

# Oregon Department of State Lands (DSL) Filled Lands Advisory Group (FLAG)

## Recommendations

### I. INTRODUCTION

The Filled Lands Advisory Group (FLAG) was formed out of 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. For the purposes of this document, historically filled lands are lands which were created upon submerged and submersible lands by artificial fill or deposit prior to May 28, 1963. This date marks the 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 convened six times from October 2013 through June 2014. The FLAG engaged with DSL on a number of key topics including: an overview of current statute and rule, discussion of 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 the Process Flowchart outlining a system for settling historically filled lands claims. This document provides further details and summarizes the FLAG recommendations for modifying the historically filled lands resolution process.

### II. BACKGROUND

At statehood, Oregon was granted ownership of the submerged and submersible lands (“beds and banks”) 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 for public navigation, recreation, fisheries and commerce.

DSL is the administrative arm of the State Land Board authorizing uses of state-owned submerged and submersible lands. Revenue generated from these authorizations is deposited into the Common School Fund for Oregon’s K-12 public schools.

Throughout much of Oregon’s history, the placement of fill on the state’s submerged and submersible lands was unregulated. Most often the U.S. Army Corps of Engineers and port authorities placed dredge materials from navigation channel creation and maintenance on these lands. They used them, in effect, as convenient disposal sites.

The filled lands were generally considered beneficial, resulting in more opportunities for commerce through deepened shipping channels and expanded business opportunities along wharfs and docks. It was often thought that filling submerged and submersible land by businesses and private landowners was an improvement to what was often perceived as low-value areas. In some cases, owners of land adjacent to waterways placed fill or allowed fill to be placed on the submerged and submersible land fronting their property in order to increase the area of upland they could use.

Beginning in the middle of the last century, the Land Board and the Legislature began to recognize that the unregulated filling of state-owned waterways had negative impacts on the environment and on the public trust values in the waterways. In 1963, the Legislature addressed the need to regulate filling of its waters by passing the New Lands Act (ORS 274.905 – ORS 274.940). This legislation not only gave the Land Board the authority to sell, lease and trade state-owned filled lands but established a procedure for DSL to follow when determining their market value.

Prior to the 1963 law, ownership frequently was not addressed or resolved at the time filled lands were created. As a result, ownership has become clouded over time and county tax records are not necessarily reflective of legal title. Since the 1973 amendments to the “New Lands Statutes” and the enactment of the “Formerly Submerged, Submersible Lands” statutes, title companies have included exclusions in their title reports for the state’s potential right to claim these submerged and submersible lands.

The State of Oregon claims an interest in filled lands by virtue of the fact that they were formed on state-owned submerged and submersible lands provided the state has never relinquished its title to the underlying submerged and submersible lands. Before 1963; however, the state did relinquish title to some submersible lands such as historically filled lands created on tidelands that were previously conveyed (sold or granted away) by the state. As a result, the state does not claim title to all historically filled lands but only those lands where the state’s title has never been relinquished.

In 1971, the Legislature established an advisory committee to aid the Land Board by investigating waterway ownership problems and proposing legislation to the 1973 Legislature. The Department received federal funding that same year to inventory tidelands and landfills in Oregon estuaries. It was hoped that when completed, these two projects would provide the Department with tools for managing state-owned submerged and submersible lands. A number of inventories were completed in the 1970s, and were used to settle filled lands claims. The work done by the Department and advisory committee led to some amendments to the New Lands Statutes in 1973.

In general, DSL has not proactively pursued any type of comprehensive statewide settlement of historically filled lands claims since the 1970s. These issues are 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 will find a “cloud on title” through their research and initiate contact between DSL and the landowner.

DSL currently resolves these issues on a case by case basis following the provisions of OAR 141-067. This involves:

- 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.



This process can be expensive and time consuming for both the state and the applicant. It involves extensive historical research, costs of an appraisal and valuation of the property, and costs of negotiations. The state collects an application fee to help offset costs. However, any additional costs for administration, negotiation, and litigation are paid out of the Common School Fund earnings as a statutory expense (see Appendix A; Common School Fund Graphic). The Department is responsible for performing its public trust and statutory (ORS 274.940) responsibilities, as well as its fiduciary responsibilities to the Common School Fund.

### III. FLAG RECOMMENDATIONS

The FLAG developed the following recommendations with the administrative and technical support of DSL. These recommendations are meant to improve and clarify the steps taken when resolving historically filled lands claims. The recommendations are summarized as a Process Flowchart in Appendix B. The following sections describe in more detail the FLAG recommendations. These recommendations may require rule or statutory changes. Possible agency and legislative actions are identified throughout. In proposing this process, the FLAG strove to:

- Provide a transparent and fair process for an applicant requesting to purchase or clear title to historically filled lands;
- Ensure the public trust, cultural resources and other stakeholder interests are assessed and taken into account prior to the sale or transfer of historically filled lands;
- Reduce the costs of administration, negotiation and litigation by offering some agreed upon options for clearing title provided that the sale or transfer does not unreasonably interfere with recreation, fish and wildlife, or navigation. Reducing costs is a benefit to the applicant, DSL and the Common School Fund.

#### A. Review Strength of Claim

This is the initial, and one of the most time-consuming and expensive steps in determining the extent (or lack) of state-ownership in historically filled lands. The result of this research drives the decisions made by both DSL and the applicant in resolving filled lands issues. This step requires the most research and may yield inconclusive results. This step moves forward best when both parties work in a collaborative manner. Open correspondence and the sharing of information reduce time and expense to both parties. This may be difficult if litigation is being considered by either DSL or the applicant.

DSL analyzes a site for a number of features and issues when determining the state's strength of claim. This includes, but is not limited to:

1. When was fill placed?
2. Who/What entity placed the fill?
3. What was the purpose of the fill?
4. Where was the location of ordinary high water or ordinary low water (OHW/OLW) at time of fill?
5. Where is the location of OHW/OLW currently?
6. What are the current site characteristics and use?
7. Are there prior conveyances from the state?
8. Are there current or historic public interests or uses?

Typically answers cannot be found for all of the questions. Applicants are encouraged to assist in this analysis by providing available information.

Recommendation: There appears to be little that can be done to streamline the research required in order to verify or disprove the state's claim to historically filled lands. However, this step sets the framework for the rest of the process and the associated streamlining measures. An internal checklist (Appendix C) will be completed when reviewing the state's strength of claim in a parcel. The information collected on the checklist will be available to an applicant or any interested party for review. The checklist will help provide transparency by showing the factors considered and the results for the applicant and other interested stakeholders.

The strength of claim review will yield one of the following results:

**1. No Claim Found**

In researching the historically filled lands, DSL finds that the state has no clear claim of ownership or has already conveyed ownership through an earlier action.

Recommendation:

DSL will offer to provide a quitclaim to the property in question if required. This is referenced as the "EZ process with no compensation" in the Process Flowchart. This will be done as an administrative action with signatory authority delegated by the State Land Board to the director. These actions will not go to the State Land Board for review and approval. No public review period or other due diligence actions is required. The reasoning behind this is that DSL does not believe that the state has a claim of ownership; therefore, a true property interest is not being released by the state. No compensation will be required for this quitclaim.

DSL may charge an administrative fee to cover the agency's costs of executing and recording the quitclaim deed.

Agency Action:

It is recommended that the State Land Board delegate authority to the director to execute the quitclaim deeds without State Land Board approval. This delegation will need to be codified through rule. It is recommended that OAR 141-067 be amended to reflect the recommendations of the FLAG and clarify the administrative process. DSL may evaluate and recommend an administrative fee adjustment through rulemaking.

Legislative Action:

No legislative action is anticipated.

**2. Claim Demonstrated**

If evidence exists indicating that the state has a claim of ownership to all or a part of the historically filled lands, DSL will begin its ORS 274.940 Assessment and Due Diligence on the property as required by statute, rule, and DSL's State Agency Coordination Plan. The results of the ORS 274.940 Assessment and Due Diligence will direct DSL's next steps in the process. These two steps may be done concurrently:



## **B. ORS 274.940 Assessment**

The provisions of ORS 274.940 require DSL to evaluate the public interests of a potential land sale on recreation, conservation of fish and wildlife, or the development of navigation facilities.

### Recommendation:

DSL notifies interested parties of the potential land sale and solicits public comment on whether such lands should be preserved for recreation, conservation of fish and wildlife, or the development of navigation facilities as required by ORS 274.940 (Statutory Interests). If significant comments are received during the public comment period indicating that the property in question should be preserved for Statutory Interests, then DSL may hold a public hearing to further evaluate the need to preserve the property. DSL may stop the land sale process at this point if it is determined that the public interest requires such lands to be preserved. In the case of such a reservation, DSL will allow the adjoining or opposite upland or riparian owner reasonable access across such reserved lands to the adjoining waterway. The applicant retains their right to pursue any other remedies afforded by law if DSL decides to stop the land sale process.

Identified interests will be noted as “Low,” “Moderate,” or “High”. Some examples that may lead to a determination of the sale having a high interest include:

- Current or historic use of the parcel for fishing or recreation.
- Direct public access to the water from a public road or right of way across the state-owned filled lands.
- Notification from the local port district, the United States Coast Guard, or the Oregon State Marine Board that the site is important to existing or future navigational needs.

If the assessment shows that there is likely low interest in recreation, fish and wildlife, or navigation the property will be evaluated based on the Real Market Value (RMV) of the state-owned portion of the parcel as documented in the local tax assessor records.

There may be situations where a moderate interest is identified, but DSL determines that it is in the best course of action to move forward with the land sale. Any land sale that moves forward where a moderate interest has been identified will do so through the Standard Process regardless of the RMV of the state-owned portion of the parcel. DSL will use the Standard Process to address the concerns raised during the ORS 274.940 Assessment. For example, negotiations may require that a piece of the site be reserved for navigational purposes, or to protect a threatened or endangered species. DSL may also negotiate a public easement across the property as part of the sale transaction. Valuation of the property may be negotiated to take into account the interest that has been identified.

### Agency Action:

It is recommended that OAR 141-067 be amended to clarify the assessment process. DSL will also clarify negotiable terms through rulemaking. DSL will review its public review policy to ensure that affected stakeholder groups are notified of a potential historically filled lands sale.

Legislative Action:

No legislative action is anticipated.

**1. Due Diligence and Assessment**

DSL follows the public review process as currently described in OAR 141-067-0180 and performs a resource review that includes a review of the mineral, cultural, economic and public use interests in the property. A Department of Administrative Services (DAS) Land Sale Notice is filed as required by state law. DAS will notify all state agencies and political subdivisions of the anticipated transaction. DSL will document the assessed RMV of the property (not including improvements) in dollars per square foot assigned to the land within the tax lot or comparable (properties with features that are similar to the property whose value is being sought) tax lot by the county tax assessor. DSL will perform this due diligence step concurrently with the ORS 274.940 Assessment whenever possible.

Recommendation:

DSL notifies potentially affected stakeholder groups of the potential land sale. DSL has drafted a New and Historically Filled Lands Evaluation Form (Appendix D) that will help DSL determine if the parcel should be sold and under which process. The New and Historically Filled Lands Evaluation Form is available to an applicant or any interested party for review. DSL expects that the checklist will help provide transparency of the factors considered for the applicant and other interested stakeholders.

Agency Action:

It is recommended that OAR 141-067 be amended to clarify the due diligence process. DSL will review its public review policy to ensure that affected stakeholder groups are notified of a potential historically filled lands sale.

Legislative Action:

No legislative action is anticipated.

If the ORS 274.940 Due Diligence and Assessment and Due Diligence review allows DSL to move forward with the land sale, the value of the property will be determined as follows:

**C. Valuation**

- 1. Low Value Property** (RMV of the state-owned portion of the property is less than \$20,000, as documented in local tax assessor records).

Recommendation:

DSL will offer to provide a quitclaim to the property for no compensation. This is referenced as the "No Compensation EZ Process" in the Process Flowchart. This will be done as an administrative action, with signatory authority delegated to the director. These actions will not go before the State Land Board for review and approval. No appraisal will be required for this transaction.

DSL may charge a fee up to covering the agency's costs of administering the land sale process.



Note:

If the assessed value is found to be artificially depressed for any extenuating circumstance, DSL may select another comparable tax lot as the basis for calculating the RMV. This is a common provision in other agency rules (waterway leasing, remediation and restoration, etc.).

Agency Action:

The State Land Board will need to delegate authority to the director to execute the quitclaim deeds without State Land Board approval. This delegation will need to be codified through rule. It is recommended that OAR 141-067 be amended to reflect the recommendations of the FLAG and clarify the administrative process. DSL may evaluate and recommend an administrative fee adjustment through rulemaking.

Legislative Action:

No legislative action is anticipated.

2. **Moderate Value Property** (RMV of the state-owned portion of the property is greater than \$20,000 and less than \$100,000, as documented in local tax assessor records).

Recommendation:

DSL will offer to provide a quitclaim deed for the property for 50% of the RMV of the state-owned portion of the property. This is referenced as the "EZ Process with compensation" in the Process Flowchart. No appraisal will be required for this transaction. These transactions shall go to the State Land Board for review and approval. DSL may charge a fee up to covering the agency's costs of administering the land sale process.

Note:

If the assessed value is found to be artificially depressed for any extenuating circumstance, DSL may select another comparable tax lot as the basis for calculating the RMV. This is a common provision in other agency rules (waterway leasing, remediation and restoration, etc.).

Agency Action:

It is recommended that OAR 141-067 be amended to reflect the recommendations of the FLAG and clarify the administrative process. DSL will evaluate and recommend an administrative fee adjustment through rulemaking.

Legislative Action:

No legislative action is anticipated.

3. **High Value Property** (RMV of the state-owned portion of the property is greater than \$100,000, as documented in local tax assessor records)

Recommendation:

DSL will follow the historically filled lands sale process as currently described in OAR 141-067. An appraisal will be required. The appraisal must meet the general requirements described in OAR 141-067-0310. DSL will make available a list of agency approved

appraisers and appraisal instructions. The use of an agency approved appraiser that follows the agency's appraisal instructions will likely result in an appraisal value acceptable to DSL. DSL may negotiate the final sale price and adjust the sale price as allowed in OAR 141-067. It is recommended that DSL consider moderate interests to recreation, fish and wildlife, or navigation when negotiating the final transaction. These transactions go to the State Land Board for review and approval.

DSL may charge a fee up to covering the agency's costs of administering the land sale process.

Agency Action:

DSL has the ability to negotiate these land sales under OAR 141-067. DSL will evaluate and recommend an administrative fee adjustment through rulemaking.

Legislative Action:

No legislative action is anticipated.

**D. Do Not Sell**

#### **IV. ADDITIONAL RECOMMENDATIONS**

1: Comments

If DSL receives comments on the potential land sale indicating that it may have moderate or high Statutory Interests or otherwise effect Public Trust Uses (fishing, navigation, recreation, and commerce), DSL will evaluate the comments and provide findings on the New and Historically Filled Lands Evaluation Form (Appendix D). The findings will list the affected interest with cause and evaluate the interests as no, minimal, or significant. These findings will help DSL determine if:

- a. The potential interest is reasonable;
- b. The comments need to be sent to the applicant for review and response; or
- c. A public hearing is required to further evaluate the Statutory Interests as delineated in ORS 274.940.

The New and Historically Filled Lands Evaluation Form is available to an applicant or any interested party for review. DSL expects that the evaluation form will help provide transparency by showing the factors considered, and the results for the applicant and other interested stakeholders.

Agency Action:

It is recommended that OAR 141-067 be amended to reflect the recommendations of the FLAG and clarify the administrative process.

Legislative Action:

No legislative action is anticipated.

2: Moderate Interests

If DSL determines that there are moderate Statutory Interests or adverse effects to Public Trust Uses, these should be accounted for through the valuation process.



Agency Action:

It is recommended that OAR 141-067 be amended to clarify that DSL may account for the Statutory Interests or Public Trust Uses when negotiating the final sales price. It is recommended to evaluate these interests during the ORS 274.940 Due Diligence and Assessment phases, and summarize the findings on the New and Historically Filled Lands Evaluation Form. It is recommended that interests deemed moderate move a potential transaction to the standard process where the value of the interests or mitigating conditions (easements, withholding of a portion of the parcel, etc.) can be negotiated.

Legislative Action:

No legislative action is anticipated.

3: Public Access

DSL should preserve public access to the water to the extent practicable. If appropriate, a public easement to the water should be a condition of any land sale.

Agency Action:

It is recommended to amend OAR 141-067 by adding a policy statement indicating the State's preference to retain or restore public access to the water when appropriate. DSL will need to draft criteria for when an easement is appropriate, which could be either added to the OAR or adopted under DSL policies and procedures.

Legislative Action:

No legislative action is anticipated.

4: Exceptions and Reciprocal Quitclaims

DSL is responsible for protecting the Public Trust Uses to the submerged and submersible lands. When issuing a quitclaim to historically filled lands, DSL includes the following exception:

- Subject to and excepting the rights of the State of Oregon, and all rights of the public in and to any portion of the property conveyed lying below the line of Ordinary High Water of the waterway as it is located on the date of recording of this deed.

This is the current practice of the Department.

DSL may also require the landowner/applicant to issue a reciprocal quitclaim to the state as part of the transaction. This quitclaim is to the lands lying below the line of Ordinary High Water of the waterway. Requiring a reciprocal quitclaim to the lands lying below Ordinary High Water has been a noted recommendation of the Department of Justice for some time.

Agency Action:

It is recommended that DSL require a reciprocal quitclaim to the lands lying below Ordinary High Water. It is recommended that DSL draft a template reciprocal quitclaim that can be easily reviewed and executed by an applicant. It is recommended that that DSL amend OAR 141-067 as needed.

Legislative Action:

No legislative action is anticipated.

5: Time Limit

It is recommended that DSL place a limit on the time available for an applicant to accept an offer to settle the state's claim to the historically filled lands. Once DSL (with State Land Board approval if necessary) and the applicant have agreed upon a resolution, DSL and the applicant shall have twelve months to complete the transaction. If the transaction is not completed within twelve months, DSL may:

- a. Revoke the offer to settle the state's claim and require a new application and fee; or
- b. Extend the deadline in writing to an agreed upon timeframe.

Agency Action:

It is recommended that OAR 141-067 be amended to reflect this recommendation and clarify the administrative process.

Legislative Action:

No legislative action is anticipated.

6: Additional Legislative Actions:

It is recommended that statute be amended to clarify that the Administrative Procedures Act doesn't apply to a decision on historically filled lands. Any disagreement may be litigated in circuit court.

It is recommended that the following statutory revisions be completed at the advice of Legislative Counsel.

1. Amend ORS 274.905 to statutorily define "historically filled lands" to mean new lands created before May 28, 1963.
  - a. "New lands" is defined in ORS 274.905. Statutorily defining historically filled lands as a subset of new lands will be useful in further amendments to 274.905–274.940 to clarify that different processes apply to the state's disposition of new lands depending on when the lands were created by artificial fill or deposit.
2. Amend 274.910 (2) as follows: "The provisions of ORS 274.905 to 274.940 apply to new lands created [*before,*] on or after May 28, 1963."
  - a. The term "before" in the phrase "before, on or after" is a drafting term-of-art indicating that the statutes are to apply retroactively or, in this instance, to apply to all lands that were created by artificial fill or deposit prior to May 28, 1963 as well as after that date.
  - b. Because ORS 274.910 (2) currently provides that ORS 274.905-274.940 apply to new lands created "before, on or after" May 28, 1963, it is believed that the statutes do not currently allow for differential treatment between what the FLAG terms "historically filled lands"--lands filled before May 28, 1963--and filled lands created after that date. Amending ORS 274.910 (2) to remove the word "before" would serve to authorize and clarify the agreed-upon policy by the FLAG that the processes outlined in the new lands statutes should apply only to lands



- created “on or after,” but not before May 28, 1963 (with the exception that ORS 274.940 will continue to apply to all new lands regardless of the fill date).
- c. Legislative Counsel believes that the amendments to ORS 274.910 (2) must occur before any rulemaking to carry out the FLAG recommendations. Without this statutory change, it is believed that DSL does not have the statutory authority to adopt rules creating a process for resolving historically filled land claims that is different from the current 274.905 to 274.940 process.
3. ORS 274.910 should be further amended to provide that DSL shall (or may) engage in rulemaking to determine a process for disposing of historically filled lands.
    - a. This amendment is not considered legally necessary (as long as the term “before” is removed from the statute), but it would serve to clarify and reinforce in statute the idea that lands filled before May 28, 1963 are subject to the FLAG-recommended process and lands filled after May 28, 1963 are subject to the statutory process.
  4. Amend ORS 274.940 to clarify that the assessment under this statute is required for *all* “new lands”, including historically filled lands and new lands disposed of under 274.929. Also amend 274.940 to clarify that a determination under 274.940 is not a final agency action.
    - a. Since the assessment requirements in 274.940 are intended to apply to all new lands, a question is whether the FLAG’s conclusion that ORS 274.940 determinations should not be final agency actions is meant to apply to the assessments done for all new lands, or just historically filled lands.
    - b. ORS 274.940 is confusing to read and could also do with additional “technical fix” amendments that will not change the substance of the statute, but will clarify when the statute is to apply.
  5. Repeal ORS 274.960 to ORS 274.985.
    - a. These statutes legislatively mandate that DSL perform a study of lands “formerly submerged and submersible” where the title to the property is in question. The study was required to be completed, and any declarations of a state interest pursuant to the study made by July 1, 1979. The statutes appear to be moot and should be repealed. It would be appropriate to draft a relating clause for the FLAG legislative concept that would encompass the repeal of these statutes. The repeal would help to streamline the filled lands process by eliminating related statutes from the ORS that are unclear and no longer useful, but that may lend themselves to argumentation by upland owners as to the state’s ability to claim an interest in new lands.

## V. TIMELINE

DSL provided a brief update on the FLAG recommendations to the State Land Board at the June 2014 meeting. A full report of the FLAG process and recommendations will be presented to the State Land Board at the February 2015 meeting, and may request that the State Land Board initiate rulemaking to implement the recommendations. FLAG members will be invited to participate in the subsequent rulemaking effort. The formal rulemaking process will likely occur in 2015. DSL may also provide a report of the FLAG process and recommendations to the Oregon State Legislature during the 2015 session. DSL will begin to discuss legislative concepts, if needed, with

the legislature during the 2015 session. However, any FLAG recommendations requiring statutory revisions will not be advanced by DSL until the 2016 or 2017 legislative sessions.

## **VI. FLAG SUBGROUP**

While the FLAG came to agreement on a number of items, they were not able to come to consensus on the imposition of a statutory deadline for DSL to assert a claim to historically filled lands. DSL convened a Subgroup at the conclusion of the FLAG to further discuss the issue. The Subgroup was comprised of members from the original FLAG, and met three times in September and October of 2014. After deliberation, the Subgroup agreed to the following recommendation.

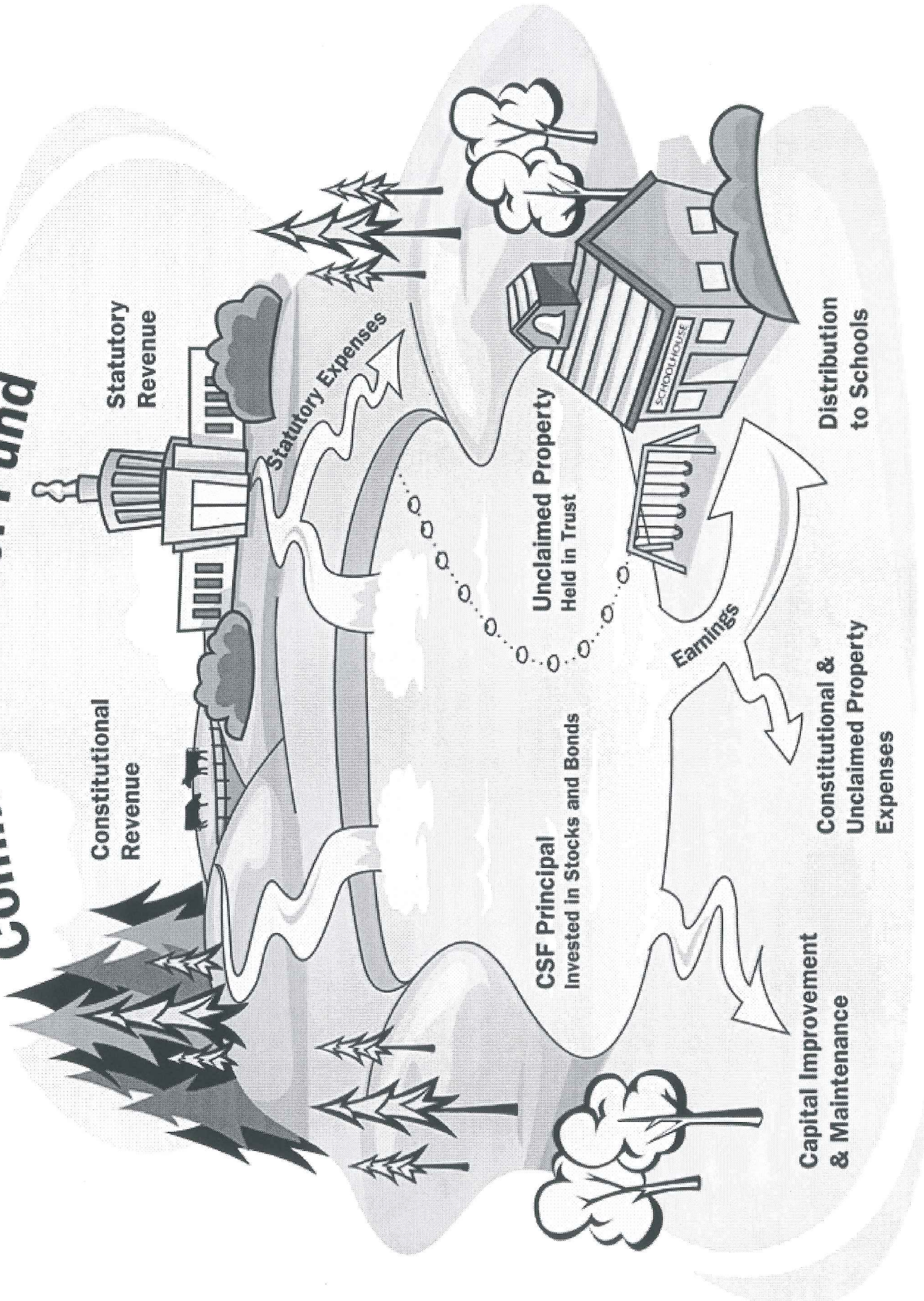
**THE FLAG SUBGROUP RECOMMENDS PURSUING THE STATEWIDE IDENTIFICATION AND NOTIFICATION OF HISTORICALLY FILLED LANDS. THE FLAG SUBGROUP NOTES ANY STATUTORY IDENTIFICATION AND NOTIFICATION REQUIREMENTS MUST BE CONTINGENT ON FUNDING BEING APPROPRIATED TO DSL TO COMPLETE THIS TASK, AND WITH A TIME FRAME LONG ENOUGH TO PROVIDE DSL EVERY OPPORTUNITY TO SUCCESSFULLY COMPLETE THE TASK.**

The Subgroup recommendation document and exhibits are attached as Appendix E.



APPENDIX A

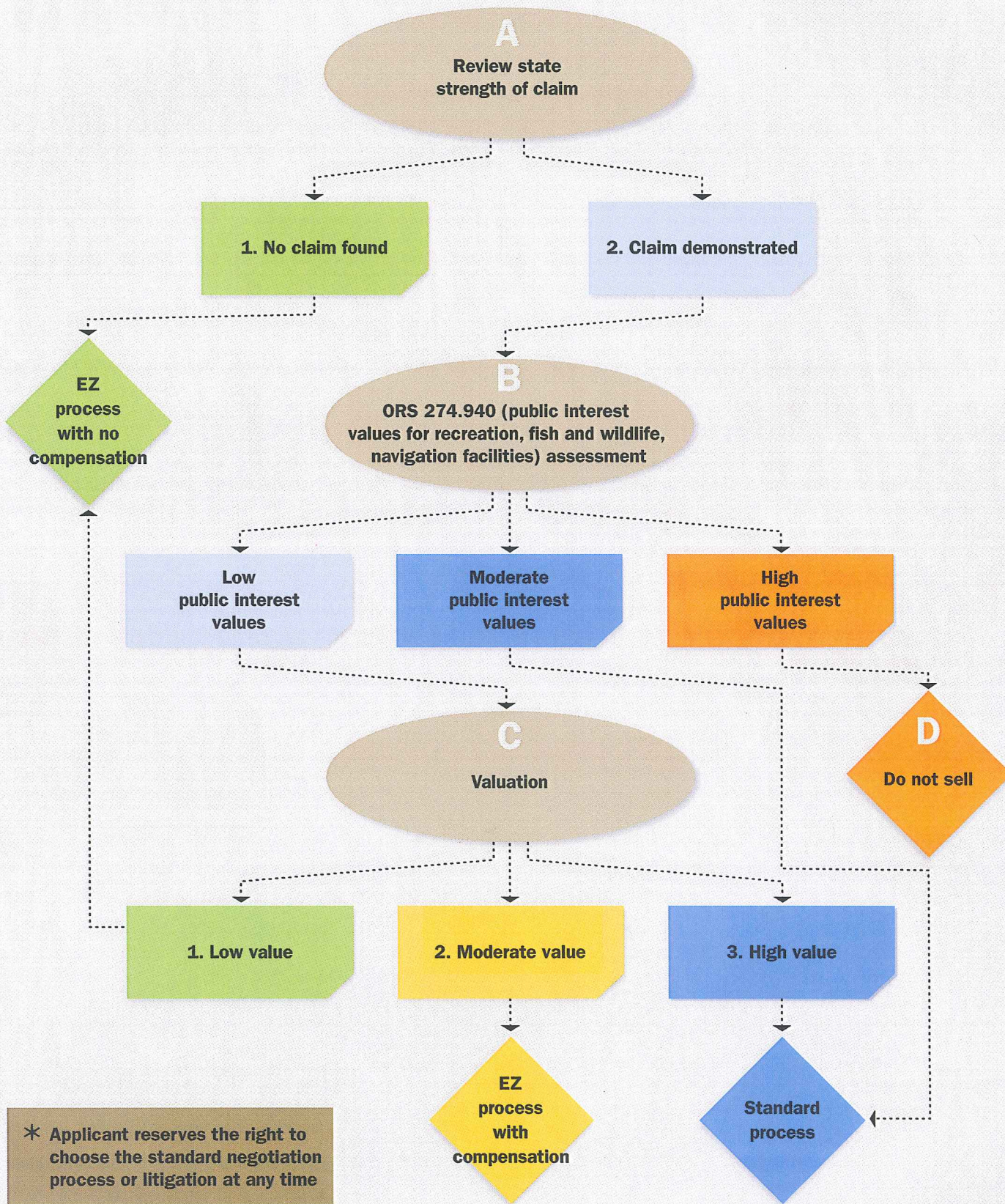
# Common School Fund





### Historically Filled Lands Flowchart\*

*Historically filled lands are uplands created before May 28, 1963, by the placement of fill (earth, rock, sand and other material) on submerged and submersible lands.*



\* Applicant reserves the right to choose the standard negotiation process or litigation at any time



## APPENDIX C

### Filled Lands Strength of Claim Review Checklist

Application No:            County:            TRSQQ:            Tax Lot:

Acreage:            Waterway:

Upland Owner:

Address:

CITY STATE ZIP

1. When was fill placed:
2. Who/What entity placed the fill:
3. What was the purpose of the fill:
4. Location of OHW/OLW at time of fill (or closest available information):
5. Location of OHW/OLW currently:
6. Current site characteristics and use: NATURAL/UNDEVELOPED,  
PRIVATE/COMMERCIAL/WHARF, PUBLIC ACCESS BY:
7. Public Interest/Uses:
8. Prior conveyances: TIDELANDS, DEED, ETC.
9. When did current owner purchase property:

## Appendix D

# New & Historically Filled Lands Evaluation Form

Evaluation done in:  Office  Field

Parcel Name: \_\_\_\_\_ County: \_\_\_\_\_ Site #: \_\_\_\_\_ LAS #: \_\_\_\_\_

Map & Tax Lot: \_\_\_\_\_ Total Acreage of Filled Land: \_\_\_\_\_ Total Acres of Tax Lot: \_\_\_\_\_

Waterway: \_\_\_\_\_ Mineral Rights: \_\_\_\_\_

Physical Description (attach aerial photo):  
\_\_\_\_\_

### Criteria:

Parcel is filled/new land which was placed by \_\_\_\_\_ (whom).  
\_\_\_\_\_

Fill was placed in \_\_\_\_\_ (year).  
\_\_\_\_\_

Has the property sold/transferred ownership since the fill was placed? If so, how many times?  
\_\_\_\_\_

DSL has not pursued resolution of ownership previously.  
\_\_\_\_\_

Adjacent Property/Upland Owners & Use: \_\_\_\_\_

Zoning: \_\_\_\_\_

Within a Port District:  Yes  No Port District Name: \_\_\_\_\_

Cultural-Historic: Parcel Reviewed:  Yes  No

Previously Surveyed:  Yes  No  Partially

Cultural Resources Identified (if yes, consult w/staff archaeologist):  Yes  No

Probability of Cultural Resources:  Low  Medium  High

Fishing/Fish Habitat Use: Parcel Reviewed:  Yes  No

Previously Surveyed:  Yes  No  Partially

Fishing/Fish Habitat Uses Identified:  Yes  No

Identified by: \_\_\_\_\_

Probability of Fishing/Fish Habitat Issues:  Low  Medium  High



## Appendix D

Navigation Use: Parcel Reviewed:  Yes  No

Previously Surveyed:  Yes  No  Partially

Navigation Use Identified:  Yes  No

Identified by: \_\_\_\_\_

Probability of Navigation Use Issues:  Low  Medium  High

Recreational Use: Parcel Reviewed:  Yes  No

Previously Surveyed:  Yes  No  Partially

Recreational Use Identified:  Yes  No

Identified by: \_\_\_\_\_

Probability of Recreational Use Issues:  Low  Medium  High

Commercial Use: Parcel Reviewed:  Yes  No

Previously Surveyed:  Yes  No  Partially

Commercial Use Identified:  Yes  No

Identified by: \_\_\_\_\_

Probability of Commercial Use Issues:  Low  Medium  High

Known Endangered Species: \_\_\_\_\_ If yes, Consult ODFW: \_\_\_\_\_

Endangered Plant Study Completed: \_\_\_\_\_

Buildable:  Yes  No Lot of Record:  Yes  No

Potential for Zone Change/Partition: \_\_\_\_\_

Does the added land alter the Highest & Best Use of the property (add another homesite):

Highest and Best Use Conclusion: \_\_\_\_\_

Legal Access:  Yes  No County Maintained Road:  Yes  No

Access by Waterway: \_\_\_\_\_ Condition: \_\_\_\_\_

Interior Roads/Trails/Condition: \_\_\_\_\_

Property Boundaries/Corner Survey Markers: \_\_\_\_\_

## Appendix D

Easements (to/from whom and what type): \_\_\_\_\_

Nearest DSL Parcel (direct): \_\_\_\_\_

Topography/Shape of Parcel: \_\_\_\_\_

Vegetation Cover (types, condition, % coverage): \_\_\_\_\_

Site Structures/Improvements: \_\_\_\_\_

Electrical Transmission Lines/Corridor (on-site or nearby): \_\_\_\_\_

Potential for Alternative Energy: \_\_\_\_\_

Subsurface/Mineral Sale  Yes  No If yes, DOGAMI Report ordered: \_\_\_\_\_

DAS Surplus Real Property Notice Completed: \_\_\_\_\_ Sent: \_\_\_\_\_

View Site/Water Features/Other amenities: \_\_\_\_\_

Waterway Structures:  Yes  No Authorization Type: \_\_\_\_\_ LAS #: \_\_\_\_\_

Lease History: \_\_\_\_\_

Current Use: \_\_\_\_\_

Evidence of Prior Activity (wildfire, crops, historic home site): \_\_\_\_\_

Fill Type: \_\_\_\_\_ Who Originated the fill if known: \_\_\_\_\_

Property Expenses: \$ \_\_\_\_\_ Other Holding Costs: \$ \_\_\_\_\_

DSL/Other Comments: \_\_\_\_\_

Assessor's RMV: \$ \_\_\_\_\_ Tax Year: \_\_\_\_\_

Estimated Market Value: \$ \_\_\_\_\_ Source: \_\_\_\_\_

Evaluation/Discussion:

\_\_\_\_\_

Recommendation:

\_\_\_\_\_

Originator: \_\_\_\_\_

Date: \_\_\_\_\_ Reviewer: \_\_\_\_\_

Date: \_\_\_\_\_



## Appendix E

### Oregon Department of State Lands (DSL) Filled Lands Advisory Subgroup Recommendations

#### **Introduction:**

The Filled Lands Advisory Group (FLAG) was formed out of 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. The FLAG came to consensus on a number of items, but determined that one recommendation required further discussion. This was Additional Recommendation #6 from the June 4, 2014 working draft.

#### “6: Agency Notification Requirement and Timeline

It is recommended that DSL perform an in-depth study of historically filled lands where the title to the property is in question, and provide notification to the adjacent/co-owner of the property. DSL would have a set amount of time to identify lands with a cloud on title and provide a written notification to the adjacent/co-owner. The state’s right to claim ownership would be limited to those lands that were identified within the specified timeframe where a notification was sent. The state would not be able to make a claim on historically filled lands that were not identified during the allowed timeframe.”

Following the conclusion of the FLAG, DSL convened a subgroup to further address this issue. The subgroup included: Chris Hathaway, Lower Columbia Estuary Partnership; Dave Hunnicut, Oregonians in Action; Martha Pagel, Schwabe, Williamson & Wyatt; Jim Green, Oregon School Boards Association; and Maddy Sheehan, Sheehan & Sheehan LLC.

The subgroup was supported by: Chris Castelli, DSL; Cathy Gregory, DSL; Gerry Hutson, DSL; Jim Paul, DSL; Mary Abrams, DSL; Mark Schumock, Department of Justice; and Maureen McGee, Legislative Counsel.

#### **FLAG Subgroup Recommendation:**

The subgroup met on September 9, 2014, October 9, 2014 and October 30, 2014 and developed the following recommendation.

**The FLAG Subgroup recommends pursuing the statewide identification and notification of historically filled lands. The FLAG Subgroup notes any statutory identification and notification requirements must be contingent on funding being appropriated to DSL to complete this task, and with a time frame long enough to provide DSL every opportunity to successfully complete the task.**

In preparation for these meetings, DSL developed two flowcharts (Appendix A & B) that attempt to estimate the steps required and resources needed in order to successfully complete these tasks. The subgroup spent the second and third meetings addressing legal issues and providing further recommendations for what should go into a legislative concept.

## Appendix E

### Subgroup Recommendations for a Legislative Concept:

1. Any concept should be limited to waterways that have been determined to be state-owned either through tidality or navigability. Historically filled lands on waterways that may be determined to be navigable in the future will be addressed when the declaration process and/or adjudication process is completed.
2. The Portland Harbor Superfund site (Lower Willamette River) should be excluded from any concept. This area is very complex and may be subject to litigation.
3. A concept must contain funding for DSL to complete the tasks required of it. The current DSL estimate is 4.5 limited duration FTE over two biennium. Funding across biennium will be done with continuous appropriation.
4. A concept should include a requirement for DSL to report back to the legislature after the first biennium. This will give DSL an opportunity to provide a status report and ask for additional time or resources if necessary.
5. A concept should contain some general expectations for notification to affected parties by DSL. This will help to protect affected parties and DSL in the long run. Other particulars of the notification and outreach process may be flushed out in rule or internal policy.
6. As a placeholder, it was agreed that the deadline for DSL to notify affected parties of a potential claim is **December 31, 2025**. The rationale is that 10 years should be sufficient to allow DSL to successfully complete the work, or present evidence to the legislature outlining why additional time is needed. This deadline only pertains to DSL's requirement to give official notice. There is no deadline on resolving claims once the landowners have been notified. DSL will use the FLAG proposed process to resolve cases in as timely a fashion as possible.
7. A concept will need an emergency clause and operative language to allow DSL to begin the staffing process and any required rulemaking or policy development.
8. A concept should carry forward all of the statutory recommendations of the FLAG. The full FLAG and Subgroup recommendations are intertwined. Therefore, the risk of one bill passing and the other failing should be eliminated. The FLAG statutory recommendations are:
  - a) It is recommended that statute be amended to clarify that the Administrative Procedures Act doesn't apply to a decision on historically filled lands. Any disagreement may be litigated in circuit court.
  - b) Amend ORS 274.905 to statutorily define "historically filled lands" to mean new lands created before May 28, 1963.
  - c) Amend 274.910 (2) as follows: "The provisions of ORS 274.905 to 274.940 apply to new lands created [*before,*] on or after May 28, 1963."
  - d) ORS 274.910 should be further amended to provide that DSL shall (or may) engage in rulemaking to determine a process for disposing of historically filled lands.
  - e) Amend ORS 274.940 to clarify that the assessment under this statute is required for *all* "new lands", including historically filled lands and new lands disposed of under 274.929. Also amend 274.940 to clarify that a determination under 274.940 is not a final agency action.
  - f) Repeal ORS 274.960 to ORS 274.985.

## Appendix E

### Other Subgroup Recommendations:

1. At the October 9, 2014 Subgroup meeting, it was recommended that no funding will come from the Common School Fund in order to complete these tasks. However, Jim Green (Oregon School Boards Association) believes that the Beneficiaries of the Common School Fund may be willing to provide some funding for these tasks. There is a benefit to the Common School Fund for DSL to address these in a comprehensive manner rather than having them be an ongoing drain on DSL and Common School Fund resources. Mr. Green will check with the Beneficiaries and verify if they support providing some funding for these tasks.
2. It is recommended that draft concept language be submitted to the Subgroup for review and comment prior to being moved forward.

### Next Steps:

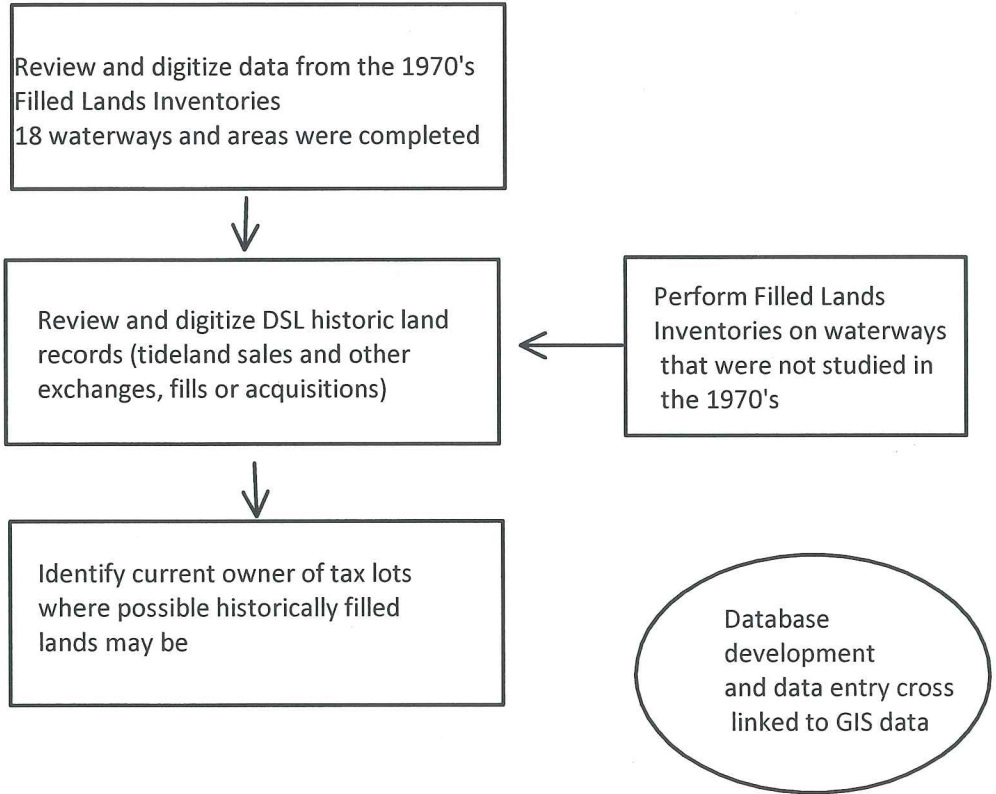
Subgroup recommendations, meeting minutes, and supporting documentation will be made available to the FLAG. Subgroup recommendations will be included as an appendix with the FLAG recommendation document and presented to the State Land Board.



## Appendix A

### Step 1: Identify Existing State-Owned Historically Filled Lands\*

\*Historically filled lands are uplands created before May 28, 1963, by the placement of fill (earth, rock, sand and other material) on submerged and submersible lands.



#### Estimated Resource Needs:

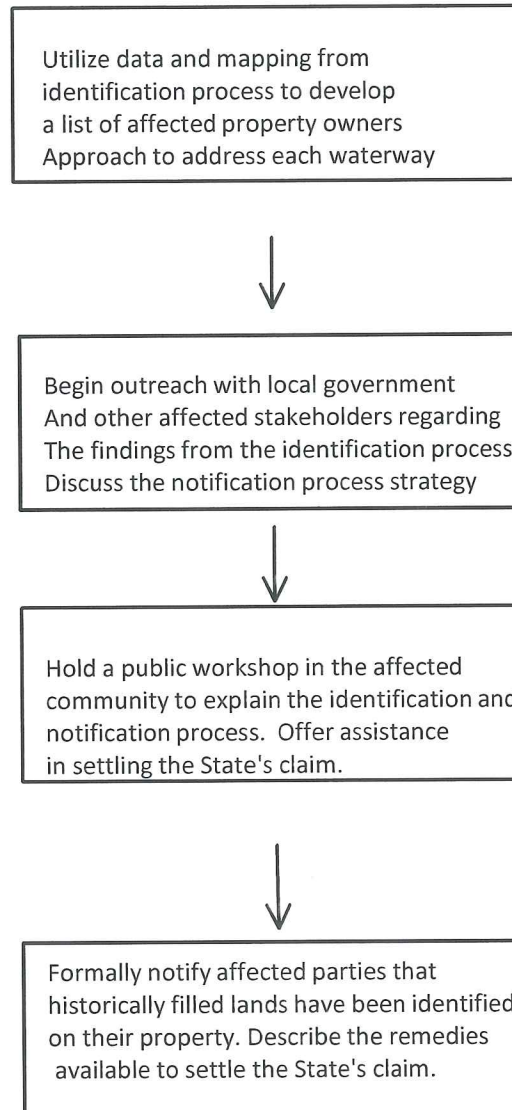
1 LD FTE: Research Specialist

1 LD FTE: GIS Analyst

0.5 LD FTE: Database Entry

## Appendix B

### Step 2: Historically Filled Lands Notification Process



#### Estimated Resource Needs:

1 LD FTE: Project Manager

1 LD FTE: Administrative Assistant

#### Notes:

- Each waterway will take at least two months to complete in order to schedule meetings, and space out notifications and workshops sufficiently. LD staff can likely work on two waterways concurrently.
- The notification process does not take into account settling the identified historically filled lands. That task is the responsibility of the DSL Real Property Division.