, line 6:

Redesignate subsection (b) as subsection (c), and insert a new subsection (b) as follows:

"(b) Such contract may provide for the operation of, and transfer of title to, the Landsat system as determined by the Secretary to be appropriate and in the national interest.".

Page 8, line 10-page 9, line 6:

Delete this subsection.

NOTE: Present subsection (c) creates undesirable and unnecessary ambiguities concerning the role of Congress in reviewing the selection actions of the Secretary. It may be read to mean that after the Secretary awards a contract, the congress may review that award. This is bad contracting procedure, and will place the chill of uncertainty on the entire process. Bidders will be reluctant to commit full resources to a bid because they will be more than usually uncertain of the outcome.

The Secretary has the obligation to keep Congress informed of developments. It is also in his interest

to do so, since Congress will also have the last word on any contract, the contract being contingent upon monies being appropriated.

However, the Congress should set policy governing the award of this contract, and the Secretary should be granted adequate discretion and authority to execute that policy.

Page 9, line 8:

Change "203" to "202".

Page 9, line 15:

After the word "data", add:

"; and

(3) such other factors as the Secretary deems appropriate and relevant".

NOTE: The Secretary should retain some degree of discretion in the award of the title II contract. It

would not be desirable to "lock him in" to only two selection criteria.

Page 11, line 9:

Strike "six" and insert "eight".

Page 12, lines 1-21:

Delete this subsection. See comments on present section 202(c).

Page 14, line 5 - page 16, line 23:

Strike the entire section and insert new section as set out in attachment to these comments.

NOTES: The bill currently contains no provisions governing the "qualifications" of licensees. (The only provision which may be so construed - dealing with the establishment of a "central, reponsible

entity" by a consortium, may be considered definitional, and we have for this reason proposed moving it to section 103(5).) Ambiguities concerning what constitutes a "qualified" entity are thus raised, but not resolved, by the use of this term.

Currently, the bill contains no criteria by which the Secretary can determine whether an application should be granted or denied. In theory, all applications from United States parties which are in correct form must be granted, even though it may be quite clear that the applicant is not "qualified", e.g., that it does not have adequate financial or technical resources, or that it does not have adequate insurance coverage, or that there is substantial evidence that the applicant will not abide by the terms of the license.

We think that section 402 can also be clarified regarding the steps which the applicant must "agree in advance" to take [e.g., present section 402(c)(2)], and what the licensee is required to do under the terms of the license [e.g., present sections 402(b) and 402(c)(3)].

We emphasize that the bill should set forth each action which the government wishes a licensee to take or refrain from taking during the operation of his system. The bill should further require that each of these steps be set forth in each license issued.

The House bill (H.R. 5155) contains expanded provisions regarding the Secretary's regulatory and enforcement authorities. We believe these are an essential feature of any title IV licensing scheme.

Page 17, line 2:

After "403.", insert "(a)".

Page 17, line 11:

Insert new subsections (b) and (c), as follows:

"(b) The provisions of this Title shall not apply to any activity carried out by the National Aeronautics and Space Administration pursuant to its authority under Title IV of the National Aeronautics and Space Act of 1958, as amended.

"(c) Nothing in this section shall affect the authority of the Federal Communications Commission to assign radio frequencies pursuant to the Federal Communications Act, as amended."

Page 19, line 11 - page 21, line 2:

Strike this section and insert as follows:

"(b)(1) The Secretary shall continue to provide storage, maintenance and access for unenhanced data from civil remote land sensing systems, including, in his discretion, such data from the Landsat system, the system operated pursuant to title III of this Act, and any system licensed pursuant to title IV of this Act.

"(2) Storage, maintenance and access shall be undertaken only with respect to data which the Secretary, following established archiving practices, determines to have real or potential value to the Nation.

"(c) Copies of all data generated by any system operator under titles II, III, or IV of this Act shall promptly be made available to the Secretary by such system operator in a form suitable for processing for storage, access and maintenance. The Secretary is authorized, subject to appropriations therefore, to pay to such system operator reaonable costs for reproduction and transmittal of such copies.

"(d) (1) Any system operator shall have the exclusive right to sell all data generated by such operator for a period not to exceed ten years from the date such data are generated. During the ten-year period, the Secretary shall not engage in any activity which infringes upon this right.

"(2) Any system operator may at any time relinquish, with respect to any data generated by such operator, his exclusive right to sell such data. Such relinquishment shall be transmitted in writing to the Secretary.

"(e) Following the relinquishment or expiration of such exclusive right to sell data, the data shall be in the public domain and the Secretary and may be distrubuted by the Secretary at prices reflecting the reasonable costs of reproduction and transmittal.

"(f) In carrying out the function of this section, the Secretary may use existing facilities or may contract for the performance of such functions, to the extent provided for in advance by appropriations acts."

NOTE: The principal change effected in this re-write is to ensure that the Secretary does not perform a "warehousing" function for system operators at taxpayer expense. Presently, the bill may be interpreted to require the Secretary to store all data generated by system operators, and return it to them upon demand, for only nominal fees. This is not a desirable result. System operators should be responsible for their own storage, maintenance and access, until such time as their exclusive right to the data either expires or is relinquished.

Page 21, line 13:

Strike ", such as launch services,".

Page 21, lines 15 - 21:

After the word "Commission", add: ", in consultation with the Secretary,".