



Filled Lands Project Legislative Update

September 15, 2017



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FILLED LANDS PROJECT:

A project of Oregon’s Department of State Lands for the identification and notification of the state’s interest in historically filled lands.

September 15, 2017

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EXECUTIVE SUMMARY

Throughout much of Oregon's history the placement of fill on the state's submerged and submersible lands was unregulated and considered an improvement to what were seen as low-value areas. In many cases the state retains an ownership interest if the lands were formed by placing fill on state-owned submerged and submersible land. This has led to a "cloud on title" to many properties, which requires the state and the adjacent landowner to settle the state's claim to clear title.

The Filled Lands Advisory Group (FLAG) was formed after the 2013 legislative session to engage with the Department of State Lands (DSL) to ensure a fair and reasonable process to resolve state ownership interests in historically filled submerged and submersible lands. Historically filled lands were defined as lands which were created upon submerged and submersible lands by artificial fill or deposit prior to May 28, 1963, prior to enactment of state laws addressing disposition and ownership. The FLAG made a suite of recommendations for streamlining the administrative process.

[Senate Bill 912](#) passed into law during the 2015 legislative session and codified a number of the FLAG recommendations. Senate Bill 912 also required the State Land Board to meet certain requirements before asserting title to historically filled lands, requiring the State Land Board to direct DSL to determine whether the state retains any interest in historically filled lands in tidal and navigable waterways. Senate Bill 912 established legal sideboards for a public notification process and Land Board declaration of state's interests in historically filled lands. Senate Bill 912 allocated some General Fund monies to DSL to complete this work and required DSL to provide a progress report to the legislature by September 15, 2017.

DSL spent most of the 2015-2017 biennium developing the administrative framework through rulemaking, hiring the limited duration positions needed to perform the work, and beginning the initial review of historically filled lands on a number of state-owned waterways. Below is a summary of major accomplishments from the 2015-2017 biennium:

- Process work flow documented;
- Hiring limited duration staff skilled in document management and GIS to assist with the data collection review and metadata updates required;
- Adopting [administrative rules](#) ;
- Developing a waterway ownership mapping manual;
- Developing filled lands review methodology document;
- Completing the Filled Lands Initial Review analyses for the Chetco River, Tillamook Bay and Siletz River; and
- Starting the Filled Lands Initial Review analysis for the Lower Columbia River-Region 1 (Completed early in the 2017-2019 biennium).

DSL's 2017-2019 budget provides funding and positions to continue the identification and notification of historically filled lands. This includes the continuation of the limited duration positions for the filled lands initial review work and the addition of two new limited duration positions to begin the filled lands notification and declaration process. Major goals for the 2017-2019 biennium include:

- Continuing the initial review work on state-owned waterways;
- Presenting agency recommendations to the State Land Board to initiate the formal notification and declaration process for waterways where an initial review has been completed;
- Completing the declaration of state's interest in historically filled lands on waterways where an initial review and formal notification process have been completed; and
- Providing periodic updates to the FLAG, legislature, and other interested stakeholders.

DSL has experienced delays in hiring the approved positions in order to comply with cost savings requirements for the agency's personal services budget. This is anticipated to slow the progress in continuing the initial reviews, as well as in beginning the formal waterway notification and declaration processes. DSL has also experienced considerable turnover in approved positions due to the limited duration status of the positions.

DSL does not have any recommendations for legislation at this time. DSL is analyzing the data from the initial reviews. Trends identified through this analysis may be valuable in crafting future legislative concepts. DSL will evaluate the progress of the filled lands work throughout the 2017-2019 biennium and may request the continuation of positions and/or professional services limitation as part of the agency's 2019-2021 budget.

BACKGROUND 1859 - 2015

At statehood Oregon acquired ownership title to the submerged and submersible lands of navigable and tidally influenced waterways under the Equal Footing Doctrine and the Oregon Admissions Act. In conjunction with the Public Trust Doctrine, this ownership embodies the principle that the state holds title to these lands subject to a duty to maintain them for public navigation, recreation, fisheries and commerce.

The Oregon Legislature delegated to DSL the authority to authorize uses of state-owned submerged and submersible lands. Revenue generated from these authorizations is deposited into the Common School Fund. Monies from the fund are sent to K-12 public schools throughout Oregon, and also used for DSL's aquatic resource management programs.

Throughout much of Oregon's history the placement of fill on the state's submerged and submersible lands was unregulated. Filling was generally considered an improvement to what were seen as low-value areas. Land owners adjacent to waterways placed fill or allowed fill to be placed on the submerged and submersible land adjacent to their property in order to increase the usable area of their property. Filling submerged and submersible lands created expanded business opportunities along wharfs and docks, and on new agricultural lands. Dredging, which created much of the material available for fill, fostered more opportunities for commerce through deepened shipping channels. In 1967, the Oregon Removal-Fill law was enacted and the practice of filling waterways became a regulated activity.

The act of filling in submerged land is considered an avulsive event that does not change property ownership lines. Thus, unless the state relinquishes title, it retains ownership of lands formed by placing fill on state-owned submerged and submersible land. Before 1963 the state relinquished title to some submersible lands. The state does not claim title to all filled lands; only those lands where the state's title has never been relinquished and those for which the state has acquired title through sale or exchange.

In 1963, the state legislature enacted statutes addressing the ownership of "new lands," lands created by the artificial placement of fill. Although subsequently amended, these statutes provide for the purchase of lands created after May 28, 1963. Not addressed were filled lands created before that date.

DSL did not proactively pursue any type of comprehensive statewide settlement of historically filled lands claims. These issues have been typically raised on an individual basis through a bank financing requirement, regulatory permit or potential sale of the property. In many cases, the lending bank or title company found a "cloud on title" through their research and initiated contact between DSL and the landowner.

DSL resolved these issues on a case by case basis following the provisions of OAR 141-067. This involved: initial contact and ownership inquiry; application submittal and completeness review;

State Land Board approval to initiate the land sale process; public and agency notifications; analysis of resources (mineral, cultural, archeological, etc.); review of comments and resource analysis; review of appraisal(s) and negotiation on sales price; State Land Board approval of negotiated transaction; and completion of the transaction. It involved extensive historical research, costs of an appraisal, valuation of the property, and costs of negotiations. The state collected an application fee to help offset costs. However, any additional costs for administration, negotiation and litigation were paid out of the Common School Fund earnings as a statutory expense.

The Filled Lands Advisory Group (FLAG) was formed after the 2013 legislative session to engage with DSL to ensure a fair and reasonable process to resolve state ownership interests in historically filled submerged and submersible lands. Historically filled lands are defined as lands which were created upon submerged and submersible lands by artificial fill or deposit prior to May 28, 1963, prior to enactment of state laws addressing disposition and ownership. Filled lands created after May 28, 1963 are subject to all the provisions of ORS 274.905 to 274.940; also known as the “New Lands Statutes.” The FLAG engaged with DSL on a number of key topics including: an overview of statute and rule, key legal issues, the process of identifying and resolving ownership, the appraisal and valuation of filled lands, and the interests of many stakeholders involved with the process. With DSL technical support the FLAG developed a streamlined process to settle historically filled land claims.

[Senate Bill 912](#) passed into law during the 2015 legislative session and codified a number of the FLAG recommendations. Senate Bill 912 also required the State Land Board to meet certain requirements before asserting title to historically filled lands, and requiring the State Land Board to direct DSL to determine whether the state retains any interest in historically filled lands in tidal and navigable waterways. Senate Bill 912 established legal sideboards for a public notification process, and Land Board declaration, of state’s interests in historically filled lands.

DSL subsequently developed administrative rules [OAR 141-068](#) which further refined the process for the identification and notification of historically filled lands and established the process for clearing title to those lands, per the FLAG recommendations. DSL recruited FLAG members for the rules advisory committee; while also adding some new members from the Oregon Farm Bureau, Association of Oregon Counties, City of Coos Bay and the Oregon Department of Fish and Wildlife. DSL began the Filled Lands Project in 2015 with existing staff resources and temporary staffing to begin enacting the FLAG recommendations and directive from SB 912.

2016/2017 PROGRESS

In May of 2016 the Filled Lands Project team added a Planner 2 level staff person and a project manager to guide the work. By July 2016, the team was complete with the hire of a GIS staff person. Because the Filled Lands Project team was new to the agency, a steering committee was established to guide them. The steering committee is made up of staff that were subject matter experts in DSL's GIS ownership data, DSL's ownership determination process, legislative policy and administrative rule making and proprietary coordination. Finally, the Filled Lands Project team is sponsored by the Deputy Director for Operations which demonstrates the importance of the project and agency executive-level support.

Building upon the 2015 work, the Filled Lands Project team tested the process for researching, documenting and developing GIS datasets and refined the methodology to meet Senate Bill 912 directives. DSL also developed a policy option package for the 2017-2019 biennium in order to begin the formal historically filled lands notification and declaration process.

2016/2017 achievements include:

- Process work flow documented;
- Hire of limited duration staff skilled in document management and GIS to assist with the data collection review and metadata updates required;
- Administrative rules adopted;
- Development of a waterway ownership mapping manual;
- Development of filled lands review methodology document;
- Completion of the Filled Lands Initial Review analyses for the Chetco River, Tillamook Bay, Siletz River and the Lower Columbia River-Region 1;
- Update to FLAG members;
- The inclusion and approval in the agency's 2017-2019 budget to:
 - Continue the limited duration positions for the filled lands initial review work; and
 - Hire new limited duration positions to begin the filled lands notification and declaration process, as directed by Senate Bill 912.
- Regular reporting for DSL staff and leadership on project status; and
- Planned priorities for the waterways to be reviewed and analyzed.

2017 – 2019 GOALS

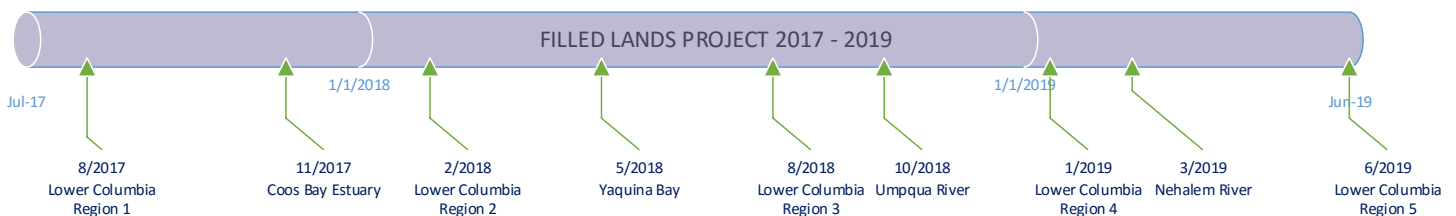
Goals for the 2017-2019 biennium include:

- Continue the initial review work as shown on the timeline below.

- Hire the new limited duration positions to begin the filled lands notification and declaration process. The hiring of these new positions has been delayed in order to comply with mandatory cost savings in the agency’s personal services budget;
- Present an agency recommendation to the State Land Board to initiate the notification and declaration process for any number of the waterways where an initial review has been completed.
- Migrate GIS ownership data into a software development environment specifically designed to serve the entire agency;
- Generate discrete GIS datasets for waterway ownership and filled lands; and
- Provide periodic updates to the FLAG, legislature, and other interested stakeholders.

TIMELINE

The timeline below presents target dates for completion of Filled Lands– Initial Review reports.



Scope of work

Below is DSL’s current list of state-owned waterways scheduled for a filled lands initial review analysis.

Waterway by priority Filled Lands Initial Review Reports: 2017 and beyond 2019

- | | |
|---|------------------------------------|
| 1. Coos Bay Estuary | 10. Lower Columbia River, Region 6 |
| 2. Lower Columbia River, Region 2 | 11. Rogue River |
| 3. Yaquina Bay | 12. Lower Columbia River, Region 7 |
| 4. Lower Columbia River, Region 3 | 13. Coquille River |
| 5. Umpqua River | 14. Siuslaw River |
| 6. Lower Columbia River, Region 4 | 15. Nestucca River |
| 7. Nehalem River | 16. Alsea River |
| 8. Lower Columbia River, Region 5 | 17. Salmon River |
| 9. Willamette River-upriver from the Portland Harbor Superfund Site | 18. Netarts Bay |

19. Upper Columbia River -from
Bonneville Dam to State Boundary
20. Sand Lake
21. John Day River
22. Klamath River
23. McKenzie River
24. Sandy River
25. Snake River
26. Necanicum River - Elk Creek
27. Depoe Bay
28. Beaver Creek

29. Yachats River
30. Berry & Sutton Creeks
31. Siltcoos – Tahkenitch
32. Smith River
33. Tenmile Creek
34. New River
35. Sixes - Elk River
36. Port Orford
37. Pistol River

PROJECT CHALLENGES

DSL has postponed the hiring of the limited duration positions at the beginning of both the 2015-2017 and 2017-2019 bienniums in order to comply with mandatory savings requirements in the agency's personal services budget. This has resulted in some project delays in beginning the initial reviews, as well as the formal waterway notification and declaration processes.

There has also been a considerable amount of turnover in these limited duration positions. DSL can be at a disadvantage when competing with the private sector for labor that is qualified to fill these high skill level positions. One of the primary reasons is the uncertainty that an employee faces when accepting a limited duration position. DSL has endured a 200% turnover rate in the ISS 4 and Planner 2 positions. This has led to significant delays in completing initial reviews for waterways; as DSL has been forced to re-recruit for the positions, complete the hiring process, and train the new hires on the project and the process. DSL expects this to be a continuing challenge during the 2017-2019 biennium, due to the nature of limited duration positions and the relatively low unemployment rate in the Willamette Valley for skilled labor.

DSL has not found it feasible to make other permanent resources available to work on this project due to current agency workloads and other Land Board and legislative priorities (such as the Elliott State Forest project and the Portland Harbor Superfund Site).

LEGISLATIVE RECOMMENDATIONS

DSL is not bringing forward any recommendations for legislation at this time. DSL is beginning to analyze the data from the waterway initial reviews, in particular, the acreage size and current use (Farm, Transportation, Industrial, Water Control, etc.) for historically filled lands where a state claim has potentially been demonstrated. Trends identified through this analysis may be valuable in crafting future legislative concepts.

DSL will evaluate the progress of the filled lands work through the 2017-2019 biennium and may request the continuation of positions and/or professional services limitation as part of the agency's 2019-2021 budget.

FILLED LANDS: INITIAL REVIEW-SILETZ RIVER

DSL is attaching the "Filled Lands Initial Review-Siletz River" as a sample of the work that is being completed as part of the Filled Lands Project. All completed initial reviews and methodology documents are available from DSL as requested.