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246428

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ENTERED
Office of Proceedings
September 25, 2018
Part of
Public Record

September 25, 2018

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W., Room 1034
Washington, DC 20006

Re: David L. Durbano – Continuance in Control – Washington Eastern Railroad, LLC, FD 36227

Dear Ms. Brown:

Enclosed for filing are an original and eleven copies of a verified notice of exemption under 49 C.F.R. §1180.2(d)(2) pursuant to which David L. Durbano seeks to continue in control of Washington Eastern Railroad, LLC (“WERR”) upon WERR becoming a Class III carrier in Washington Eastern Railroad, LLC – Change in Operators Exemption – Eastern Washington Gateway Railroad Company, FD 36226, which is being filed concurrently.

Please acknowledge receipt and filing of the Notice by date-stamping the enclosed eleventh copy and returning it to the courier to return to me.

Finally, pursuant to 49 C.F.R. § 1002.2(f)(38)(iv), I have enclosed is a filing fee check in the amount of \$1,900.00. If there are any questions about this matter, please contact me directly or Crystal M. Zorbaugh, who can be reached at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

FILED
September 25, 2018
SURFACE
TRANSPORTATION BOARD

cc: Stuart A. Fredman
Bruce Carswell

Sincerely,

William A. Mullins
Attorney for David L. Durbano

FEE RECEIVED
September 25, 2018
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36227

**DAVID L. DURBANO – CONTINUANCE IN CONTROL – WASHINGTON EASTERN
RAILROAD, LLC**

**VERIFIED NOTICE OF EXEMPTION UNDER
49 C.F.R. §1180.2(d)(2)**



**William A. Mullins
Crystal M. Zorbaugh
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Fax: (202) 663-7849**

September 25, 2018

Attorneys for David L. Durbano

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36227

**DAVID L. DURBANO – CONTINUANCE IN CONTROL – WASHINGTON EASTERN
RAILROAD, LLC**

**VERIFIED NOTICE OF EXEMPTION UNDER
49 C.F.R. §1180.2(d)(2)**

Pursuant to the class exemption at 49 C.F.R. §1180.2(d)(2), David L. Durbano (“Durbano”) hereby provides this verified notice of exemption from 49 U.S.C. §11323 for Durbano to continue in control of Washington Eastern Railroad, LLC (“WERR”) (currently a non-carrier owned and controlled by Durbano) upon WERR becoming a Class III rail carrier in Washington Eastern Railroad, LLC – Change in Operators Exemption – Eastern Washington Gateway Railroad Company, FD 36226, while Durbano remains in control of six other Class III STB regulated carriers, which he owns, either directly or indirectly, and controls. The carriers currently owned and controlled by Durbano include: Texas & Eastern Railroad, LLC (“T&ER”); Southwestern Railroad, Inc. (“SWRR”); Cimarron Valley Railroad, L.C. (“CVR”); Clarkdale Arizona Central Railroad, L.C. (“CACR”); Wyoming and Colorado Railroad Company, Inc. (“WYCO”); and Saratoga Railroad, LLC (“Saratoga”).

This proceeding is related to Washington Eastern Railroad, LLC – Change in Operators Exemption – Eastern Washington Gateway Railroad Company, FD 36226, in which WERR has filed for authority under 49 C.F.R. §1150.31 to replace Eastern Washington Gateway Railroad Company (“EWG”) as the operator over approximately 107.8 miles of railroad line (known as

the “CW Branch”) between milepost 1.0 near Cheney, WA, to the end of the track at milepost 108.8 in Coulee City, WA and over approximately 5.9 miles of track (known as the “Geiger Spur”),¹ which connects with the CW Branch at Geiger Junction near Medical Lake, WA. The Geiger Spur is owned by the County of Spokane, WA. The CW Branch is owned by the State of Washington, Department of Transportation (“WDOT”). Both the CW Branch and the Geiger Spur are currently leased to EWG (collectively, the Geiger Spur and the CW Branch are referred to as the “Lines”).

In support of this notice of exemption and in compliance with 49 C.F.R. §1180.4(g), Durbano and WERR state the following:

INFORMATION REQUIRED BY 49 C.F.R. §1180.6

(1) A description of the proposed transaction, including appropriate references to any supporting exhibits and statements contained in the application and discussing the following:

49 C.F.R. §1180.6(a)(1)(i) – Description of Transaction and Parties Thereto:

Description of the Proposed Transaction.

In this proceeding, Durbano seeks to continue in control of WERR upon WERR becoming a Class III rail carrier in FD 36226, while Durbano remains in control of six other Class III STB regulated carriers currently owned and controlled by Durbano, including: T&ER, SWRR; CVR; CACR; WYCO; and Saratoga.

¹ The Geiger Spur consists of two segments: the first segment extends from milepost 2.5 (at the east gate of Fairchild Air Force Base) to milepost 4.93 (at McFarlane and Hayford Roads) near Airway Heights, WA and the second segment extends from milepost 0.0 at Geiger Junction at its connection with the CW Branch to milepost 3.45, where it connects with the first segment at milepost 2.7.

Description of the Parties.

Applicant, Durbano (individually and through his control and ownership of Western Group and Snowy Range Cattle Company, both non-carrier holding companies) currently owns and controls six Class III carriers subject to the STB's jurisdiction: T&ER, WYCO, SWRR, CVR, CACR, and Saratoga. Durbano's STB regulated rail carrier subsidiaries are located as follows: T&ER operates in Texas; WYCO operates in Oregon; SWRR operates in New Mexico; CVR operates in Kansas, Oklahoma, and Colorado; CACR operates in Arizona, and Saratoga owns but does not operate a 23.71-mile rail line between milepost 0.57 (at Walcott, WY) and milepost 24.28 (at Saratoga, WY) in Carbon County, Wyoming, commonly referred to as the "EB Line." The EB Line is a non-operating carrier.

WERR is currently a non-carrier indirectly owned by Durbano. WERR will become a Class III common carrier railroad subject to the Board's jurisdiction upon consummation of the transaction in FD 36226.

Names, Addresses, and Phone Numbers of Involved Parties.

<u>Applicant's Legal Name, Address, and Phone No.</u>	<u>WERR's Legal Name and Address:</u>
David L. Durbano P.O. Box 1544 Ogden, Utah 84402 Telephone: (801) 621-5311	Washington Eastern Railroad, LLC Washington Eastern Railroad, LLC 3819 Airport Road, N714 Ogden, UT 84405-1532 or P.O. Box 1544 Ogden, Utah 84402 Telephone: (801) 621-5311

Durbano controls the following six rail carriers who operate in the states specified:

<u>Carriers:</u>	<u>State</u>
Texas & Eastern Railroad, LLC	Texas
Wyoming and Colorado Railroad Company, Inc.	Oregon
Southwestern Railroad, Inc.	New Mexico

Cimarron Valley Railroad, L.C.
Clarkdale Arizona Central Railroad, L.C.
Saratoga Railroad, LLC

Kansas, Oklahoma, and Colorado
Arizona
Wyoming

Certification.

Durbano hereby verifies that (1) the rail lines to be operated by WERR do not connect with any other railroads in the Durbano corporate family; (2) the proposed continuance in control is not part of a series of anticipated transactions that would connect the carriers with each other or any railroad in their corporate family; and (3) the transaction does not involve a Class I carrier. Therefore, pursuant to 49 C.F.R. §1180.2(d)(2), the proposed transaction is exempt from the prior approval requirements of 49 U.S.C. §11323.

Durbano's counsel to whom questions should be directed:

William A. Mullins
Crystal Zorbaugh
Baker & Miller PLLC
2401 Pennsylvania Avenue, NW, Ste. 300
Washington, DC 20037
Tel: (202) 668-7820
Fax: (202) 663-7849

49 C.F.R. §1180.6(a)(1)(ii) – Proposed Schedule for Consummation:

Durbano and WERR intend to consummate this transaction on or after the effective date established by the Board in FD 36226 for WERR to replace EWG as the exclusive operator of the Lines, which is anticipated to be October 21, 2018.

49 C.F.R. §1180.6(a)(1)(iii) – Purpose to be accomplished by transaction:

Durbano seeks to continue in control of WERR upon WERR becoming a rail carrier to promote operating efficiency and maximize the reliability of rail service provided by WERR.

49 C.F.R. §1180.6(a)(5) -- List of States in Which the Parties' Property is Located.

Applicant Durbano controls the following rail carriers who operate in the states specified:

<u>Carriers:</u>	<u>State</u>
Texas & Eastern Railroad, LLC	Texas
Wyoming and Colorado Railroad Company, Inc.	Oregon
Southwestern Railroad, Inc.	New Mexico
Cimarron Valley Railroad, L.C.	Kansas, Oklahoma, and Colorado
Clarkdale Arizona Central Railroad, L.C.	Arizona
Saratoga Railroad, LLC	Wyoming

Durbano seeks to remain in control of his existing carriers and WERR upon WERR becoming a carrier. WERR's operations are located in Washington State.

49 C.F.R. §1180.6(a)(6) -- Maps Exhibit.

Attached to this Notice as Exhibit 1 are two maps:

- (1) The first map shows the location of the other railroads currently controlled and owned by Durbano.
- (2) The second map shows the Lines to be operated by WERR. Note, none of the other railroads controlled by Durbano are in the State of Washington.

49 C.F.R. §1180.6(a)(7)(ii) -- Agreement.

Durbano has not and does not plan to enter into any agreement related to applicant's continuance in control of WERR.

49 C.F.R. §1180.4(g)(1)(i) -- Level of Labor Protection.

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III rail carriers.

49 C.F.R. §1180.4(g)(4) – Interchange Commitments:

Durbano certifies that neither this continuance in control transaction nor the related change of operators exemption in FD 36226 contain any provision or agreement that would limit future interchange with a third-party connecting carrier.

49 C.F.R. §1105.6 through 1105.8--Environmental Report.

The proceeding is exempt from environmental review under 49 CFR §1105.6(c)(2)(i) because the proposed action will not cause any significant changes in carrier operations.

In addition, this proceeding is exempt from historic review under 49 CFR §1105.8(b)(2) because the transaction involves the sale, lease, or transfer of property between corporate affiliates with no significant changes in operations.

Caption Summary

While not required by the regulations, attached to this Notice as Exhibit 2 is a proposed caption summary.

Respectfully submitted,



William A. Mullins
Crystal M. Zorbaugh
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

September 25, 2018

Attorneys for David L. Durbano

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36227

**DAVID L. DURBANO – CONTINUANCE IN CONTROL – WASHINGTON EASTERN
RAILROAD, LLC**

**VERIFIED NOTICE OF EXEMPTION UNDER
49 C.F.R. §1180.2(d)(2)**

VERIFICATION

Pursuant to 28 U.S.C. 1746, I, David L. Durbano, declare under the penalty of perjury under the laws of the United States that I am authorized to make this verification and the foregoing verified notice of exemption is true and correct to the best of my knowledge and belief.

Executed this ____ day of September 2018


David L. Durbano

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

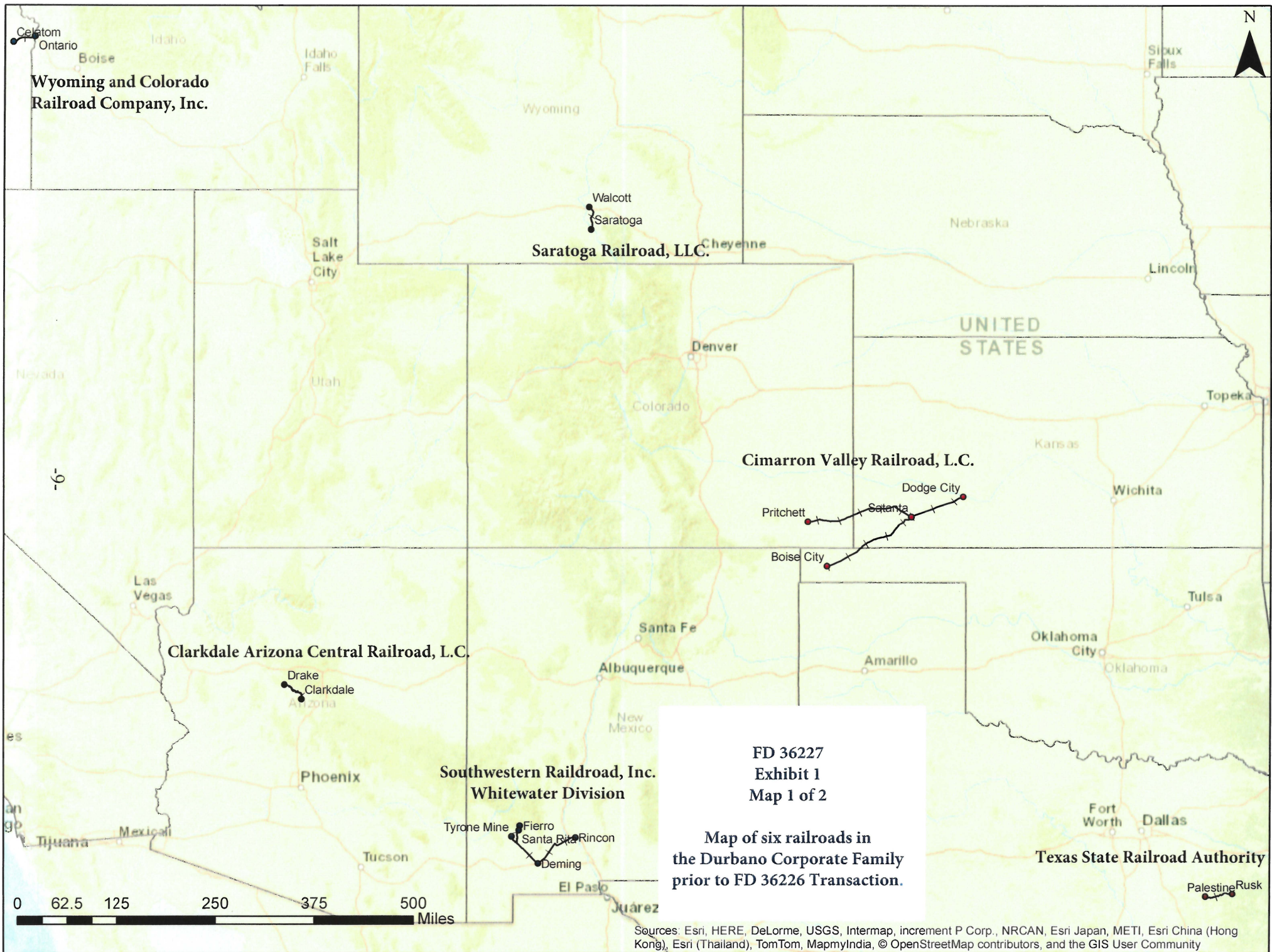
FD 36227

**DAVID L. DURBANO – CONTINUANCE IN CONTROL – WASHINGTON EASTERN
RAILROAD, LLC**

**VERIFIED NOTICE OF EXEMPTION UNDER
49 C.F.R. §1180.2(d)(2)**

EXHIBIT 1

MAPS



WASHINGTON EASTERN RAILROAD, LLC

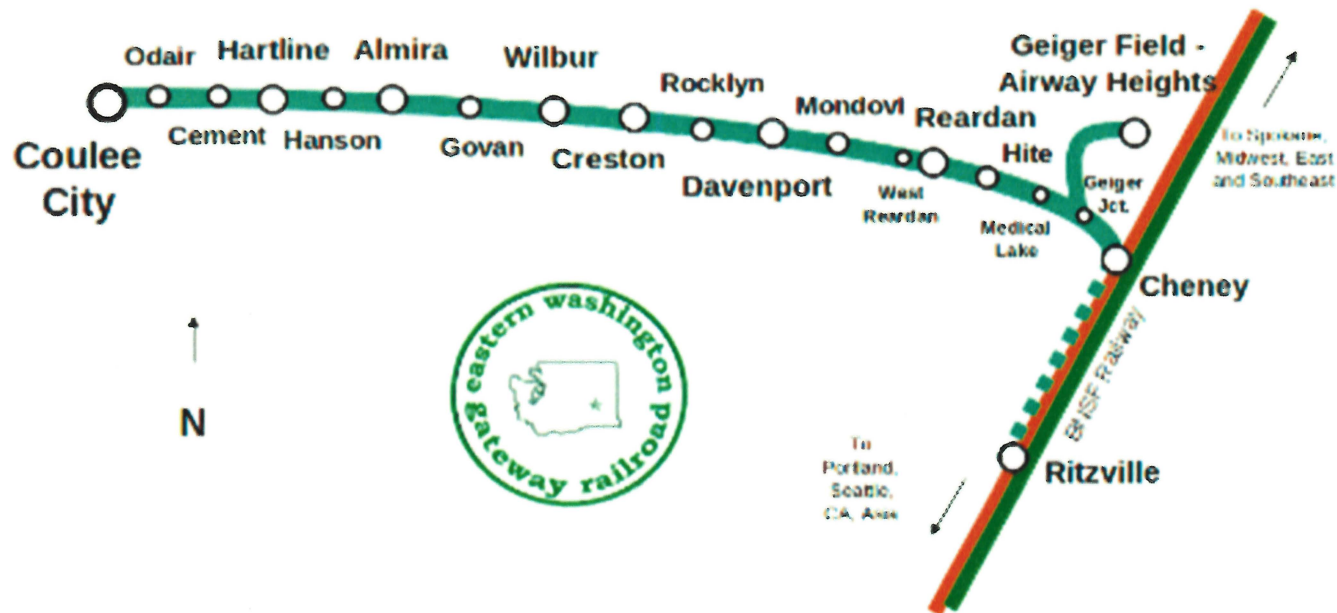
– CHANGE IN OPERATORS EXEMPTION –

EASTERN WASHINGTON GATEWAY RAILROAD COMPANY

FD 36226

Eastern Washington Gateway Railroad

System Map



**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

FD 36227

**DAVID L. DURBANO – CONTINUANCE IN CONTROL – WASHINGTON EASTERN
RAILROAD, LLC**

**VERIFIED NOTICE OF EXEMPTION UNDER
49 C.F.R. §1180.2(d)(2)**

EXHIBIT 2

PROPOSED CAPTION SUMMARY

PROPOSED CAPTION SUMMARY
SURFACE TRANSPORTATION BOARD
NOTICE OF EXEMPTION

(FD 36227)

DAVID L. DURBANO. – CONTINUANCE IN CONTROL EXEMPTION – Washington Eastern Railroad, LLC

David L. Durbano (“Durbano”) has filed a verified notice of exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to continue in control of Washington Eastern Railroad, LLC (“WERR”) upon WERR becoming a Class III carrier in Washington Eastern Railroad, LLC – Change in Operators Exemption – Eastern Washington Gateway Railroad Company, FD 36226, while Durbano remains in control of six other Class III STB regulated carriers currently owned and controlled by Durbano, including: Texas & Eastern Railroad, LLC (“T&ER”); Southwestern Railroad, Inc. (“SWRR”); Cimarron Valley Railroad, L.C. (“CVR”); Clarkdale Arizona Central Railroad, L.C. (“CACR”); Wyoming and Colorado Railroad Company, Inc. (“WYCO”); and Saratoga Railroad, LLC (“Saratoga”).

This transaction is related to a concurrently filed verified notice of exemption in Washington Eastern Railroad, LLC – Change in Operators Exemption – Eastern Washington Gateway Railroad Company, FD 36226, in which WERR has filed for authority under 49 C.F.R. §1150.31 to replace Eastern Washington Gateway Railroad Company (“EWG”) as the exclusive operator of an approximately 107.8 mile railroad line (known as the “CW Branch”) between milepost 1.0 near Cheney, WA, to the end of the track at milepost 108.8 in Coulee City, WA and approximately 5.9 miles of track (known as the “Geiger Spur”),¹ which connects with the CW

¹ The Geiger Spur consists of two segments: the first segment extends from milepost 2.5 (at the east gate of Fairchild Air Force Base) to milepost 4.93 (at McFarlane and Hayford Roads) near

Branch at Geiger Junction near Medical Lake, WA (collectively, the Geiger Spur and the CW Branch will be referred to as the “Lines”).

Durbano and WERR intend to consummate this transaction on or after the effective date set by the Board for WERR’s acquisition of the Lines in FD 36226.

Durbano controls six other Class III rail carriers: T&ER, SWRR, CVR, CACR, WYCO, and Saratoga. Durbano certifies that (1) the rail lines to be operated by WERR do not connect with any other railroads in the Durbano corporate family; (2) the proposed continuance in control is not part of a series of anticipated transactions that would connect the carriers with each other or any railroad in their corporate family; and (3) the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. § 11323. See 49 C.F.R. § 1180.2(d)(2).

If the notice of exemption contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. §10502(d) can be filed at any time.

The filing of a Petition to Revoke will not automatically stay the proposed transaction. Any petitions to revoke must be filed with the Board and served on Durbano’s representative:

William A. Mullins, Baker & Miller PLLC, 2401 Pennsylvania Ave., NW, Suite 300,
Washington, DC 20037, (202) 663-7820.

Decided: _____

By the Board

Airway Heights, WA and the second segment extends from milepost 0.0 at Geiger Junction at its connection with the CW Branch to milepost 3.45, where it connects with the first segment at milepost 2.7.