

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 35692

**Eastside Community Rail, LLC—Acquisition and Operation Exemption—
GNP RLY Inc.**

Docket No. FD 35730

**Ballard Terminal Railroad Company, L.L.C.—Lease Exemption—Eastside
Community Rail, LLC.**

**ECR’S OBJECTION TO POST-DEADLINE FILINGS;
ECR NOTICE**

Eastside Community Rail, LLC (“ECR”) hereby provides written objection to post-remand comments submitted after the Surface Transportation Board’s July 30, 2020 deadline. The United States Court of Appeals for the District of Columbia Circuit ordered that this matter be remanded to the Surface Transportation Board (the “Board”) for further proceedings on the two specific questions remanded back to the Board. *Snohomish County, Washington v. Surface Transportation Board*, 954 F.3d 290 (D.C. Cir. 2020). The Board did not initiate a briefing or pleading schedule with responses and replies; instead, it required post-remand filings from all concerned by July 30, 2020. This is not a circumstance that would be subjected to or governed by 49 C.F.R. §1104.13(a) where replies were contemplated or allowed. Accordingly, ECR objects to the untimely submissions.

On August 3 or August 4, Snohomish County filed a submission titled Reply to Eastside Community Rail/Engle/Jensen and on August 6 City of Woodinville joined filing its own Reply to Eastside Community Rail Comments Opposing Revocation of Exemptions. On August 17, Snohomish County filed a Notice of Recent Development (Embargo) that was replied to by CWallA Building Materials Company (“CWallA”) on August 8, 2020. For purposes of considering the Court of Appeals remand, none of these documents should be considered. If considered, none of these submissions justify the Board going against its prior decisions. In fact, the Board need only explain its rationale that nothing in the Notice of Exemption was “false” because the party who requested the exemption was, in fact, the party that filed for the exemption. Moreover, there were no relevant, material omissions in the Notice of Exemption because the Board only deems a Notice misleading if omissions create conflicts with the Court’s own authority or jurisdiction.¹

¹ The Board’s controlling authorities on this question were carefully analyzed and briefed in ECR’s timely Post-Remand Comments, and are copied here for convenience of the Board:

ECR NOTICE

As Notice to the Board, ECR includes an accompanying statement from ECR through its president Douglas Engle. Snohomish County and City of Woodinville would have the Board rely on a self-serving Notice of Embargo that is based on a statement from James Forgette (Ballard), an individual who does not have authority to act on behalf of ECR, did not communicate with ECR, and cannot be deemed an individual competent or authorized to effect a Notice of Embargo. Subsequent notices and submissions from CWalla confirm the line is an active freight line, indeed, the prospective purchaser and CWalla both establish that there continues to be value in the freight easement. While a controversy may be developing about the difference between capital improvements and maintenance obligations, as CWalla points out any temporary inactivity triggers an obligation not to indefinitely embargo but to actually “restore services within a reasonable period.” *Louisiana Railcar, Inc. v. Missouri Pacific R.R. Co.*, 5 I.C.C.2d 542, 544 (1989). None of the filings submitted to this Board are germane to the validity of the exemption.

At least Snohomish County and City of Woodinville would lead this Board to go beyond the regulations at issue and wade into subject matter that Congress has not delegated to the Board. Rather than focus the analysis where it should be on the Notice of Exemption and prior Board decisions, Snohomish County and City of Woodinville continue to make the same arguments about how business transactions occurred outside the Board’s jurisdiction. Acting prudently, the Board has previously declined to entertain arguments or challenges to business transactions that may have

Relevant to this case, the Board has previously confirmed that the regulations at issue do not require the Notice of Exemption to include information about possible or even pending property interest disputes: “[T]he railroad is correct that it was not specifically required by the regulations to provide information regarding the pending property interest disputes...” *Black Hills Transp. Inc. d/b/a/ Deadwood, Black Hills & Western R.R.—Modified Rail Certificate*, FD 34924, 2010 WL 302027, at *3 (STB served Jan.27, 2010).

The Board has only in exceptional circumstances found a failure to disclose to be misleading by omission. In the *Black Hills Transp. Inc.* decision, the Board found an omission materially misleading only because it affected whether the Board had jurisdiction over the property. In that matter, a dispute existed about whether the state had obtained a necessary interest in the right-of-way (“ROW”). The Board stated: “When an abandonment has been consummated, the agency loses jurisdiction over the property.” *Id.* Because the omission affected the authority of the Board, it was materially misleading. The Board has also found a failure to disclose information to be materially misleading in the case of a condemnation action. *US Rail Corp.—Lease & Operation Exemption—Shannon G., LLC*, FD 35042, 2008 WL 4534375, at *3 (STB served Oct. 8, 2008). And the Board has found an omission materially misleading when it involved “lease of and operation over a line of railroad that has been constructed without Board authority.” *US Rail Corporation—Lease and Operation Exemption—Shannon G.*, STB Finance Docket No. 35042, at 3-4 (STB served Oct. 8, 2008).

This matter is distinguishable from all instances when the Board has found an omission to be materially misleading. Here, it was not material for the Board to consider imagined disputes, none of which have come to fruition, for this Notice of Exemption. Instead, the general rule continues to be, as the Board decided in the *Black Hills Transp. Inc.* matter, that applicants are “not specifically required by the regulations to provide information regarding the pending property interest disputes.” Consequently, because the extraneous information was not required, and because the information does not affect the Board’s jurisdiction or authority, the Board was not materially misled.

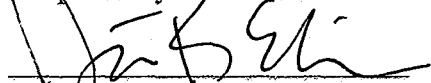
been pursued by applicable parties or considered by a governing bankruptcy court many years ago. These are not topics for the Board to regulate and our Supreme Court has left no doubt on that:

Nonetheless, no matter how “important, conspicuous, and controversial” the issue, ... an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And “...we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.”

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161, 120 S.Ct. 1291 (2000), citing *United States v. Article of Drug...Bacto-Unidisk*, 394 U.S. 784, 800, 89 S.Ct. 1410 (1969). The Board has authority over the Notice of Exemption. Representations must comply with 49 C.F.R. §1150.34, which they did here because there is nothing false in the representation of who requested the exemption and there is nothing misleading because the Board’s own authority or jurisdiction is not implicated and the Board requires no additional, extraneous material about surrounding transactions. Congress did not explicitly establish gaps in the controlling regulations that would enable the Board to examine and rule upon the nature of surrounding business transactions that may have occurred. *Contrast Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778 (1984). This Board has been correct in its prudence to not follow Snohomish County and City of Woodinville where they would mislead this Court.

The Court of Appeals did not require that the Board reach a different conclusion or disposition in this matter. In fact, the Court stated: “The Board might or might not ultimately determine that it has not been misled by Engle’s maneuvering.” *Id.* at 303. Rather, the Court of Appeals required that the Board articulate “the reasoning behind its decision with sufficient clarity to enable petitioners and this court to understand the basis for its decision.” *Id.* The Board made the correct decision. The Court of Appeals asked for more rationale. ECR has provided the rationale that appears to have always been the underlying basis for the Board’s decision to deny the petition to revoke. The Board should not deviate from its correct analyses and should not be drawn into the tall weeds where parties are attempting to change the subject and litigate disputes about business transactions that would not have been before the Board in the first instance and are not properly before the Board now. Under the Board’s prior decisions and a plain reading of the applicable regulations, the Notice of Exemption was neither false nor misleading and no additional information regarding business transactions was required for the Board’s review. The petition to revoke must be denied with this rationale. For the property at issue, ECR remains the rightful holder of the rail easement w/ Exemption.

Respectfully submitted this 15th of September,

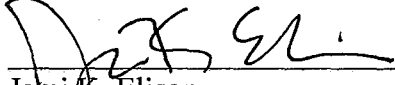


Jami K. Ellison, WSBA#31007, Counsel for Eastside Community Rail, LLC

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Issaquah, WA 98027
(jami@tclg-law.com)

Certificate of Service

I hereby certify that, on this 15th day of September, 2020, a copy of the foregoing ECR's Objection to Post-Deadline submissions and Notice was served by email on all parties on the official Service List for these Proceedings.



Jami K. Elison

Eastside Community Rail, LLC

Attn: Douglas Engle, President
4117 S. Lamonte, Spokane, WA 99203
cell: 509.319.0471 | e-mail: DEngle76@comcast.net

September 9, 2020

To: Surface Transportation Board
Re: FD 35692 & FD 35730

My apologies for getting the FD numbers wrong in my prior statement. Given the plethora of replies to ECR's timely reply to other party's prior submissions, I am disappointed that this matter drags on by plaintiffs disregard of the Board's Decision deadline. ECR wants an amicable outcome or the right to operate without land owner interference.

FIRST; Ballard had no right to submit for line embargo as ECR, even using their contact information. James Forgette, BTRC general manager, made no effort to contact ECR regarding their maintenance concerns or embargo filing. I believe this constitutes fraud by Ballard.

SECOND; in the prior OMA, it is clear that maintenance was ECR's responsibility as the Third-Party Operator, which was subsequently leased to Ballard who carried this responsibility. In 2010, BNSF transferred the track in Class 2 and portions in Class 3 operating status, not decades of disrepair as Snohomish County ("SnoCo") proports. Regular maintenance was adhered to during the 10-yr OMA with limited Owner capital repairs to maintain CCF (common carrier freight) operations.

Capital repairs were and are Owner responsibilities, witness Owner capital works done under the prior OMA:

1. Port of Seattle paid for an completed an extensive culvert capital rehab to protect the upstream side of the track structure and significant work on the downstream side through a private property to the next culvert.
2. SnoCo paid for and completed capital repairs and new signage on the Connelly Rd Bridge after it was repeatedly struck by truck traffic.
3. Woodinville paid for and completed capital improvements for two at grade crossings at NE 175th St and Redmond-Woodinville Rd NE.
4. SnoCo paid for and provided capital repairs to the 240th St SE at grade crossing following several trailers bottomed out crossing the tracks.

Clearly, by their own works, Owners are responsible for capital maintenance of the rail assets.

THIRD; the City of Woodinville initiated a quiet title action in KingCo courts, which lacks jurisdiction in this matter. Woodinville was made aware of the court's lack of jurisdiction from ECR's and NW Signal's responses, yet chose to proceed. Their action is both a fishing expedition and simple harassment. CWalla was subjected to subpoena for discovery even though they are not a party to their action nor own any track over city property. ECR has filed for dismissal.

Eastside Community Rail, LLC

Defendants in this matter include:

- ECR
- Telegraph Hills [has not existed for years]
- Douglas Engle
- Ballard
- GNP
- NW Signal
- Kevin Kucera
- Joanne Skievaski [former wife]
- Earl Engle
- Puget Sound Energy
- All other persons...

Based on all responses, **only** ECR claims ownership of the freight easement, yet Woodinville persisted in filing interrogatory demands and contempt filings against me and ECR.

FOURTH; ECR is commonly recognized as the freight easement owner by the Owners themselves through their actions since 2012, including not limited to:

- Port of Seattle approving the bankruptcy transaction.
- 2013 forward countless meetings and events with SnoCo and Woodinville regarding the rail corridor. (see attached Agenda, which shows SnoCo leadership participating with ECR).
- Woodinville brought ECR before the WA UTC for their upgraded at grade crossings in its 2014/15 action.
- On November 19th, 2019, during final OMA discussions, Mr. Montagne asserted “ECR is now in violation of its responsibility to cooperate in an audit...”
 - How can SnoCo assert, at the same time of this action, demand that ECR has a “responsibility” and is in “violation” if the OMA and freight easement are not valid?

Clearly, the Owners have acknowledged ECR’s ownership of the easement as demonstrated by their actions above.

FIFTH; the freight easement now has ongoing value free of the “poison pill” 10-year term under the prior OMA. Mr. Jensen has identified new interested shippers, determined incremental value for rail operations, has a financing plan, and seeks to acquire the freight easement from ECR, provided the STB affirms its prior decisions in this matter that ECR is the sole owner of the freight easement.

Combined with resurrection of a successful 15-yr excursion passenger service, which the Owners have thwarted under the prior OMA, the operating line will be quite profitable. This can be confirmed via previous Board submissions including third-party verified analysis. This remains the reason ECR has carried the torch, fought hard, and over a decade to maintain rail service on this line despite constant and persistent public interference and attacks in search of a trail inside the corridor and importantly, Owner’s stated desire for control of the operating railroad itself by forcing an abandonment.

Eastside Community Rail, LLC

SIXTH; per a Nov. 19th, 2019 email from Mr. Montagne to me, “Snohomish County acquired its interests in the Eastside Corridor for both rail and trail purposes. That remains the objective of Mr. Teigen [SnoCo Parks & Rec director] and the County.” ... “The County proposes to you that you immediately initiate a process, presumably by application or petition for exemption, to obtain STB abandonment authority for any owner or licensee for the freight rail easement at issue. The County will assist if you request.” [emphasis added] ECR is not interested in abandoning this line.

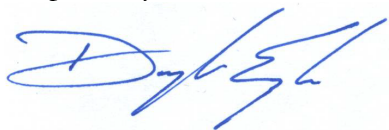
Further, ECR’s sale of the easement to a new Rail Operator, such as Mr. Jensen, will enable SnoCo’s support as further described by Mr. Montagne; “Under the modified certificate program, the County expects the line will be eligible for federal and state financial assistance allowing correction of problems that arise or have arisen from deferred maintenance on a low density rail operation. The County intends to cooperate with a modified certificate operator in efforts to receive third party grants and loans, so long as not at further expense to the County, to upgrade the Snohomish County portion of the line. The County plans also to move forward with a regional trail adjacent to, but not interfering with, the rail line. We would negotiate a division of the corridor for rail and trail purposes with our modified certificate operator. We would work with Woodinville to achieve continuity into King County.” Essentially, the Owners acknowledge the viability of the line and want to control the railroad for their ends.

FINALLY; the STB approved the Port’s acquisition as a State of Maine transaction, only because it had a third-party operator (“TPO”), GNP, now ECR, under a Maintenance and Operating Agreement (“OMA”). Now that the OMA has expired, Owners must either petition the STB to become a RR, or negotiate a new Rail Corridor Operating Agreement (“RCOA”) with ECR to maintain the “State of Maine” transaction. The best path forward for the Owners is to accept their situation. ECR asks the Board to demand a 90-day period to complete an operating agreement.

As previously submitted in this matter, ECR initiated and attempted to utilize the “Coordination Committee” provisions under the prior OMA to work through a new operating agreement since the OMA was due to expire in the weeks ahead. SnoCo refused the offer, yet such a committee offers the best long-term solution to maximizing public benefit of the rail corridor. The following page has the deal points we believe are amenable to all parties concerned as a starting point.

If the Owners choose not to support a new operating agreement effort, ECR asks to Board to support ECR to use its eminent domain powers as provided to railroads in the State of Washington (see attached), to put an end to the lack of Owner capital repairs, ongoing interference with rail operations and our customers. Given nominal support from the Board, ECR or likely a new Rail Operator, the railroad will extend the 132-years of continuous rail operations for decades to come.

Respectfully submitted,



Douglas Engle, President

Eastside Community Rail, LLC

NEW RAIL CORRIDOR OPERATING AGREEMENT (“RCOA”) DEAL POINTS

I reviewed prior issues and believe these terms beneficial to all concerned to start discussions.

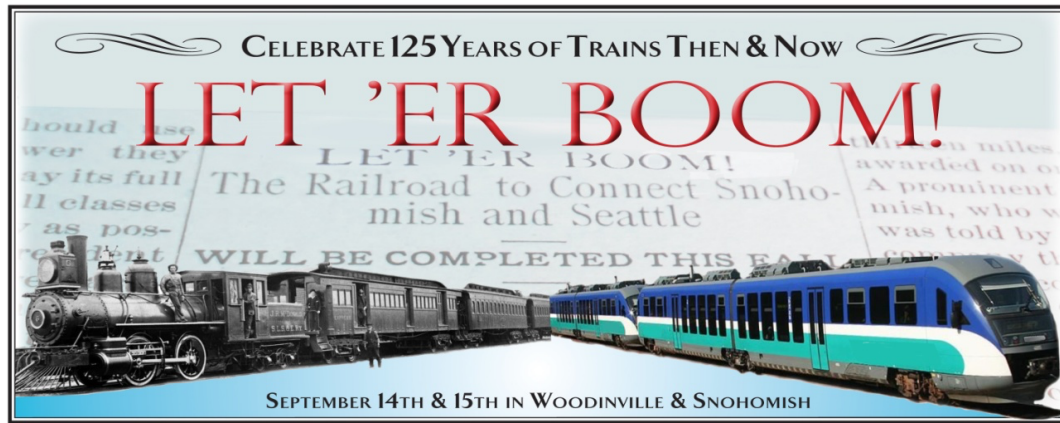
Purpose: To maximize rail corridor public benefit.

Approach: RCOA as a public private partnership.

1. Rail Operator acknowledges Owners have interest in developing a trail and public works inside the rail corridor.
2. Owners acknowledge Rail Operator as the rightful owner of the freight easement as provided/affirmed by the STB.
3. Owners acknowledge that Rail Operator controls operations, developments and actions within the easement under federal law and regulations, aside from areas WA UTC controls.
4. A Rail Corridor Cooperation Committee shall be formed to keep all parties informed as to any potential impacts or planning relating to the rail corridor and have at minimum quarterly meetings. All parties shall seek open, honest, and forthright communications in a public private partnership.
5. Owner access will be provided for their developments and maintenance works with proper Rail Operator coordination for safety and rail operations.
6. If the line is to be abandoned, Rail Operator shall support Owner’s railbanking actions at Owner’s expense.
7. In exchange for Rail Operator’s support for Owner developments inside the corridor and elimination of Owner capital maintenance obligations, Owners shall transfer all rail asset ownership to Rail Operator who accepts responsibility for capital repairs and maintenance.
8. Owners shall provide complete support of Rail Operator’s third-party financing needs for rail operations and improvements at Rail Operator’s expense.
9. Rail Operator shall provide complete support for Owner development financing needs at Owner’s expense.
10. Rail Operator shall provide typical shortline insurance appropriate for its operations and indemnification of Owners.
11. Owners shall insure and indemnify Rail Operator for their developments and activities inside the freight easement.
12. There is no agreement term and no compensation for rail traffic or rail operations.

Why both parties will cooperate:

1. Owners have publicly supported continued rail operations, don’t want to be a RR, and desire new public works inside the rail corridor while maintaining railbanking rights.
2. Owners eliminate \$3-5M capital repair maintenance expenditures and maintain “State of Maine” transaction status and public budgets are being seriously squeezed by the pandemic.
3. If no agreement, ECR will have to finance a \$5,000,000 acquisition under eminent domain to reimburse Owners for their purchase price from the Port of Seattle or abandon the line.
4. Both parties virtually eliminate their associated ongoing freight easement legal dispute and other costs in favor of a public private partnership whose mutual objective is to maximize the public benefit of the rail corridor.



September 14 Rail Symposium 9 am - 4 pm at AngelArmsWorks 230 Ave. B, Snohomish. Event is free but registration required for meal count. Agenda below...
Please respond to Bruce Agnew at bagnew@discovery.org (206-228-4011)

September 15 Woodinville and Snohomish public celebrations

11 am to 4 pm including historical presentations and costumes, a mini-train ride for children, model rail cars and music. Snohomish events are at Harvey Airfield, 9900 Airport Way. Historical displays also are planned at the **Snohomish Visitor Information Center** at 1301 First St.

Woodinville events are scheduled at the tracks across from the Woodinville Post Office at 17610 Woodinville-Snohomish Road. A special passenger train is set to leave Woodinville at noon on Sunday carrying local and state elected officials. The slow-moving train is expected to arrive in Snohomish around 2 p.m. **For more information on September 15 events, contact Kathy Cox at...**
kathy@marketingphilharmonic.com 435-822-3925

Saturday Symposium | September 14, 2013

Agenda

9a Doors Open, AngelArmsWorks | 230 Avenue B

See: <http://www.angelarmsworks.org/events/> And
www.SnohomishThenandNow.org

9:30a **Al Runte and J. Craig Thorpe:**

“How Trains Save the Environment”

10:45a **David Dilgard:** “The Lake Shore & Eastern Boom.”

11:45a Sing along with Peter Blake and friends:

“When the Lake Shore and Eastern is Done”

Noon: **Catered Lunch** sponsored by Cascadia Center for Regional Development

12:30p **Paul Dorpat, Kurt E. Armbruster, and Jean Sherrard: Rails of the Region**

1:30p Welcome to Eastside TRailway Meeting:

Karen Guzak, City of Snohomish, unveils the Craig Thorpe concept rendering

Les Rubstello, City of Woodinville news and updates in wine country

1:45p All Aboard Washington passenger rail updates: Loren Herrigstad, Lloyd Flem

2:15p Where we are now and where we are going:

Peter Camp – Snohomish County news on the corridor

Stephanie Wright, Snohomish County Council

Dave Somers, Snohomish County Council

2:45p Kathy Cox: wineries & tourism, preview of September 15 celebration

2:50p Doug Engle and Ernie Wilson: Eastside Community Rail, short rail legislation, Ballard Terminal and freight potential

3:00p Legislative Rail Caucus: Washington state Rep. Luis Moscoso

3:45p Rail safety, operations and labor interest in Eastside Rail Corridor: Mike Elliott, International Brotherhood of Locomotive Engineers and Trainmen, Herb Krohn, United Transportation Union (invited)

4:15p Sound Transit Update on Eastside projects: Andrew Schmid, PIO

4:30p Audience questions/comments: Bruce Agnew, Cascadia Center

4:45 - 5p **No Host Wine/Beer @ Angel Arms Works**

5 – 6:30 pm Walk two blocks to **Sunsets in Snohomish**: Wine Tasting and Shopping Downtown Snohomish. Get tickets for \$10 here:

<http://www.historicdowntownsnohomish.org/sunsets-in-snohomish.asp>

6:30 pm No host dinner: FIRST & UNION Café

"We are excited to be celebrating how rail positively impacted our cities and how rails and trails can make the Upper Eastsides' residents lives even better", said Eastside TRailway Alliance co-chairs, **Karen Guzak**, Mayor of Snohomish and **Les Rubstello**, City of Woodinville Council member.

The **Eastside TRailway Alliance** formed in January 2013 with the Snohomish and Woodinville as co-chairs with the purpose of promoting multi-usage of the Eastside Rail Corridor. Volunteer or support? - contact Kathy Cox or Bruce Agnew



RCW 81.36.010

Right of eminent domain.

Every corporation organized for the construction of any railway, macadamized road, plank road, clay road, canal or bridge, is hereby authorized and empowered to appropriate, by condemnation, land and any interest in land or contract right relating thereto, including any leasehold interest therein and any rights-of-way for tunnels beneath the surface of the land, and any elevated rights-of-way above the surface thereof, including lands granted to the state for university, school or other purposes, and also tide and shore lands belonging to the state (but not including harbor areas), which may be necessary for the line of such road, railway or canal, or site of such bridge, not exceeding two hundred feet in width, besides a sufficient quantity thereof for toll houses, workshops, materials for construction, excavations and embankments and a right-of-way over adjacent lands or property, to enable such corporation to construct and prepare its road, railway, canal or bridge, and to make proper drains; and in case of a canal, whenever the court shall deem it necessary, to appropriate a sufficient quantity of land, including lands granted to the state for university, school or other purposes, in addition to that before specified in this section, for the construction and excavation of such canal and of the slopes and berms thereof, not exceeding one thousand feet in total width; and in case of a railway to appropriate a sufficient quantity of any such land, including lands granted to the state for university, schools and other purposes and also tide and shore lands belonging to the state (but not including harbor areas) in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct, and for yards, terminal, transfer and switching grounds, docks and warehouses required for receiving, delivering, storage and handling of freight, and such land, or any interest therein, as may be necessary for the security and safety of the public in the construction, maintenance and operation of its railways; compensation therefor to be made to the owner thereof irrespective of any benefit from any improvement proposed by such corporation, in the manner provided by law: AND PROVIDED FURTHER, That if such corporation locate the bed of such railway or canal upon any part of the track now occupied by any established state or county road, said corporation shall be responsible to the state or county in which such state or county road so appropriated is located, for all expenses incurred by the state or county in relocating and opening the part of such road so appropriated. The term land as herein used includes tide and shore lands but not harbor areas; it also includes any interest in land or contract right relating thereto, including any leasehold interest therein.

[1961 c 14 § 81.36.010. Prior: 1907 c 244 § 1; 1903 c 180 § 1; 1895 c 80 § 2; 1888 p 63 § 2; Code 1881 § 2456; 1869 p 343 § 2; RRS § 10539.]