



Oregon

Kate Brown, Governor

Department of State Lands

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State Land Board

State Land Board

Kate Brown
Governor

Regular Meeting
April 12, 2016
Agenda Item 3

Jeanne P. Atkins
Secretary of State

Ted Wheeler
State Treasurer

SUBJECT

Request for approval of the sale of historically filled lands, new lands and historically filled submersible lands in Coos County.

ISSUE

Whether the State Land Board should authorize the sale of historically filled, new and historically filled submersible lands to Ocean Terminals Co. in North Bend, Coos County.

AUTHORITY

Oregon Constitution, Article VIII, Sections 2 and 5: pertaining to the Common School Fund and land management responsibilities of the State Land Board.

ORS 273.171; relating to the duties and authority of the Director.

ORS 273.281 and ORS 273.285; relating to the payment for state lands.

ORS 274.040; relating to the sale of submersible lands

ORS 274.920; relating to the creation of new lands upon submersible or submerged lands.

ORS 274.937; relating to the right of an individual to purchase new lands created by the individual.

OAR 141-067; relating to the sale, exchange and purchase of state land.

SUMMARY

Background

At its meeting of December 13, 2011, the State Land Board authorized the Director of the Department of State Lands (DSL) to issue the appropriate permits to create new

lands for future sale to Ocean Terminals Co. in North Bend. ORS 274.920 states that no entity (other than the United States promoting navigation), shall artificially create new lands by fill or deposit upon submerged or submersible lands without the approval of the owner of those lands and the owner of the upland adjacent to the proposed fill. In this case, Ocean Terminals owns the uplands adjacent to the proposed fill, and the state owns the submerged/submersible lands.

The 2011 report also noted that Ocean Terminals had long been in discussions with DSL over the ownership of historically filled lands occupied by Ocean Terminals. Since that time, DSL has been in discussions with Ocean Terminals about the historically filled lands. Additionally, Ocean Terminals has recently completed the creation of the new lands. Ocean Terminals and DSL have reached agreement (Appendix A) on the price of the historically filled and new lands (pending an “as-built” survey at project completion).

In Summer 2015, Ocean Terminals requested that additional submersible lands be added to the sale, citing Homeland Security reasons. The area to be added would total about 0.7 acres between the historically filled lands and ordinary low water. After consulting with the Department of Justice (DOJ), it was determined that this sale of submersible lands could occur under existing DSL and State Land Board authorities.

Sale

Ocean Terminals and DSL have agreed on a total purchase price of \$258,434, based on an agreed-upon per-acre value (confirmation of final value subject to the final survey of “new lands” and the submersible lands fronting the historically filled lands—see Appendix B). The land values were determined as follows:

Historically Filled Lands: OAR 141-067-0200(8)(a)-(e) provides five factors to adjust the appraised value of historically filled lands. The appraised value of the historically filled lands was \$780,800 (\$61,000 per acre for 12.8 acres). The factors and related values for this sale include:

- Strength of State’s Ownership Claim. The parties agreed on a 30% discount to the appraised value: a discount of \$234,240.
- Environmental Condition of the Property. The parties agreed that no discount should be applied for this factor.
- Cost of various alternatives for addressing environmental or other conditions of the property. The parties agreed no discount should be applied for this factor.
- Access or lack of access. The parties agreed on a discount of 35% based on lack of access to the historically filled lands: a discount of \$273,280.
- Property taxes paid by the applicant in support of K-12 schools. The parties agreed on a discount of \$160,115 based upon property tax information in support of K-12 schools provided by Ocean Terminals.

Based on these factors and the negotiated discounts, the price for the historically filled lands was set at \$113,165 (\$8,841/acre).

New Lands: Ocean Terminals was issued a Removal/Fill permit to create 3.8 acres of new lands adjacent to the historically filled lands. ORS 274.937 provides that a party that creates new lands has the right to purchase the new lands. The language in the Statute states the following:

“The individual shall pay to the Department of State Lands for the new lands the value of the state-owned submersible or submerged lands upon which the new lands were created immediately prior to the creation of the new lands thereon and a reasonable portion of the private benefit realized from the creation of the new lands as an addition to the adjoining or opposite upland in front of which the new lands were created.”

The statute does not provide any additional guidance on interpreting the above language. However, legislative research conducted by the DOJ determined that the intent of the language was to provide a partial offset to the full appraised upland value. In the spirit of acting consistent with this intent, the parties agreed that 60% of the appraised value was a reasonable value to be applied to the new lands in order to satisfy the statutory language cited above. Thus, using the same original appraised upland value as was utilized for the historically filled lands (\$61,000/acre), the appraised value of the new lands was established at \$231,800 ($\$61,000 \times 3.8$). 60% of that value is \$36,600 per acre, for a total of \$139,080. This total may be adjusted based upon the final survey to confirm the precise acres of the new lands.

Submersible Lands: As noted above, in the summer of 2015 Ocean Terminals requested that additional submersible land be added to the sale, based on Homeland Security concerns. The land in question totals about 0.7 acres. The parties agreed that the price for the submersible land would be the same adjusted price per acre as the historically filled land (\$8,841/acre), or a total of \$6,189. This total may be adjusted based upon the final survey of the property, along with the new lands.

Final Sale: The final sale, pending State Land Board approval and confirmation of final value subject to the final land survey, should be completed in the near future. The total price, including the historically filled lands (\$113,165), the new lands (\$139,080) and the submersible lands (\$6,189) is estimated at \$258,434. The parties will exchange Quit Claim deeds to memorialize the final boundaries.

RECOMMENDATION

The Department recommends that the State Land Board authorize staff to complete the direct sale of the lands described above to Ocean Terminals for a value of \$36,600 per acre for new lands, and \$8,861 per acre for the other lands (estimated total of \$258,434, pending a final survey to confirm the precise acres of the new and submersible lands), and to exchange Quit Claim deeds to memorialize the sale.

APPENDICES

- A. Draft settlement agreement
- B. Site map

Martha O. Pagel
Schwabe, Williamson & Wyatt
530 Center Street, Suite 400
Salem, Oregon 97301

Re: Settlement of Historically Filled Lands and New Lands Claim with Ocean Terminals Co.

Dear Martha:

The purpose of this correspondence is to outline the settlement of our clients' respective claims to certain historically filled lands and new lands adjacent to Ocean Terminals' real property commonly known as Tax Lots 100, 500, and 600 in Township 25S, Range 13W, Section 10 (Tax Lots 500 and 600) in Coos County, Oregon. This correspondence has been prepared for you to counter-sign so that both parties may proceed with confidence to implement the terms of the settlement addressed below.

Settlement Regarding Historically Filled Lands and New Lands

Historically Filled Lands

The State's claim relative to historically filled lands fronting or within the above-referenced tax lots will be resolved by payment from Ocean Terminals to the State in the sum of \$113,165.00. Although the parties disputed the quantity of historically filled lands at issue, the parties agreed to determine compensation on the basis that the State's claim consists of 12.8-acres. An appraisal commissioned by the State determined that the fair market value of the filled lands is \$61,000.00 per acre, resulting in a total appraised value of the historically filled lands of \$780,800.00. The appraised value of the historically filled lands was then adjusted downward following application of the factors identified in OAR 141-067-0200(8)(a)-(e) as follows:

Strength of the state's ownership claim. The parties agreed on a discount for strength of State's claim of 30%, the sum of \$234,240.00.

Environmental condition of the property. The parties agreed that no discount should be applied for this factor.

Cost of various alternatives for addressing environmental or other conditions of the property. The parties agreed that no discount should be applied for this factor.

Access or lack of access. The parties agreed on a discount of 35% based on lack of access, the sum of \$273,280.00.¹

¹ Although the parties have agreed on application of a flat percentage discount relative to lack of access to the historically filled lands, the parties acknowledge that the State's agreement shall have no precedential value and will not bind the State in future negotiations for the settlement of claims to historically filled lands.

Property taxes paid by the applicant in support of K-12 public schools. The parties agreed on a discount of \$160,115.00, based on the amount of property taxes paid by Ocean Terminals on the historically filled lands that were in support of K-12 public schools.

Based on these discounts, the settlement value was calculated as follows:

\$780,800.00 – Appraised Value
- \$234,240.00 – Strength of Claim
- \$273,280.00 – Lack of Access
- \$160,115.00 – Property Taxes
\$113,165.00 – Settlement Value

In order to address site security needs for operation of a maritime industrial facility and in recognition of Ocean Terminals' need to comply with security requirements imposed by United States Office of Homeland Security, the State agrees to include all filled lands that are currently submersible lands up to the line of ordinary low water fronting the historically filled lands in the quit claim deed that will be issued to Ocean Terminals under this settlement agreement. The parties have estimated a total of 0.7 acres of submersible lands to be quit-claimed pursuant to this provision. The exact amount of acreage will be determined by a survey to be obtained and provided by Ocean Terminals prior to closing. The amount of compensation to be paid to the State for the submersible lands will be determined on the basis of the same per-acre settlement value price to be paid for the historically filled lands (\$8,841.00 per acre.) The estimated payment amount is \$6,189.00.

New Lands

Ocean Terminals holds a Removal/Fill Permit to create 3.8-acres of new lands adjacent to the historically filled lands adjacent to or within the above referenced tax lots. The parties have agreed that Ocean Terminals will pay the State the sum of \$139,080.00 for the State's interest in the new lands to be created.

ORS 274.937 provides that when an individual creates new lands upon submersible or submerged lands owned by the state, the individual has the right to purchase the new lands. The compensation due to the State in such cases is "the value of the state-owned submersible or submerged lands upon which the new lands were created immediately prior to the creation of the new lands thereon and a reasonable portion of the private benefit realized from the creation of the new lands as an addition to the adjoining or opposite upland in front of which the new lands were created." The statute provides no further guidance as to how the purchase price is determined. The parties have agreed that the formula set forth in ORS 274.937 is difficult to apply. The parties agree that 60% of the appraised value of the new lands approximates the "the value of the state-owned submersible or submerged lands upon which the new lands were created immediately prior to the creation of the new lands thereon and a reasonable portion of the private benefit realized from the creation of the new lands as an addition to the adjoining or opposite upland in front of which the new lands were created." An appraisal commissioned by the State determined that the fair market value of the new lands is \$61,000.00 per acre, resulting in a total

appraised value of the historically filled lands of \$231,800.00 (\$61,000.00 x 3.8-acres). The sale price is 60% of the appraised value, the sum of \$139,080.00.

It is anticipated that the creation of the new lands by Ocean Terminals will be completed by the end of February 2016. Upon completion, the actual acreage of the new lands will be determined and the sale price adjusted according to the above formula if necessary.

Documenting the Sale of Historically Fill Lands and New Lands

The parties' agreement with respect to resolution of the State's claim to the historically filled lands and the sale of the new lands will be reduced to writing in the form of a Purchase and Sale Agreement (the "Agreement") prepared by the State and subject to review by the Oregon Department of Justice. Among other things, the Agreement will provide for:

- (1) A total purchase price to be paid to the State in the sum of \$258,434.00 (subject to final adjustment, if necessary for the actual surveyed acreage of "new lands" created by fill and submersible lands fronting the historically filled lands).
- (2) The conveyance of State's interest in the historically filled lands and in the new lands to Ocean Terminals by Quit Claim Deed. The legal description will describe the waterward boundary of the lands conveyed as the line of ordinary low water after creation of the new lands;
- (3) A Quit Claim Deed from Ocean Terminals to the State for all submerged lands waterward of line of ordinary low water after creation of the new lands;
- (4)
- (5) Pre-closing possession of the historically filled lands and new lands by Ocean Terminals pursuant to the terms of an Access Permit to be issued by the State;
- (6) Closing of the transaction contingent on approval of the State Land Board, and
- (7) Closing of the transaction on or before April 30, 2016.

Withdrawal of Order to Cease and Desist

On November 9, 2012, DSL issued a Cease and Desist Order to Ocean Terminals (7325-ENF), directing it to coordinate with DSL's proprietary section for resolution of issues relating to the "historically filled lands" described above before conducting any further work under a removal-fill permit (30681-EP) issued for creation of the "new lands." Ocean Terminals objected to issuance of the order on the basis of its on-going dispute with DSL concerning ownership of the historically filled lands. On December 27, 2012, DSL determined that Ocean Terminals was in compliance with the removal-fill permit and rescinded the order. Pursuant to Ocean Terminal's agreement to purchase the disputed lands, DSL agrees there was no violation of the removal-fill permit and it will not use the Cease and Desist Order in 7325-ENF, or any of the allegations contained therein, as evidence of a violation for any purpose in connection with current or future actions by Ocean Terminals under the Removal-Fill Program. In addition, Ocean Terminals agrees to waive any and all rights to appeal or seek remedies in court for DSL's issuance of the November 9, 2012 Cease and Desist Order 7325-ENF or its rescission.

Wharf Certification

The parties acknowledge that following creation of the new lands and the closing of the transaction Ocean Terminals will submit a wharf certification pursuant to OAR 141-082-0270 for its structure occupying state-owned submerged and submersible lands.

Sincerely,

Mark F. Schumock
Senior Assistant Attorney General

Term of Settlement are approved and agreed to by Ocean Terminals Company, Inc., an Oregon corporation by and through:

Martha O. Pagel, attorney for Ocean Terminals Co.

State of Oregon Department of State Lands

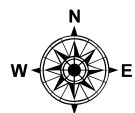


Submersible Lands
0.7 acres

Historic Filled Lands
12.8 acres

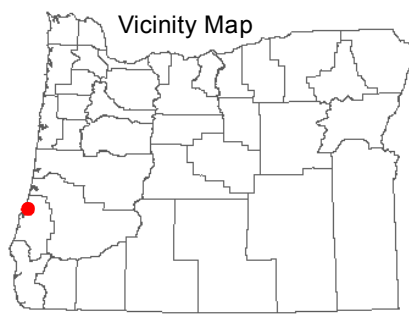
New Lands
3+ acres

Sources: Esri, DeLorme, USGS, NPS, Esri, HERE, DeLorme, MapmyIndia, © OpenStreetMap contributors, Esri, HERE, DeLorme, MapmyIndia, © OpenStreetMap contributors, and the GIS user community



0 400 800
Feet

1 inch equals 800 feet
Map Projection:
Oregon Statewide Lambert
Datum NAD83
International Feet



- 1904 High Water from USACE
- Submersible Lands
- New Lands
- Historic Fill

Appendix B

State of Oregon
Department of State Lands
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Date: 3/10/2016

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