

The Land Remote Sensing Policy Act: Selected Legal Developments 1992 - 2003

**Presented by
Prof. Joanne Irene Gabrynowicz
to**

**U.S. Commercial Remote Sensing Industry Conference
1 December 2003**

**National Remote Sensing and Space Law Center
University of Mississippi School of Law**

www.spacelaw.olemiss.edu

© Gabrynowicz 2003
Reproduced with
Permission





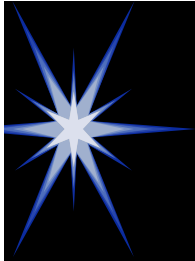
Selected Legal Developments

1992 - 2003



- **License evolution: from statute to regulations**
 - **License application review: evolution of license conditions**
 - **"Shutter control"**
- **Private system data policy**
- **Frequently asked questions**
 - **Changes in the *Landsat* Program Management**
 - **Status of Interim Final Rule**
 - **Status of 2/2/2000 MOU without comment**

© Gabrynowicz 2003



**License Evolution:
from Statute to Regulations**
**License application review and
evolution of license conditions**



© Gabrynowicz 2003



License Evolution: from Statute to Regulations

License Application Review



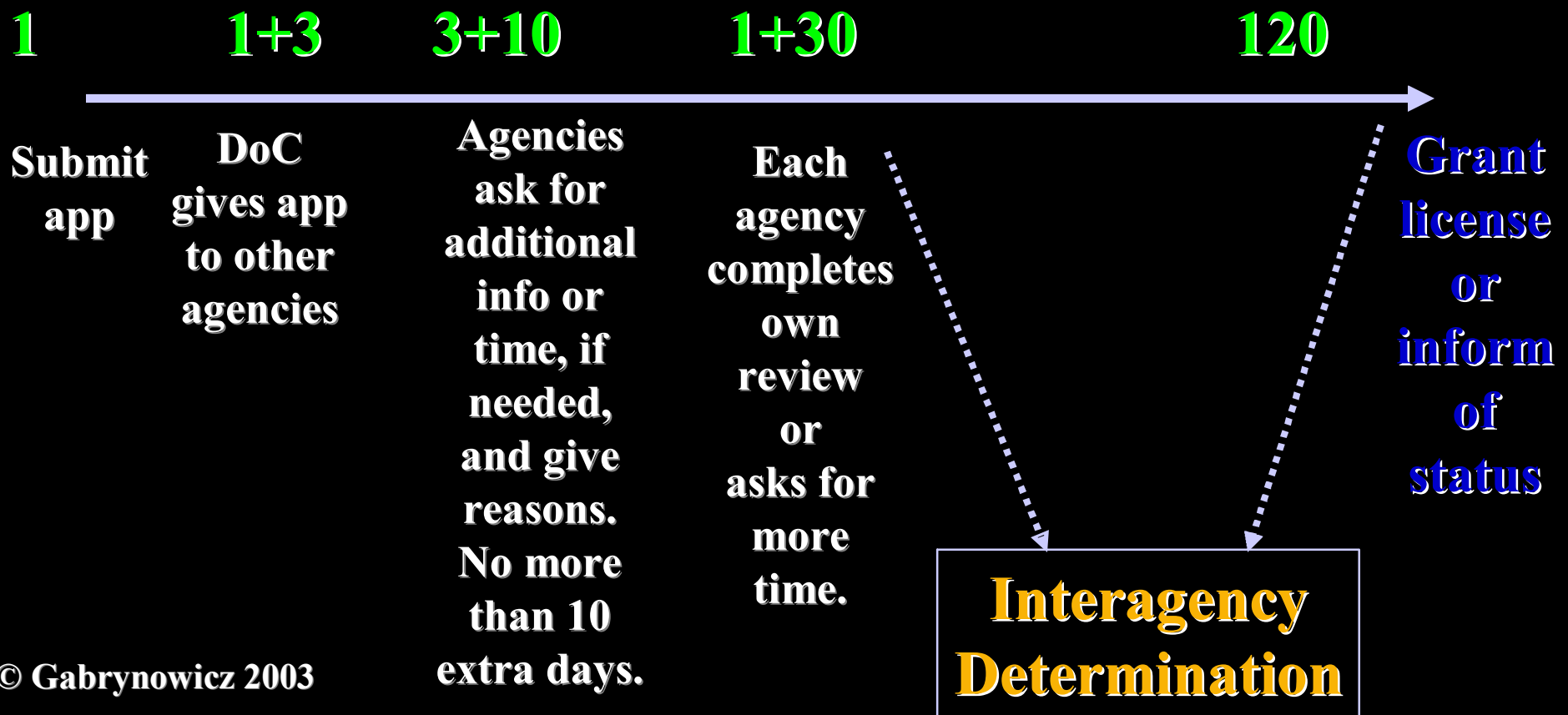
- **Statute**
 - **Dept. of Commerce/NOAA is licensing authority**
 - **Depts. of Defense and State have review authority**
- **Regulations**
 - **Add intelligence community**
 - **CIA, NIMA, NRO, DIA, intelligence segments of the services, the FBI, and Treasury, Energy and State Departments**



License Evolution: Statute to Regulations

License Application Review

Timeline (Working Days)



License evolution: Statute to Regs

Consultation During Review of Licensing Actions

4 DoC informs; Asst to Pres for National Security “in coordination” with Pres Asst for S&T seek consensus in depts.

3 Pres. Assts for National Security and S&T informed; Commerce Sec. or Deputy consults with DoS and/or DoD counterparts

2 State or Defense Secretary make written determination; can't be delegated

1 DoS, DoD want conditions, DoC disagrees



5
President



“all efforts”
to resolve
within 3
weeks

Suspension of
inconsistent
licensing
actions



License Evolution: Statute to Regulations

License Application Review

Evolution of License Conditions



- Initial approach: gather data anywhere imposing temporal or geographic limits only when necessary
 - Optical systems
- Later approach: control individual products, not operations
 - Generated by newer technologies
 - Hyperspectral, radar, etc.





License Evolution: Statute to Regulations

License Application Review

Evolution of License Conditions

Two-stage model



- License operations up to a specific spectral and/or spatial capability
- Obtain additional approval beyond
- For example
 - USG approval needed to approve a request for hyperspectral data from a sensed state
 - may be denied under second tier restriction



License Evolution: Statute to Regulations

License Application Review

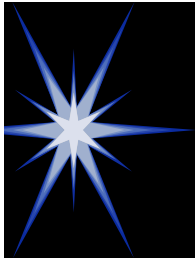
Evolution of License Conditions



Exclusive Government Use Licensing Model

- Applies to specifically identified data
- *"shall be reserved for the exclusive use of the U.S. Government and any foreign government that the U.S. Government may designate"*
- Requires Government-to-Government agreement or other arrangement for data protection and dissemination

© Gabrynowicz 2003



**License Evolution:
from Statute to Regulations**
Interruption of normal operations
"shutter control"



© Gabrynowicz 2003

License Evolution: Statute to Regulations

Interruption of Normal Commercial Operations

- **Regulations contain process for implementation**
- **Case of first impression: licensee - govt. contract**
 - **Government had exclusive rights to imagery for post-9/11 Afghanistan images from Oct. 5 - Dec. 5, 2001**
 - **Rights ended January 6, 2002**
 - **Virtually all imagery made publicly accessible**
- **Conventional wisdom: was not "shutter control"**
 - **However, regulations do allow "shutter control" implementation by exclusive commercial contract**

License Evolution: Statute to Regulations

Interruption of Normal Commercial Operations

"The licensee may be required...to limit data collection and/or distribution by...to meet significant national security or significant foreign policy concerns, or international obligations of the United States...During such limitations, the licensee shall, on request, provide unenhanced restricted images on a commercial basis exclusively to the U.S. Government."

15 CFR 960.11 (4)



© Gabrynowicz 2003



License Evolution: Statute to Regulations

Interruption of Normal Commercial Operations

"...in accordance with the procedures set forth in the Interagency MOU Fact Sheet..."

15 CFR 960.11 (4)

- Question of fact: What process was followed?**



© Gabrynowicz 2003

License evolution: from statute to regulations

Consultation re: Interruption of Normal Commercial Operations “Shutter Control”

6



President

5 Commerce Sec objects to State and/or Defense Sec, Pres Assts; Assts “initiate ASAP Principals-level” process to achieve interagency consensus

4 Pres Assts for National Security and S&T “promptly” given determination

3 State or Defense Sec make conditions; can’t delegate below acting sec; determination to Commerce Sec

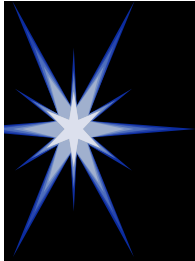
2 Commerce Sec “personally” consults w/ State and/or Defense Sec; can’t delegate below acting sec

1 DoS and/or DoD want shutter control, DoC disagrees

“all efforts” to resolve within 7 days

Licensee notified of conditions

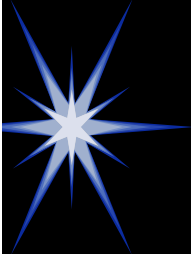
Staff consultations “shall [allow] sufficient time” for secretaries to consult personally



Private System Data Policy



© Gabrynowicz 2003



Private System Data Policy

The Public - Private Spectrum

Public

Hybrid

Private



**All Tax
\$\$**

**Public and Private
\$\$**

**All Private
\$\$**

**Full
Nondiscriminatory
Access**

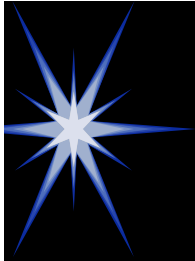
**Case-by-case
determination**

**Access to sensed
states only**



© Gabrynowicz 2003





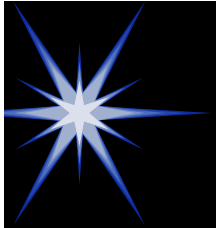
Private System Data Policy



Regulations and Data Ownership

- **Company must disclose**
 - Amount of government resources that went into, or will contribute toward, the development, fabrication, launch, or operation of the system
- **If fully government funded**
 - All unenhanced data available on nondiscriminatory basis



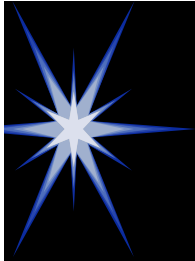


Private System Data Policy



Regulations and Data Ownership

- **If entirely privately funded**
 - Data provided according to reasonable commercial terms and conditions
 - "Sensed state" can't be denied
 - Also on commercial terms
- **If partial government support**
 - Some access to unenhanced data on a nondiscriminatory basis
 - Case-by-case determination with provisions included in the individual license



A Few Frequently Asked Questions



© Gabrynowicz 2003



A Few Frequently Asked Questions

***Landsat* Program Management Changes**

- **Congress appointed NASA and DoD**
 - **Subsequent interagency agreements transitioned *Landsat* operations to DOI/USGS**
 - **Eight years later, an amended Directive was released that reflected what had already, in fact, been agreed**
- **Question: Did agencies have authority to transfer responsibilities prior to formal legislative or administrative action?**
 - **Yes**
 - **Specific laws grant agencies program management flexibility**
 - **Expected to make rules and policies to carry out statutory law**
 - **Congress' participation in general process ends when a law is passed**



A Few Frequently Asked Questions



Status of Interim Final Rule

- **Regulations issued as Interim Final Rule**
- **Question: Can a rule be "final" if it is called "interim"?**
 - **Yes**
 - **Name is not determinative of status**
 - **Meeting requirements of Administrative Procedure Act (APA) rule making process is legally regarded the same as a final rule**
 - **Procedures were met**



A Few Frequently Asked Questions

Status of 2/2/2000 MOU Made Without Seeking Comment

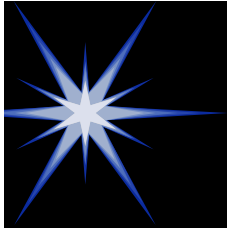


- **2/2/2000 MOU was incorporated into rules without subjecting it to the notice and comment requirement of Administrative Procedure Act**
- **Question: was this appropriate?**
- **Probably yes**
- **Procedural rules are exempt from notice and comment requirements**
 - **MOU is probably a procedural rule rather than a substantive rule**

The Land Remote Sensing Policy Act: Selected Legal Developments 1992 - 2003

Observations

- **Distinction between operating restrictions and initial requirements for interruption of "normal" operations is blurring**
 - **Linked to government as dominant customer**
- **Known facts and regulatory language gives both "shutter control" proponents and opponents reasonable grounds in a future legal challenge**
 - **Transparency precedent set regarding release of restricted imagery**
- **Withdrawal of LDCM RFP has suspended additional clarification of private system data policy**
- **Interim Final Rule still evolving: another comment period just closed**



The Land Remote Sensing Policy Act: Selected Legal Developments 1992 - 2003

**Questions?
Comments?**



© Gabrynowicz 2003