

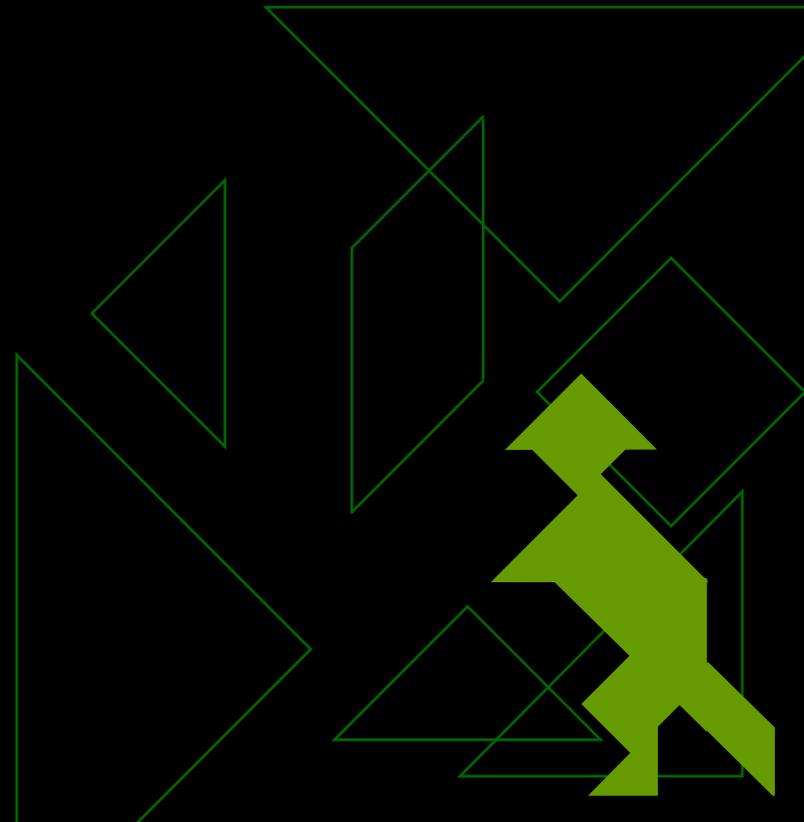
# Real Estate Documents

## When to Use What

S. Janice Howell

# Agenda

- ◆ Overview
- ◆ Objectives
- ◆ Rules
- ◆ Documents
- ◆ Summary
- ◆ What Type Outgrant?
- ◆ Next steps

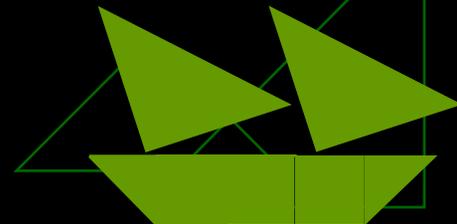


# Overview

- ◆ Explanation of different types of documents
- ◆ Discussion of when to use what type of outgrant

# Objectives

- ◆ Better understanding of various documents involved.
  - Define features, authorities, requirements or restrictions, types of use
- ◆ Better Understanding of when to use what type of outgrant.



# Rules

- ◆ Be Legal
- ◆ Be Creative
- ◆ Define Risks
- ◆ Practice Project Management Business Process (PMBP)

# Documents - Cooperative Agreement

- ◆ 31 USC 6301 – not authority
  - Defines criteria for selecting appropriate legal instruments – procurement contract, grant, cooperative agreement
- ◆ Cooperative Agreement is the legal instrument to define the business relationship between the US and another entity when -
  - principal purpose is to transfer thing of value to the recipient **or** carry out a public purpose of support or stimulation authorized by a law of the United States
    - ◆ instead of acquiring property or services for the direct benefit or use of the US Government
  - **And substantial involvement is expected between the parties**

# Documents - Cooperative Agreement

- ◆ Authority for relationship must already exist
  - Requires authority for the action from some other law, such as cultural or historical; cost-share
- ◆ Reference ER 1130-2-441

# Documents - Cooperative Agreement

- ◆ Challenge Cost Sharing Cooperative Agreements (PL 102-580):
  - For recreation & natural resources
  - With non-federal interests
  - May entail services, materials, or funds

# Documents - Cooperative Agreement

- ◆ The Water Resources Development Act (WRDA) of 1996, on dredge material disposal facilities
  - Sec. 217 - cooperative agreements with non-Federal sponsors of navigation projects for long-term management strategies for controlling sediments
  - Sec. 218 - agreements with a project sponsor, a private entity, or both for the acquisition, design, construction, management, or operation of a dredged material disposal facility and use of any dredged material disposal facility by a non-Federal interest

# Documents - Outgrant

- ◆ Outgrant is a generic term
- ◆ From the United States to another entity
  - *Out*-grant rather than *In*-grant
- ◆ Written document establishing
  - period of use,
  - consideration for the use and
  - any conditions or restrictions



# Who Can Be a Grantee?

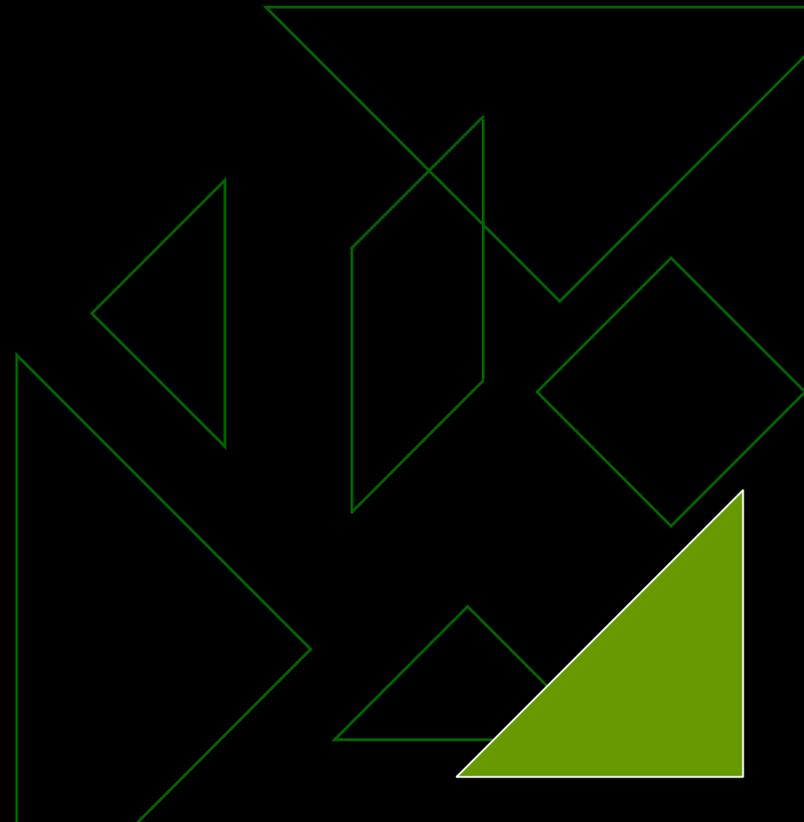
- ◆ Any legal entity that can hold property, sue, and be sued under the laws of the state where the property is located:
  - Individuals and Individuals trading as a firm,
  - Partnership,
  - Corporation,
  - Association
  - Indian Tribes
  - State and Local Government entities
- ◆ Other Federal Agencies

# Army Regulations

- ◆ AR 405-80, *Management of Title and Granting Use of Real Property*
- ◆ EC 405-1-80 will be replacing ER 405-1-12, Chapter 8
  - General procedures for the drafting, executions and issuance of instruments
  - Specifics on authority, policy and procedure by type of outgrant
  - Formats in Appendix by type

# Outgrant Types

- ◆ Lease
- ◆ Easement
- ◆ License
- ◆ Permit



# Documents – Leases

- ◆ Features
- ◆ Authorities
- ◆ Types of Use

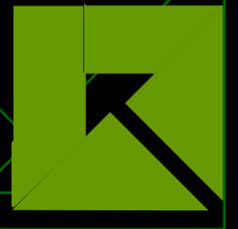


# Features of Leases

## ◆ Written document

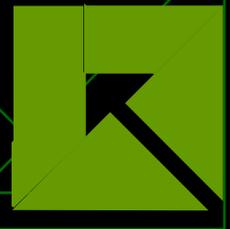
- Conveys possessory interest, usually exclusive
- Granted for a specific period of time - “**term**”
- Granted for a specific consideration, **generally** FMV cash, but can be other value
- Contains authorized uses and restrictions on use

## ◆ All execution delegated to the District



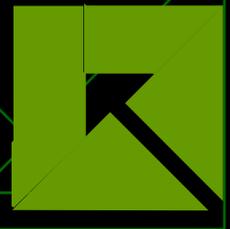
# Features of Leases

- ◆ Leasehold interest may be taxed by local authorities
  - if the local entity taxes separate estates
- ◆ Army Leases restrict use and impose conditions
  - to overcome common law that tenant can use for any legal purpose that does not damage the property
- ◆ Leases require reviews and baseline studies
  - Document current condition of the property
  - Any legal restrictions, e.g. historical or cultural



# Features of Leases

- ◆ May be assigned or subleased to others, with approval:
  - Assign leasehold - same use, no expanded or different use, and same term
- ◆ If change from state or local to private, should issue new document
  - Atornment – step into the place of



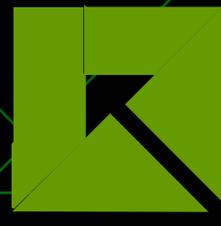
# Lease Authorities

- ◆ *16 USC 460d - Civil Works projects only*
- ◆ 16 USC 460L-13 - cost share agreements
- ◆ 16 USC 470h-3 - historic property
- ◆ 16 USC 663 - natural resources, not fish & wildlife
- ◆ *10 USC 2667 - General - Military and Civil*
- ◆ 10 USC 2689 - geothermal
- ◆ 10 USC 2878 - Military Housing
- ◆ 10 USC 4551 - ARMS
- ◆ 40 USC 471 - excess



# Lease Authority - 16 USC 460d

- ◆ Section 4 of the Flood Control Act of 1944 (*PL 78-534*), 16 USC 460d:
  - authorized the Corps of Engineers
  - to construct, operate, & maintain park & recreation areas or
  - to lease for those purposes
- ◆ Leases at water resource development project
  - Only covered flood control reservoirs until 1962



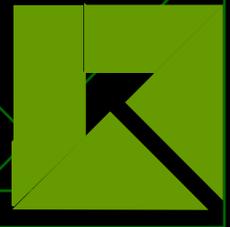
# Types of Use - 16 USC 460d

## ◆ Types of use:

- Recreation (public and non-public)
- Public Benefit,
- Development and conservation of fish and wildlife, forests, and other natural resources
  - ◆ May be authorized to cut timber and harvest crops

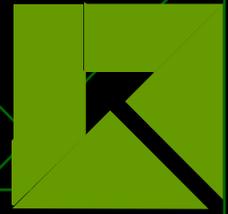
## ◆ Preference to public bodies

- May be at reduced or nominal costs



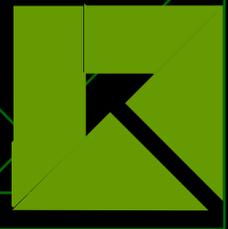
# Types of Use - 16 USC 460d

- ◆ 50 year to State or political subdivision
- ◆ Terms based on use and investment
  - Commercial concession 25 yrs w/option to renew
- ◆ *Caveat* - Term is not statutory but –
  - Leases longer than 50 years may adversely affect title and control
    - ◆ Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 USC 4601, et seq
      - tenant with longer than 50 years is treated as owner
    - ◆ Some states have laws that long term leases will be construed as fee



# Lease Authority- 10 USC 2667

- ◆ General leasing authority - dates to 1892
  - Has always applied to both civil & military actions
    - ◆ Only leasing authority for navigation projects prior to 1962
- ◆ Leasing must be advantageous to the US
  - Terms promote the national defense or are in the public interest (Standard formats meet this)
- ◆ Property
  - Under the control of the Army and
  - Not excess property, as defined by Federal Property and Administrative Services Act.



# Lease Authority- 10 USC 2667

- ◆ 5 year **statutory** term limit:
  - Secretary can find that longer term is needed
  - Term extensions *are possible*
- ◆ Fair Market Value, in cash or in-kind, required
  - Authorizes deviation from Economy Act requirement that leases be for cash
  - In-kind defined

# Types of Use - 10 USC 2667

- ◆ Any use that doesn't fit into 16 USC 460d
- ◆ Consideration collected as cash or in-kind (offsets)
  - In-kind consideration in lieu of cash rent includes:
    - ◆ Maintenance, protection, alteration, repair, improvement, or restoration
    - ◆ Providing or operating facilities
    - ◆ Construction of new facilities
    - ◆ Other services relating to activities that will occur on the leased property
- ◆ Examples, Agricultural and Grazing, harbors and piers

# Documents – Easements

- ◆ Features
- ◆ Authorities
- ◆ Types of Easements



# Features of Easements

- ◆ Written document - usually recorded in land records
- ◆ Conveys limited interest in government property
  - Grants use of property for specific purposes
  - May be for a specific term *or* perpetual
- ◆ Execution delegated to District

# Features of Easements

- ◆ Generally for linear rights-of-way, but not always
- ◆ Must be in public interest
- ◆ Limit area to that needed



# Easements - Multiple Uses

- ◆ Easements may overlap
  - with existing Gov. easements
  - with private easements
- ◆ We may also grant overlapping easements for different uses, i.e. cable, power, road

# Easement Authorities

- ◆ **10 USC 2668**
- ◆ 10 USC 2669
- ◆ 10 USC 4777
- ◆ 10 USC 9777
- ◆ 30 USC 185
- ◆ 33 USC 558b & b-1
- ◆ 40 USC 319
- ◆ 40 USC 471
- ◆ 43 USC 961, &
- ◆ Relocation authority

# Easement Authority - 10 USC 2668

- ◆ Military or Civil
- ◆ Types of easements authorized:
  - Roads, streets, & railroad tracks, &
  - Gas, oil, water, & sewer pipeline pumping stations
  - Telephone & telegraph lines
  - Wireless antennas & towers
  - Electrical substations, poles, lines, & related structures
    - ◆ This authority added in 1997

# Easement Authority - 10 USC 2668

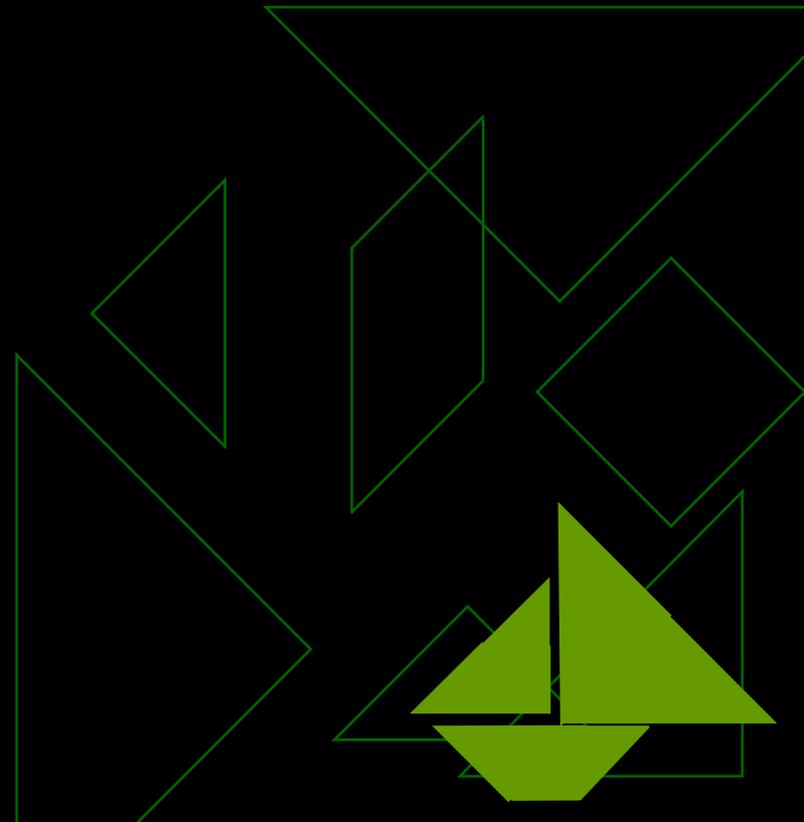
- ◆ Types of easements authorized:
  - Canals, ditches, flumes, & tunnels
  - Streets & railroad tracks
  - Wildlife dams, fish hatcheries, & reservoirs
  - ***Purposes not covered by other statutes***

# Easement Authority - 10 USC 2669

- ◆ Military or civil works
- ◆ Types of easements authorized:
  - Water, gas, & sewer pipelines
  - Irrigation pipes, &
  - Small residential or commercial gas service lines
  - Does *not* cover major gas pipelines

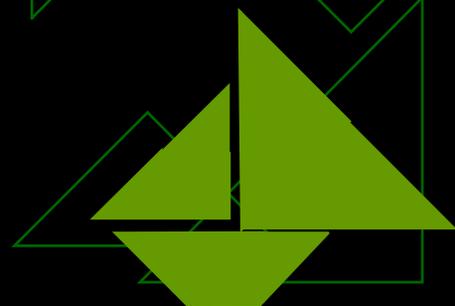
# Documents – Licenses

- ◆ Features
- ◆ Authorities
- ◆ Types of Use



# Features of Licenses

- ◆ A bare authority to a grantee, to do a specified act (s) on the property
  - Grantee does not acquire any interest in the real property.
  - Authorizes an act which would otherwise constitute a trespass.
- ◆ No alienation of title, ownership, or control of Government property.
- ◆ Use is not exclusive



# Features of Licenses

- ◆ Written document is evidence of the permission granted and of the obligations, responsibilities, and liabilities imposed on the licensee.
  - Rent may or may not be required
  - Revocable at will
  - **Not** assignable
- ◆ Doesn't require competition
- ◆ Generally for a short term of 1-5 years

# License Authorities

## ◆ Authority:

- Administrative powers of SA
  - ◆ may grant use if it does not affect title, ownership or control of property under his jurisdiction
- As a lesser right under a lease or easement authority
- Under specific legislation

# License Authorities

- ◆ Gen. Admin. Power
- ◆ 10 USC 2544 (Boy Scouts)
- ◆ 10 USC 2602 (space & quarters - Red Cross)
- ◆ 10 USC 2670 (Red Cross)
- ◆ 10 USC 2667 (Gen. Lease)
- ◆ 10 USC 2671 (Hunting & fishing – not Real Estate)
- ◆ 10 USC 2689 (Geothermal energy)
- ◆ 10 USC 4302 (space for Continuing Ed. Schools)
- ◆ 10 USC 4778 (YMCA)
- ◆ 10 USC 18235 (Reserves)
- ◆ 16 USC 460d (CW Lease)
- ◆ 16 USC 663 (Fish & wildlife)
- ◆ 32 USC 503 (Nat. Guard)
- ◆ 39 USC 406 & 411 (Post Office)
- ◆ Licenses **under** easement statutes

# Documents – Permits

- ◆ Features
- ◆ Authorities



# Features of Permits

- ◆ Grants use to another *federal* agency
  - Formalizes temporary use in lieu of verbal permission
  - Generally for a set term
  - Revocable at will
  - They are *not* assignable
- ◆ Also to DOD agency and other military departments
- ◆ Permit and license are legally the same

# Permit Authorities

- ◆ General Administrative Authority of the Secretary to grant uses which do not adversely affect title, ownership, or control
  - Tacit approval of Congress
- ◆ Implied from other statutory authorities
- ◆ To another DOD agency, other than military departments



# Other Permit Authorities

- ◆ Regulatory Permits
  - for navigable waters (Section 10) or wetlands (Section 404)
- ◆ Shoreline Use Permits
  - for boat docks or vegetation alteration
- ◆ 16 USC 470 - Archaeological Resource Protection Act (ARPA)
  - Permits for archaeological search

# Other Permit Authorities

- ◆ Randolph Sheppard Act (20 USC 107)
  - 32 CFR part 260 details DOD compliance
  - Provides right of first refusal to the blind for vending machines
  - Agreements may be with state or specific blind organizations

# Summary

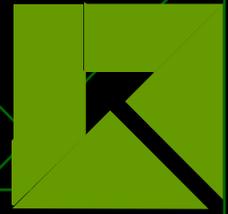
## ◆ May need *both*:

- a **Cooperative Agreement** to define business relationship and operational issues
- a **Real Estate instrument** for use of government property
- But what type?



# When to Use a Lease?

- ◆ Partner needs control and exclusive use, e.g. *Facility or room, locked and controlled*
- ◆ Partner needs property interest for financing or other fund raising reasons, e.g. *construction*
  - *Caveat: title to constructed facilities*
- ◆ Possibility of damage or contamination to real property from proposed use
- ◆ Potential for claims stemming from use of property - risk
- ◆ Property has sensitive issues that require more formal conditions on use



# When to Use an Easement?

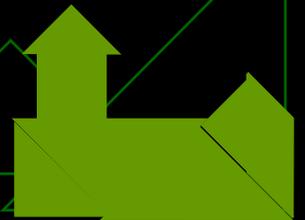
- ◆ More than a temporary or short term use
- ◆ Property lends itself to easement interest, e.g. *a road or trail*, or use is specifically listed, e.g. *wildlife dams, fish hatcheries*
- ◆ Partner wishes to have a property interest for financing or other fund raising reasons
- ◆ Need to establish liability parameters
- ◆ Potential for claims stemming from use of property – risk, volunteers, public
- ◆ Property has sensitive issues that require conditions on use

# When to Use a License?

- ◆ Short term of 1-5 years, but more than days or special event
- ◆ Not exclusive use
- ◆ Need to document obligations, responsibilities, and liabilities imposed on the licensee, with respect to real property use

# When to Use a Permit?

- ◆ Grant to another **Federal** Agency
- ◆ Use is covered by a specific statute, e.g. ARPA
- ◆ Need to document obligations, responsibilities, and liabilities, with respect to real property use

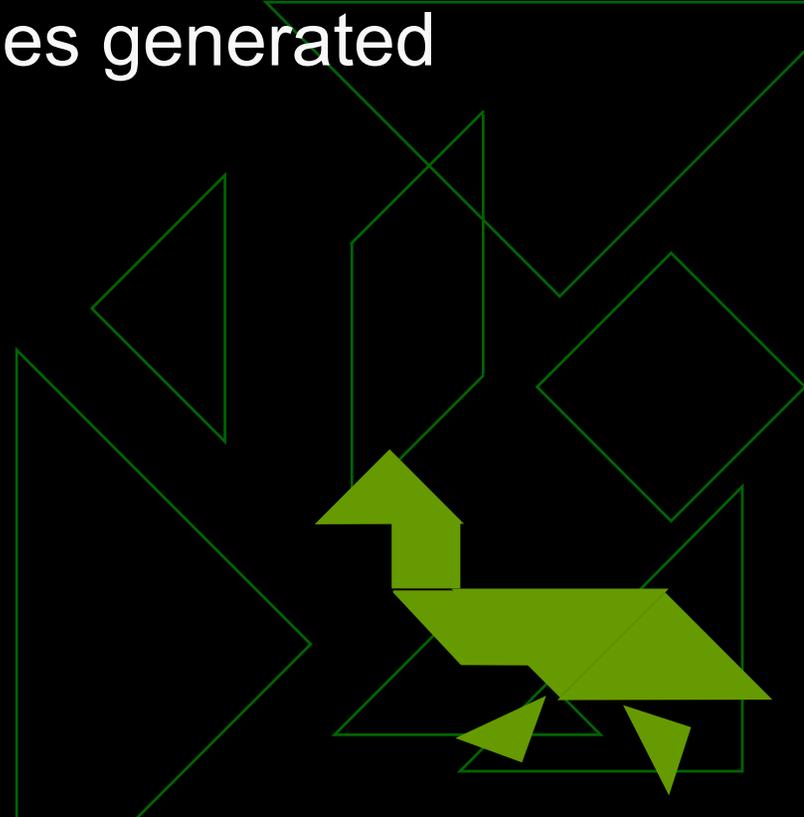


# When do you not need an Outgrant?

- ◆ Special event, e.g. Pioneer Day, Earth Day
- ◆ Short term – temporary use
- ◆ Recurring, but not continuous, e.g. once a month
- ◆ Historical group loans items for a display case

# Next Steps

- ◆ Capture issues in revisions underway to EC 405-1-80, Chapter 8:
  - Research any legal issues generated
  - Follow up with HQ



# QUESTIONS?

