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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 JEANYNE JAMES, ROBIN COLBERT,
7 WENDELL CARPENTER, JANE
8 DREVO, SAM DREVO, BROOKE
9 EDGE AND BILL EDGE, SR., LORI
10 FOWLER, IRIS HAMPTON, JAMES
11 HOLLAND, RACHELLE MCMASTER,
12 KRISTINA MONTOYA, NORTHWEST
13 RIVER GUIDES, LLC, JEREMY SIGEL,
14 SHARIENE STOCKTON AND KEVIN
15 STOCKTON, individually and on behalf
16 of all others similarly situated,

17 Plaintiffs,

18 v.

19 PACIFICORP, an Oregon corporation;
20 and PACIFIC POWER, an Oregon
21 registered electric utility and assumed
22 business name of PACIFICORP,

23 Defendants.
24
25
26

Case No. 20cv33885

Case Assigned to: Hon. Steffan Alexander

**PLAINTIFFS' MOTION FOR ISSUES
CLASS CERTIFICATION**

ORAL ARGUMENT REQUESTED

Hearing Date: TBD

Time: TBD

Room: TBD

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1 **I. UTCRC 5.010 AND UTCRC 5.050(1) STATEMENT**

2 The Parties conferred in good faith regarding this Motion and were unable to agree
3 concerning the issues in dispute. Plaintiffs estimate oral argument will require one hour and
4 request official court reporting services.

5 **II. MOTION AND INTRODUCTION**

6 All venue issues—and PacifiCorp’s lead argument against class certification—have been
7 resolved in Plaintiffs’ favor, clearing the way for this Court to certify an issues class under
8 ORCP 32 G. Certification will allow the liability questions that span all class members’ claims to
9 be answered once, in a class trial. Doing so will benefit the victims, the courts, and even
10 PacifiCorp.

11 This case involves what Governor Kate Brown has said could be the “greatest loss in
12 human lives and property in our state’s history.”¹ Plaintiffs have uncovered evidence that shows
13 PacifiCorp is likely responsible for much of that loss. The utility has for years failed to prepare
14 for fires, failed to properly maintain its electrical equipment, and failed to manage vegetation that
15 encroaches on that equipment. Last year, when confronted with weather conditions sure to lead
16 to devastating fires, PacifiCorp hoped for the best. PacifiCorp’s choices predictably caused or
17 contributed to fires that upended thousands of class members’ lives.

18 But this Motion does not seek a ruling on the merits. Rather, Plaintiffs seek to certify a
19 class so those merits issues can be efficiently resolved in a single proceeding. Below, Plaintiffs
20 propose an ascertainable class based on geography, property classification, and the presence of
21 fire. That class is supported by the reports of three experts:

24 ¹ KGW Staff, *Gov. Brown: Towns of Detroit, Blue River, Vida, Phoenix and Talent are*
25 *‘substantially destroyed,’* KGW8 (Sep. 9, 2020, 3:41pm PDT),
26 <https://www.kgw.com/article/news/local/wildfire/gov-brown-press-conference-on-wildfires-in-oregon/283-d8014ecc-cf04-4ba5-bb05-3609141542ab>.

1 **Nicole Brewer, Envista Forensics:** Nicole Brewer, an Oregon-based fire investigator for
2 Envista Forensics, has over two decades of experience fighting and investigating fires. She holds
3 multiple degrees and certificates regarding fire investigation, including as a Certified Fire
4 Investigation Instructor. Ms. Brewer is also the most senior Fire/Arson Investigator for Portland
5 Fire and Rescue, where she has worked for 14 years. She is supported by a team at Envista that
6 has investigated some of the largest utility-caused fires in the West.

7 Ms. Brewer's opinion for the purposes of class certification, based on the information
8 available thus far, is that errant electrical activity from PacifiCorp's equipment likely caused or
9 contributed to the spread of four fires: the Echo Mountain Fire, the South Obenchain Fire, the
10 242 Fire, and part of the fires in the Santiam Canyon. Ms. Brewer's work provides the scientific
11 support for the geographic scope of the class proposed below.

12 **Dr. Mark Buckley, ECONorthwest:** Dr. Mark Buckley leads the natural resource
13 practice at ECONorthwest, a Portland-based economic consulting firm. He has worked for over a
14 decade on economic issues related to wildfires in Oregon and elsewhere. His recent work
15 includes assessing the economic impact of the Chetco Fire in Curry County on regional
16 communities via effects on timber, fisheries, tourism, and relocation decisions for the South
17 Coast Development Council, Curry County and the city of Brookings. He has also consulted on
18 wildfire prevention techniques for the U.S. Forest Service, the Nature Conservancy, and the
19 Sierra Nevada Conservancy. Dr. Buckley, who has a Ph.D. in Environmental Studies, explains
20 how, using the class boundaries identified by Ms. Brewer, he can identify the properties that
21 meet the class definition and the owners of those properties.

22 **Cameron Azari, Hilsoft Notifications:** Mr. Azari is the Oregon-based Director of Legal
23 Notice for Hilsoft. He has more than 20 years of experience in the design and implementation of
24 class action legal notification and claims administration programs. Mr. Azari, who has a law
25 degree from the Northwestern School of Law at Lewis & Clark College, explains how notice
26 may be provided to the proposed class under ORCP 32.

1 This Motion explains why the proposed class meets ORCP 32's requirements, and how—
2 after certification—notice can be provided to “some or all” class members as that rule requires.

3 III. PROCEDURAL BACKGROUND

4 Plaintiffs filed this case on September 30, 2020 and the operative, Amended Complaint
5 on October 30, 2020. Class Action Compl. (Sept. 30, 2020); Am. Class Action Compl. (Oct. 30,
6 2020). Shortly after that, on November 18, 2020, Presiding Judge Bushong granted the parties'
7 stipulated request to designate this case complex. Order Designating Case Complex (Nov. 18,
8 2020). With this matter assigned to this Court for all purposes, the Court entered the parties'
9 stipulated case schedule and stipulated protective order. Case Mgmt Order (Jan. 20, 2021); Stip.
10 Prot. Order (Apr. 12, 2021).

11 Defendants then moved to dismiss, transfer venue, and strike class allegations, which the
12 Court largely denied. Opinion and Order Den. Mot. to Transfer Venue and Mot. to Strike Class
13 Allegations, and Granting, in Part, Den. in Part, Defs.' Mot. to Dismiss (May 10, 2021). On July
14 22, 2021, the Court also denied PacifiCorp's request to certify the Court's venue and inverse
15 condemnation rulings for appeal under ORS 19.225. Order Den. Defs. Mot. to Amend Order to
16 Certify Questions for Interlocutory Appeal (July 22, 2021). On October 14, 2021 the Oregon
17 Supreme Court denied PacifiCorp's petition for a writ of mandamus regarding this Court's venue
18 ruling. Order Den. Petition for Writ of Mandamus, No. S068782 (Or Sup Ct, Oct. 14, 2021).

19 In the meantime, the parties have been actively engaged in discovery, and—most
20 recently—Plaintiffs and counsel for plaintiffs in the related non-class *Allen* and *Salter* matters
21 asked this Court to consolidate the cases and bifurcate them for trial, with phase one being an
22 issues class trial on liability and causation. Pls.' Mot. to Enter Case Mgmt. Order No. 2 Re:
23 Consolidating Cases and Bifurcating Issues (Oct. 8, 2021). That proposed Case Management
24 Order (“CMO”) No. 2 envisions this issues class certification motion.

25 Finally, Plaintiffs are discussing with Defendants a stipulation for leave to amend their
26 complaint to (1) add two new named plaintiffs who are victims of fires included in the putative

1 class, (2) amend the alleged class definition to match the class proposed in this Motion, and
2 (3) add claims for non-economic damages.

3 IV. FACTUAL BACKGROUND

4 PacifiCorp is a multibillion-dollar private electric utility that has started hundreds of fires
5 and had thousands of near misses. Declaration of Cody Berne in Support of Plaintiffs' Motion
6 for Class Certification ("Berne Decl."), Exh. 1 [REDACTED]
7 [REDACTED]; Berne Decl., Exh. 2 (PacifiCorp spreadsheet titled, "fires 2007
8 thru 2-23-19.xlsx," has over 1,000 entries referring to pole fires alone).

9 On Labor Day last year, PacifiCorp's years of misconduct and indifference culminated in
10 likely the worst human-caused disaster in state history. PacifiCorp's statewide failure to keep
11 trees and brush clear from its powerlines—failures the company itself called "very damning"—
12 its failure to even begin discussing fire mitigation before it was too late, and its use of unsafe
13 equipment when firesafe alternatives were available all fell below the high standard of care that
14 governs electric utilities in Oregon.

15 Those failures came to a head on September 7, 2020, Labor Day, when a powerful
16 windstorm swept through PacifiCorp's entire Oregon service territory. While other utilities
17 proactively de-energized power lines, PacifiCorp chose not to. When the winds arrived, falling
18 trees, flying branches, and dangerous equipment and operations caused hundreds of electrical
19 faults. That predictably caused or contributed to fires that damaged or destroyed the homes and
20 property of Plaintiffs and the proposed class.

21 A. PacifiCorp has a history of taking chances with public safety.

22 PacifiCorp has been starting fires for years. Sometimes these fires burn thousands of
23 acres and lead to PacifiCorp paying millions of dollars. Answer ¶¶ 12, 46; Am. Compl. ¶¶ 12,
24 46-49 (referring to the Williams and Ramsey Canyon Fires). Other times, PacifiCorp fires stay
25 small, whether because of luck or poor burning conditions. That was not the case last September.
26

1 The extremely critical fire conditions on Labor Day—powerful east wind, high
2 temperature, low humidity, and months of drought—were akin to those that contributed to
3 earlier, massive fires in Oregon and California. PacifiCorp knew this beforehand. September 4,
4 2020, emails to PacifiCorp from its weather monitoring contractor warned that “the bottom line
5 is that we haven’t seen a[n] east wind event like this since maybe the event that started the
6 Kincade fire in Sonoma and produced the 100+ mph wind gusts on PG&E’s stations here last
7 year,” and “[i]f anything, it’s [the forecast] conservative.” Berne Decl., Exh. 3. That fire
8 destroyed or damaged over 430 structures.²

9 **1. PacifiCorp waited until 2019 to prepare a wildfire mitigation plan for**
10 **Oregon.**

11 Despite its history of starting fires and knowledge of years of utility-caused disasters in
12 California, PacifiCorp only recently began to prepare in earnest for wildfires in Oregon, where
13 the company is headquartered. As the Oregon Public Utility Commission (“PUC”) staff
14 explained in June 2020, “[t]he Company stated that its wildfire mitigation work is a multi-year
15 program that it is just beginning.” Berne Decl., Exh. 4 at 5. As a result, the utility was
16 unprepared and unresponsive when the Labor Day windstorm arrived.

17 PacifiCorp delayed planning for fire even though it has known for many years that utility-
18 caused fires could lead to disaster. *See* Preusch Decl., Exh. A, Interim Fire Origin and Cause
19 Report (“Brewer Report”) at 8-12 (discussing utility-caused fires). As one company document
20 acknowledges, “[t]he relationship between wildfire and public utilities has been brought to the
21 fore by recent developments in California. The loss of human life and property damage in 2017
22 and 2018 highlighted that wildfire is not constrained to southern California, whether associated
23 with electric utilities or not. Wildfire risk in other states, including Oregon, *cannot be ignored.*”
24 Berne Decl., Exh. 5 at 3 (Pacific Power’s Oregon Wildfire Mitigation Plan dated July 31, 2020)
25 (emphasis added). But PacifiCorp did ignore those risks for too long.

26 ² Cal Fire, *Kincade Fire Incident*, <https://www.fire.ca.gov/incidents/2019/10/23/kincade-fire> (last visited on Oct. 21, 2021).

1 When PacifiCorp finally wrote its first Oregon fire mitigation plan in 2019, that plan
2 largely ignored fire risk in most of the state.³ Instead, the company chose to focus only on areas
3 it deemed high risk. Berne Decl., Exh. 5 at 5-9; *see also* Berne Decl., Exh. 10 at 4 (discussing
4 “Fire High Consequence Areas”). This left most of Oregon out, including most areas that burned
5 during the utility-caused Labor Day fires, Brewer Report at 14-16, as PacifiCorp has since
6 acknowledged. *See* Berne Decl., Exh. 10 at 7-8 (“Of the fires identified during this windstorm,
7 no fires of consequence have ignited in designated Public Safety Power Shutoff areas.”); Berne
8 Decl., Exh. 5 at 5-9. Communities that burned took a different—and, tragically, correct—view of
9 fire danger. Marion County, for example, identified Gates, Lyons, Mill City and other places that
10 burned as “Extreme” or “High” risk. Berne Decl., Exh. 11 (Marion County Community Wildfire
11 Protection Plan at Table 6.1).

12 **2. PacifiCorp admits its vegetation management failures are “very damning.”**

13 PacifiCorp’s long history of ignoring vegetation management—the critical work of
14 keeping trees and brush from contacting power lines—made its fire planning failures even more
15 certain to cause harm. PacifiCorp has acknowledged this publicly and internally.

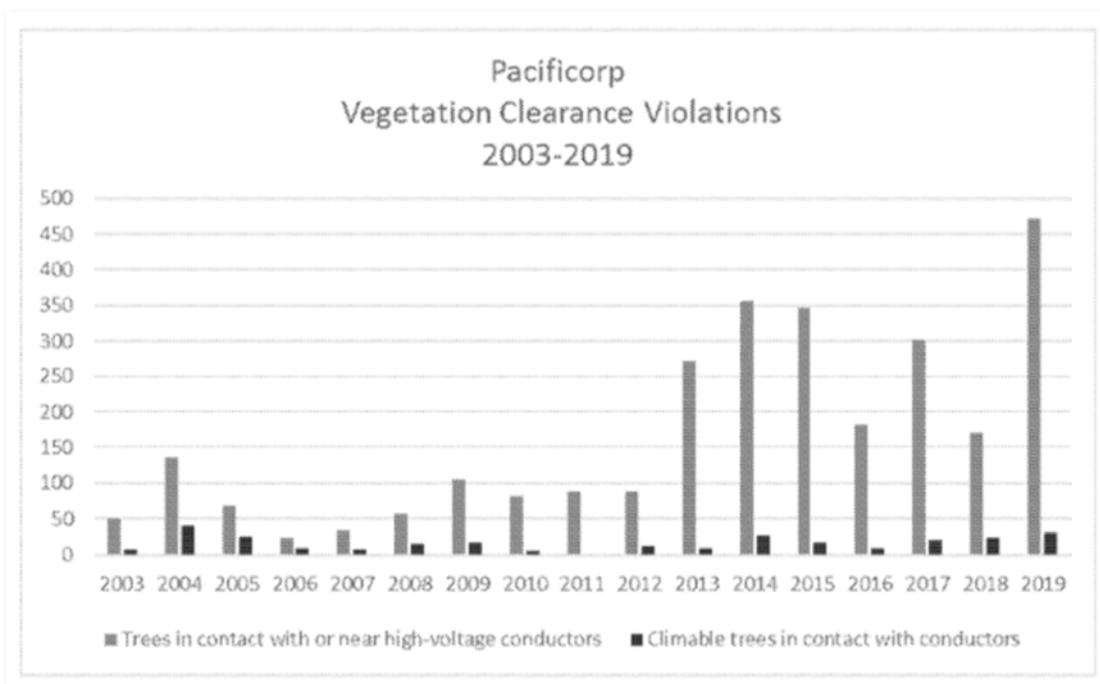
16 One of the most common ways power lines cause fires is when they touch trees and other
17 vegetation. In fact, fire danger from vegetation contacting energized power lines is so well
18 known, PacifiCorp’s contractors use the word “burner” to describe trees touching or encroaching
19 on power lines. Berne Decl., Exh. 12. Worried about the regulatory scrutiny “burner” invited,
20 PacifiCorp warned its contractors against using the term. *Id.*

21
22 ³ Along with a single, statewide fire mitigation plan common to all proposed class members,
23 PacifiCorp had many other common, statewide policies and procedures for fire. For example,
24 the company had one “Wildfire Response Playbook,” “its primary purpose is to provide
25 guidance to Pacific Power employees regarding the response to wildfires within the service
26 areas.” Berne Decl., Exh. 6 at 4. The company also had a “Fire Preparedness and Response
Playbook,” with more detail. Berne Decl., Exh. 7. And PacifiCorp had one, companywide set
of “Wildland Fire Guidelines,” “related to PacifiCorp’s transmission and distribution systems
(Guidelines).” Berne Decl., Exh. 8 at 3. In addition, PacifiCorp had [REDACTED]

[REDACTED] Berne Decl., Exh. 9.

PacifiCorp was sensitive to regulatory scrutiny because of its “disturbing” history of vegetation management violations. One and a half months before the Labor Day fires, the PUC wrote to PacifiCorp’s CEO: “[t]he number of tree and energized primary conductor contacts are disturbing, considering the high profile Wildfire Mitigation efforts in Oregon and the fire hazard in the western United States.” Berne Decl., Exh. 13 at 2. The month before that, in June 2020, a PUC staffer testified, “Staff has documented a significant increase in safety violations related to PacifiCorp’s vegetation management since 2013.” Berne Decl., Exh. 4 at 10.

The PUC Staff’s June 2020 testimony included a graph showing many violations each year, beginning in 2013 and peaking in 2019:



Berne Decl., Exh. 4 at 11.

A PacifiCorp vice president told the PUC in reply testimony later that month, “PacifiCorp recognizes that there are problems that need to be addressed.” Berne Decl., Exh. 14 at 20. PacifiCorp’s vegetation management failures were statewide. The PUC’s 2020 audit documents 20 pages of violations across the state. Berne Decl., Exh. 15; *see also* Berne Decl., Exh. 16 (PUC’s 2019 audit has 27 pages of violations across the state).

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1 Even before that 2020 audit, the PUC warned PacifiCorp in 2019 about “[t]he dramatic
2 increase in the number of locations cited from previous years, coupled with Staff observations of
3 many other locations on the verge of burning” Berne Decl., Exh. 16 at 28 (emphasis in original).
4 Internally, PacifiCorp called this audit “very damning.” Berne Decl., Exh. 17.

5 Despite the known danger of “burners” and “very damning” violations, after the Labor
6 Day fires PacifiCorp still had only “eight foresters across Pacific Power’s 35,000 square mile
7 service territory” to inspect vegetation and oversee contractors. Berne Decl., Exh. 18 at 3.

8 **3. PacifiCorp used equipment known to contribute to fires when safer**
9 **alternatives were available.**

10 Much like the company’s statewide vegetation management failures, PacifiCorp failed to
11 use firesafe equipment across Oregon.

12 PacifiCorp knew it was using unsafe equipment. Its [REDACTED]

13 [REDACTED]
14 [REDACTED] Berne Decl., Exh. 19 at 12-13. This slide says in part, [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] *Id.* (emphases in original).

22 Along with these dire warnings from regulators, at least one PacifiCorp employee warned
23 internally that the company may have been *underreporting* safety problems to regulators. Berne
24 Decl., Exh. 20 (internal Sept. 2019 emails about reporting to the PUC about “low
25 weatherheads”).
26

1 Despite these warnings, PacifiCorp did not prioritize equipment safety, and it continues
2 to not do so. A 2021 Federal Energy Regulatory Commission Enforcement Report and
3 Recommendation said, “clearance violations *on at least 45 percent of PacifiCorp’s BES* [Bulk
4 Electric System] lines were so severe... a PacifiCorp engineer conceded would not allow the
5 lines to be safely energized. Although PacifiCorp management and employees knew of clearance
6 issues on these lines since at least 2009, PacifiCorp continued to energize the vast majority of the
7 lines...”). Berne Decl., Exh. 21 at 11-12 (emphasis added).

8 At the same time regulators warned of the company’s “system wide, failing,
9 inspection/correction program,” PacifiCorp knew [REDACTED]
10 [REDACTED] Berne Decl., Exh. 19 at 13; Berne Decl., Exh. 5 at 42-46.
11 So called system hardening available to PacifiCorp included using covered conductor (power
12 lines sheathed in plastic covering). *See* Berne Decl., Exh. 5 at 42-46; Exh. 22 at 13-14 (Berkshire
13 Hathaway Energy Wildfire Management Technologies presentation, Sept. 19, 2019). According
14 to PacifiCorp’s owner, [REDACTED]
15 [REDACTED] Berne Decl., Exh. 22 at 18. A Pacific
16 Power vice president told the PUC in June 2020, “numerous studies exist including recent
17 studies by other Western utilities that provide strong evidence covered conductor greatly reduces
18 ignition risk from incidental contact including contact by vegetation.” Berne Decl., Exh. 14
19 at 11.

20 Despite knowing this, PacifiCorp had very little covered conductor and other risk
21 mitigation equipment in place in Oregon. As of summer, 2019, PacifiCorp had only nine weather
22 stations in its entire multi-state service territory, zero HD cameras in high fire threat areas, and
23 fewer than 200 miles of insulated distribution wire. Berne Decl., Exh. 23. For comparison,
24 PG&E, a California utility, had 1,300 weather stations, 600 HD cameras in high fire threat areas,
25 and 2,800 miles of insulated distribution wire. *Id.*
26

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1 PacifiCorp also knew of several other system hardening options but failed to enact them.
2 That includes 1) using fire-proof poles or fireproofing wood poles, 2) burying power lines, 3)
3 using “nonexpulsion” fuses, and 4) disabling automatic reclosers. Berne Decl., Exh. 24
4 (PacifiCorp’s 2021 Integrated Resource Plan, Volume I, September 1, 2021, pp. 3-6); Berne
5 Decl., Exh. 25 at 13-14. At PacifiCorp, using this firesafe equipment was not “standard practice.”
6 Berne Decl., Exh. 25 at 9-10.

7 **4. PacifiCorp’s indifference has been highly profitable.**

8 While it violated vegetation management requirements, used unsafe equipment, failed to
9 implement firesafe technologies, and failed to prepare for fires, PacifiCorp generated massive
10 profits for its owner, Berkshire Hathaway Energy. PacifiCorp’s combined net income for 2019
11 and 2020 was \$1.51 billion. Berne Decl., Exh. 26 (Berkshire Hathaway Energy Company’s 2020
12 10-K). For comparison, during those years, PacifiCorp’s capital expenditure in Oregon for
13 wildfire mitigation was just \$1.58 million in 2019 and forecasted \$22.6 million in 2020. Berne
14 Decl., Exh. 4 at 4.⁴

15 PacifiCorp was content to book billions in profits while employees warned that a “lack of
16 resources” meant some power lines “are in danger of not being worked” to manage vegetation,
17 even though “[m]any of these feeders are rural with a high density of trees and dying/dead trees.”
18 Berne Decl., Exh. 27. PacifiCorp spent so little managing vegetation that some lines were
19 apparently not worked at all and vegetation management on other lines was not completed “due
20 to budget constraints in 2019.” Berne Decl., Exh. 28.

21 PacifiCorp put profits before safety. Plaintiffs and the proposed class suffered the
22 consequences.

23 ⁴ PacifiCorp spent less on its entire wildfire mitigation program in 2019 and 2020 than the \$136
24 million PacifiCorp accrued, as of December 31, 2020, “as its best estimate of the potential
25 losses net of expected insurance recoveries associated with the 2020 Wildfires that are
26 considered probable of being incurred.” Berne Decl., Exh. 26 (Berkshire Hathaway Energy
Company’s 2020 10-K).

1 **B. PacifiCorp failed to respond to the 2020 Labor Day storm.**

2 PacifiCorp knew the 2020 Labor Day storm would create extreme fire danger. It also
3 knew the forecasted storm would bring down trees and vegetation across Oregon. But it did not
4 take simple steps to prevent its equipment from contributing to or causing fires.

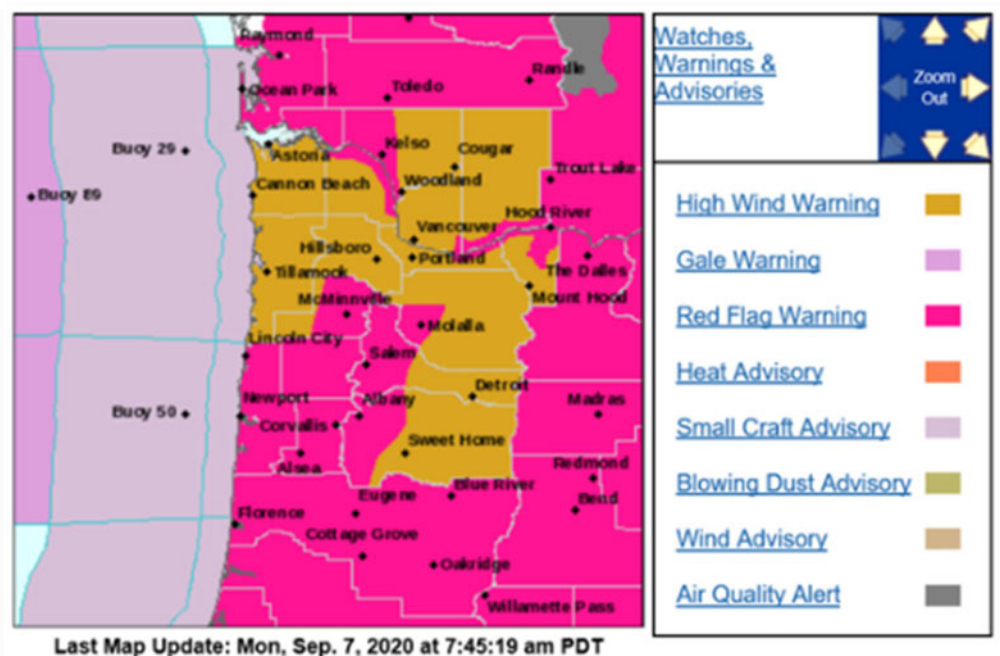
5 **1. PacifiCorp knew the windstorm was coming.**

6 At least as early as September 2, PacifiCorp was monitoring forecasts about the storm.
7 Berne Decl., Exh. 29. The next day, PacifiCorp knew “**EXTREME FIRE DANGER**
8 **EXPECTED MONDAY AND TUESDAY, PARTICULARLY MONDAY NIGHT**
9 **THROUGH TUESDAY MORNING, DUE TO DRY FUELS, WARM TEMPERATURES,**
10 **LOW RELATIVE HUMIDITIES, AND EXTREMELY GUSTY WINDS.”** Berne Decl.,
11 Exh. 30 (excerpt from forecast in PacifiCorp’s files titled “Weather_9.3.docx”) (emphasis in
12 original). The forecast went on, “[t]his weather pattern – a sharp, continental cold front & upper-
13 level trough plunging over the Intermountain West – is the same type of pattern that brings Santa
14 Ana and Diablo winds to California.” *Id.* These winds are often associated with dangerous fires.
15 *See* Brewer Report at 7-10.

16 As noted, PacifiCorp’s contract meteorologist warned the company on September 4 that
17 the forecast was the most dangerous since the previous year’s destructive Kincade Fire. Berne
18 Decl., Exh. 3. Asked by PacifiCorp if the meteorologist was “erring on the side of caution,” he
19 replied, “[i]f anything, it’s conservative. I just went through every event over the last 2 years and
20 couldn’t find anything like this one.” *Id.*

21 No later than noon on September 6, PacifiCorp knew that Portland General Electric was
22 warning that it may have to proactively de-energize lines because of the storm. Berne Decl., Exh.
23 31. Later that evening, David Lucas, PacifiCorp’s vice president in charge of transmission and
24 distribution operations, emailed a forecast to another executive, highlighting, “[w]inds could gust
25 as high as 70 mph” on Monday and “65 mph” on Tuesday. Berne Decl., Exh. 32.

1 The warnings went all the way to Pacific Power’s CEO. At 1:17 am on Labor Day, Mr.
2 Lucas emailed the CEO, “[f]ire risk is obviously high across our service territory and the entire
3 state of Oregon and Northern CA are essentially under RED flag warnings.” Berne Decl., Exh.
4 33. Later that morning, Mr. Lucas emailed another senior employee, “it may be a rough evening
5 for [the operations center] with high winds any thoughts on bringing in additional operators
6 especially given the widespread nature of the wind forecasts.” Berne Decl., Exh. 34. The email
7 included the image below showing red flag or high wind warnings for all western Oregon:



19 *Id.*

20 In addition to internal warnings, the National Weather Service was forecasting that the
21 entire state would have critical or extreme fire weather. Berne Decl., Exh. 35 (Sept. 7, 2020,
22 Storm Prediction Center Day 1 Fire Weather Outlook). “The combination of aforementioned
23 surface winds, 13-20% RH values, very dry fuels, and high ERCs will create a volatile
24 environment supportive of rapidly spreading fires exhibiting extreme behavior.” Berne Decl.,
25 Exh. 35. The United States Forest Services’ warning to PacifiCorp and others on Labor Day was

1 blunt. “Our fire danger indices already show extreme fire danger going into this wind event
2 meaning it will only take one tiny spark to create a dangerous wildfire.” Berne Decl., Exh. 36.

3 **2. PacifiCorp did not take action, even as it watched the storm bring down**
4 **power lines, starting fires as it moved across Washington and Oregon.**

5 By email and through databases that tracked power outages and fires, PacifiCorp
6 monitored the storm as it moved across Washington and into Oregon, sending trees and branches
7 into power lines and starting fires. Despite watching the storm create havoc for its power system
8 in real time, it still did not proactively de-energize its equipment.

9 An internal email sent on Labor Day at 3:54 pm included, “[w]eather is headed down
10 from the north, where other utilities have already been experiencing outages in the thousands and
11 tens of thousands.” Berne Decl., Exh. 37. A few minutes later, another internal email reported, it
12 “was noted that both the States of Washington and Idaho (including other utilities’ service
13 territories) already have substantial damage / outages as a result of this storm. So we may
14 experience that in some of our areas as well.” Berne Decl., Exh. 38.

15 An internal spreadsheet documents [REDACTED]
16 [REDACTED] fill
17 the spreadsheet. Berne Decl., Exh. 39 (emphasis in original). Many reports include location and
18 time. *Id.*⁵ Those internal documents show the storm moving toward Oregon from the northeast,
19 leading to electric utility fires as it moved toward this state.

20
21
22 ⁵ After filtering for reports relating to [REDACTED]
23 [REDACTED]
24 The animation (Berne Decl., Exh. 40) is available
25 on the thumb drive that was provided to the Court. It shows that [REDACTED]
26 [REDACTED]

1 **C. PacifiCorp was indifferent to the extreme danger.**

2 As PacifiCorp watched the devastation unfold—its equipment contributing to and causing
3 fires—it never de-energized its lines. It also re-energized lines without first inspecting them.

4 **1. PacifiCorp did not proactively shut off the power.**

5 Despite knowing that power shutoffs were an industry “best practice” and the best way to
6 protect the public from utility-caused fires, PacifiCorp did not de-energize its lines.

7 PacifiCorp emailed the PUC on Labor Day at 5:06 pm that the company’s emergency
8 operations center was open and, among other things, “monitor conditions for the possibility of a
9 public safety power shutoff.” Berne Decl., Exh. 41 (referring to the company’s emergency
10 operations center). By the time PacifiCorp sent this email, however, it knew its equipment was
11 already linked to multiple fires. *See* Berne Decl., Exh. 39 (internal PacifiCorp database of
12 outages and fires). PacifiCorp left this out of its report to the PUC. Berne Decl., Exh. 41.

13 While other utilities de-energized, and even after the storm had caused a huge number of
14 faults and fires on PacifiCorp’s system, PacifiCorp still did not activate its PSPS plan. According
15 to notes in PacifiCorp’s files, reporters asked the Governor and Chief Deputy State Fire Marshal,
16 “Santiam Fires caused by falling trees hitting powerlines. Why wasn’t power shutoff sooner?”
17 Berne Decl., Exh. 47 at 2. The Chief Deputy answered, “We did see down transmission lines that
18 started many fires.” *Id.*

19 A little over a year before the Labor Day fires, a Pacific Power vice president spoke with
20 a local news station about shutting off power because of fire danger. The vice president said,
21 “Really, [it] is to keep the public safe and to prevent catastrophic wildfires. We think that’s the
22 right thing to do. We can’t go another fire season without considering this tool.”⁶ He added, “We
23 can’t watch what happened in California and not be motivated to take steps to avoid the same
24

25 ⁶ *See* Chris Liedle, *Pacific Power takes steps to reduce wildfire risk, may shut off power in*
26 *severe weather*, KATU News (June 26, 2019), <https://katu.com/news/local/pacific-power-takes-steps-to-reduce-wildfire-risk-may-shut-off-power-in-severe-weather>.

1 catastrophe in our communities.” And, “[t]he power shut-off protocol is really emerging as an
2 industry-best practice.”

3 Internally, PacifiCorp acknowledged shutoff as a best practice. PacifiCorp’s “Wildfire
4 Mitigation and Response” presentation also noted “Pro-active De-Energization” as a “best
5 practice.” Berne Decl., Exh. 42 at 8. And under PacifiCorp’s statewide “Wildfire Mitigation
6 Plan,” the company said it “may de-energize power lines as a preventative measure during
7 periods of the most extreme wildfire risk.” Berne Decl., Exh. 5 at 51.

8 Company documents explain that a PSPS requires [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] Berne Decl., Exh. 43 at 3. These were precisely the conditions on Labor Day.

12 Despite recognizing this “best practice,” PacifiCorp’s PSPS plan was flawed in two
13 respects. First, it covered only part of PacifiCorp’s service territory in Oregon, clustered in
14 Southwest Oregon and the Columbia River Gorge. Berne Decl., Exh. 44 at 5; Brewer Report at
15 16-18. Elsewhere in the state, the utility had *no* plan for proactive power shutoffs. *See* Berne
16 Decl., Exh. 5 at 51-59. Second, in those places that were even eligible for a PSPS, PacifiCorp set
17 its shutoff thresholds at a level that had *never been met*. Berne Decl., Exh. 45. In an internal
18 email sent three days after Labor Day about how to respond to questions from a reporter
19 regarding PacifiCorp not proactively de-energizing, a PacifiCorp employee asked his coworker
20 and an outside public relations consultant, “[o]f course this calls into question the validity of
21 PSPS criteria. If this situation did not qualify, what would?” Berne Decl., Exh. 46 at 1.

22 **2. PacifiCorp violated its own policies by re-energizing damaged power lines**
23 **without first inspecting them for damage.**

24 PacifiCorp’s PSPS policy requires that “[b]efore re-energizing any facilities (line,
25 substation, etc.), the responsible grid and/or region operator will direct a full line patrol and
26 substation inspection to be completed.” Berne Decl., Exh. 48 at 7; *see also* Berne Decl., Exh. 42

1 at 8 (in PacifiCorp’s “Wildfire Mitigation and Response” presentation, under the heading “Pro-
2 active De-Energization,” PacifiCorp wrote, “[l]ine inspections before re-energization.”).

3 PacifiCorp failed to do this, compounding the harm caused by its decision to not de-energize.

4 Inspecting lines before re-energizing them ensures that the cause of a fault is no longer
5 present. “Reducing the time between when a fault occurs and that fault condition is cleared,
6 reduces the risk of igniting adjacent fuel, and therefore also reduces wildfire risk.” Berne Decl.,
7 Exh. 25 at 15. If the cause persists—for example, a power line snapped by a tree—re-energizing
8 the line could cause arcing, sparking, and fire. *See* Berne Decl., Exh. 5 at 21-22 (discussing need
9 to disable automatic reclosers and line-testing after a fault to avoid starting a fire).

10 PacifiCorp, however, left lines that were damaged re-energized after faults. Many hours
11 after the fires ignited, witnesses reported that damaged power lines were still energized. Berne
12 Decl., Exh. 49 at 2 (at 3:51 am on Sept. 8, 2020, Oregon State Police report “POWERLINES
13 DOWN ACROSS THE HW AND ARE ARCING” in Mill City) (emphasis in original); Brewer
14 Report at 21, 28, 30, and 36 (referring to witness reports of sparking and arcing power lines).
15 Other witnesses reported their lights going on and off during the storm, evidence that lines were
16 being de-energized because of faults only to be re-energized. *See* Brewer Report at 28-29.

17 **D. PacifiCorp blames the wind.**

18 PacifiCorp’s repeated refrain in the public and in pleadings in this case is that the wind is
19 to blame for the fires. But fires require an ignition source. PacifiCorp’s equipment was that
20 source, as PacifiCorp’s own documents acknowledge. *See* Berne Decl., Exh. 39 [REDACTED]
21 [REDACTED]

22 In the case of the Santiam Fire, for example, information from firefighters in the files of a
23 senior PacifiCorp employee note utility ignitions in the Santiam Canyon. Though the fire in that
24 area had originally been called the “Beachie Creek” fire after a nearby, lightning-caused
25 wilderness fire that had been smoldering for weeks before Labor Day, “it has been renamed the
26 Santiam Fire acknowledging that the Beachie Creek Fire no longer was the main cause of rapid

1 fire growth and was instead fed by a series of small fires largely caused by downed power lines
2 and other ignition sources throughout the area.” Berne Decl., Exh. 50 at 4.

3 While PacifiCorp’s attempt to shift blame is self-serving, it is also a class-wide issue. In
4 PacifiCorp’s view, all the Labor Day fires are linked to this single event. That is also how the
5 utility treated it in a regulatory filing. Berne Decl., Exh. 51 (discussing “severe weather event”
6 that led to fires “across multiple counties in Oregon”). Likewise, PacifiCorp’s internal fire
7 updates compiled information about the fires in a single document that the company updated
8 regularly. *See, e.g.*, Berne Decl., Exh. 52 (PacifiCorp’s Sept. 10, 2020, 7:00 pm wildfire update
9 discusses each of the fires at issue).

10 **E. PacifiCorp’s fires predictably caused massive devastation.**

11 More than a year after starting the fires, PacifiCorp has taken no responsibility, even
12 while acknowledging the scope of destruction.

13 PacifiCorp said, “[t]hird party reports for these wildfires [those PacifiCorp may be liable
14 for] indicate approximately 1,100 residences destroyed; several commercial and mixed-use
15 buildings destroyed; approximately 1,200 other structures destroyed; several structures
16 damaged....” Berne Decl., Exh. 18 at 2. Oregon’s wildfire damage assessment has tallied 999
17 destroyed or damaged homes in just Klamath, Lincoln, Linn, and Marion Counties.⁷

18 Even as publicly PacifiCorp dodges blame, Plaintiffs have found admissions about the
19 company causing or being implicated in fires across Oregon on Labor Day and after. That
20 includes an email from a Pacific Power forester acknowledging that “[b]oth the 242 and Slater
21 fires were investigated and were both live, healthy trees that fell from eighty feet outside of right
22 of way due to a significant wind event.” Berne Decl., Exh. 53; Berne Decl., Exh. 54 at 2 (Slater
23 Fire caused by tree on wire). In another email, a PacifiCorp employee colorfully notes, “Crap!
24

25 ⁷ Oregon Office of Emergency Management, *Damage Assessment*,
26 https://experience.arcgis.com/experience/6c42bf70be214725b8dd0de8d407eca9/page/page_2/.

1 Dusty says the Glide fire [in Douglas County] was caused by a power line falling.” Berne Decl.,
2 Exh. 55); Berne Decl., Exh. 56 (internal emails stating Beachie Creek, Echo Mountain, South
3 Obenchain, 242 and other Labor Day fires “may involve electrical facilities” and identifying
4 associated PacifiCorp facilities).

5 PacifiCorp employees also traded emails about a news report involving the Santiam fire,
6 including “[a]t least 13 new fires were started between Detroit and Mehama from downed
7 powerlines during the peak of Monday’s wind event.” Berne Decl., Exh. 57. In an internal
8 discussion about what to tell a reporter, a PacifiCorp employee wrote, “[h]ard to say we don’t
9 know if the fires were in our service area. Clearly were or there wouldn’t be outages and we
10 wouldn’t be involved at all.” *Id.* at 2.⁸ And that is what can be gleaned from emails PacifiCorp
11 has chosen to produce, even while continuing to resist production of all causation-related
12 documents.

13 Based on PacifiCorp’s document production thus far, and on her own investigation,
14 Plaintiffs’ expert Ms. Brewer concludes that PacifiCorp is most likely responsible at least in part
15 for the Echo Mountain, South Obenchain, 242, and Santiam Canyon fires. Brewer Report at 2.
16 Plaintiffs seek to certify a class of the victims of those fires.

20 ⁸ Many other documents produced by PacifiCorp or its vegetation management contractors
21 during discovery implicate PacifiCorp. *See* Berne Decl., Exh. 58 (texts about the Santiam
22 Canyon fires, “[n]umerous large trees blowing into wire causing fire.”); Exh. 59 (Electric and
23 Communication Incident Reports submitted on September 18, 2020 by PacifiCorp to the PUC
24 about the Echo Mountain, Beachie Creek, South Obenchain, Pike, and Archie Creek fires, with
25 boxes checked for “Overhead power lines”); Exh. 60 (Sept. 8, 2020, email from vegetation
26 management contractor to PacifiCorp, “[l]ooking south looks like every where the line
touchdown started a fire”); Exh. 61 (emails to PacifiCorp subject line “Obenchain fire photos”
and “Obenchain,” attaching photos of broken tree and pieces of power lines and including,
“[p]ictures of the wire that Chuck took with him from the Obenchain fire. This is from the top
phase next to the tree in question.”)

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V. LEGAL STANDARD

ORCP 32 directs courts to, “[a]s soon as practicable after the commencement of an action brought as a class action, * * * determine by order whether and with respect to what claims or issues it is to be so maintained and * * * find the facts specially and state separately its conclusions thereon.” ORCP 32 C(1).

Under ORCP 32, there are six requirements for certifying a class: (1) the size of the proposed class makes joinder impracticable (“numerosity”); (2) the class shares common questions of law or fact (“commonality”); (3) the class representatives’ claims are typical (“typicality”); (4) the representatives will fairly and adequately represent the class (“adequacy”); (5) pre-litigation notice was adequate (“notice”); and (6) a class action “is superior to other available methods for the fair and efficient adjudication of the controversy” (“superiority”). *See* ORCP 32 A, B. Plaintiffs have the “affirmative burden” of showing that ORCP 32’s requirements are met. *See Pearson v. Philip Morris*, 358 Or 88, 107, 361 P3d 3 (2015) (citing *Bernard v. First Nat’l Bank of Oregon*, 275 Or 145, 153, 550 P2d 1203 (1976)).

Oregon courts may, “when appropriate,” certify a class “with respect to particular claims or issues[.]” ORCP 32 G; *see also* ORCP 32 C(1) (referencing certification of issues). It is not necessary when certifying a so-called issues class that the “class representatives establish all the requirements of ORCP 32 A as to the action as a whole[.]” *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 205-06, 990 P2d 912 (1999). Put another way, to certify an issues class, the proponent must show only that the requirements of ORCP 32 are met for the issues proposed for certification. *See id.*

“The question of certification is a legal one that involves issues of both law and fact.” *Alsea Veneer, Inc. v. State*, 117 Or App 42, 52, 843 P2d 492 (1992), *aff’d in part, rev’d in part*, 318 Or 33 (1993). Whether to proceed as a class action is largely a decision of judicial administration; trial courts are “customarily granted wide latitude.” *Newman v. Tualatin Dev. Co.*, 287 Or 47, 51, 597 P2d 800 (1979). Oregon courts have broad authority to make rulings

1 “tailored to the practical needs of individual cases and to a variety of circumstances.”
2 *Green v. Salomon Smith Barney, Inc.*, 228 Or App 379, 386, 209 P3d 333, *rev den* 347 Or 348
3 (2009).

4 In the absence of controlling case law, Oregon courts evaluating class certification under
5 ORCP 32 may consider federal courts’ interpretations of analogous provisions of Federal Rule of
6 Civil Procedure 23 as persuasive authority. *See Froeber v. Liberty Mut. Ins.*, 222 Or App 266,
7 277 n9, 193 P3d 999 (2008) (because ORCP 32 is “modeled after the federal rules[,]” “decisions
8 by federal courts on class action settlements are persuasive”); *but see Shea*, 164 Or App at 206
9 (federal court decisions published after the adoption of an Oregon rule do not inform
10 interpretation of the Oregon rule).

11 VI. PROPOSED CLASS AND ISSUES FOR CERTIFICATION

12 A. Proposed Class Definition

13 Plaintiffs propose that this Court certify a class of the owners and residents of properties
14 burned by fires that PacifiCorp likely caused or contributed to. Plaintiffs’ proposed class is
15 objectively defined, making clear to whom notice should be provided and who would be bound
16 by a class judgment.

17 A defined class “must be sufficiently ascertainable” to serve two purposes: “to determine
18 to whom notice must be sent and to facilitate the court’s determination on the manageability of
19 the action.” *Bernard*, 275 Or at 156. The “necessity for defining the class with absolute
20 particularity does not arise, however, until entry of judgment, when it is necessary to describe
21 those persons whom the judgment will bind.” *Id.* at 157.

22 Plaintiffs’ proposed class meets that standard. That class is:

23 All (A) owners or residents, as of September 7, 2020, of any (1) privately owned
24 real property; (2) that is wholly or partially within the boundary of the maximum
25 extent of burn for the Echo Mountain (including the fire formerly known as the
26 Kimberling Fire), South Obenchain, or 242 fires, or for the Santiam Canyon fires
is wholly or partially within the boundary in Figure 1 below; and (3) experienced
fire activity during those fires; or (B) owners of a motorhome, residential trailer,
manufactured dwelling, other mobile home, or any other personal property that as

1 of September 7, 2020, was located on any property (1) wholly or partially within
2 the boundary of the maximum extent of burn for the Echo Mountain (including
3 the fire formerly known as the Kimberling Fire), South Obenchain, or 242 fires,
4 or for the Santiam Canyon fire is within the boundary in Figure 1 below; that (2)
5 experienced fire activity during those fires; and (3) whose motorhome, residential
6 trailer, manufactured dwelling, other mobile home, or any other personal
7 property, experienced fire damage during those fires.

8 Figure 1 below shows the portion of the Santiam Canyon fire that Ms. Brewer has
9 determined, based on information currently available, that PacifiCorp caused or contributed to:⁹



10 Plaintiffs' proposed class is ascertainable because it is defined based on objective, factual
11 criteria: geographic boundary, ownership classification, and fire activity. As described below,
12 applying those criteria results in a class consisting of 2,454 private properties across four fires.

13 Plaintiffs defined the class following four steps. First, Plaintiffs' expert Nicole Brewer
14 determined for which Labor Day fires it is more likely than not that PacifiCorp's electric utility
15 equipment caused or contributed to the ignition or spread of the fire, based on available
16 information. *See generally* Brewer Report 19-38.

17 Second, having established *which* fires to include, Ms. Brewer analyzed whether any
18 portions of those fires could *not* more likely than not be attributed to PacifiCorp at this time and
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23 ⁹ Discovery and Plaintiffs' investigation are continuing, and Plaintiffs reserve their right to
24 modify or expand this area based upon information that may be later discovered or developed.
25 Doing so will not affect the certainty of the class because, as explained in this Motion,
26 Plaintiffs can follow the same defined, reliable methodology to identify and notify any
additional class members.

based upon information discovered to date. This resulted in the proposed geographic limitation for the Santiam Canyon fire set forth in Figure 1 above. *See* Brewer Report at 38.

Third, building on Ms. Brewer’s work, Dr. Buckley at ECONorthwest used publicly available data to identify every tax lot within the proposed class boundaries, including only privately owned properties categorized as residential, commercial, tract, farm or rangeland, or forest. Preusch Decl., Exh. B, Expert Report of Mark Buckley, PhD (“Buckley Report”) ¶¶ 23-25. This means that part (A) of the proposed class excludes any public property. *Id.* Dr. Buckley also identified the owners of those private properties and their mailing addresses. *Id.* ¶¶ 19,38.

Finally, to identify which of those properties “experienced fire activity,” Dr. Buckley reviewed government-standard soil burn severity data. *Id.* ¶¶ 18, 25-27. Using these data, Dr. Buckley has identified those parcels within each fire boundary that have experienced at least “low” burn severity, an objective proxy confirming that a private parcel experienced a physical impact from the fire. *Id.* ¶ 33. Dr. Buckley confirmed the validity of this proxy using satellite photos of select parcels from before and after the fires as well as other publicly available data on damaged parcels. *Id.* ¶¶ 34-37.

Applying those steps results in a proposed class consisting of the owners, resident, or tenants of 2,454 private properties, with the following current estimate of the number of privately owned class properties for each fire:

Fire	Number of Private Class Properties
Santiam Canyon	1,345
Echo Mountain	600
South Obenchain	324
242	185

Buckley Report at ¶ 17; Exhs. 6, 9, 12, 15.

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1 Part B of the class definition also captures those owners of mobile homes or other
2 personal property located on any property within the fire perimeters that experienced fire
3 activity. This part of the class definition, for example, includes Plaintiff Lori Fowler. Ms. Fowler
4 was living in her RV while serving as a camp host at a public campground in the Santiam
5 Canyon during the Santiam fire, and her RV was destroyed after she helped campers evacuate.
6 Am. Compl. ¶¶ 139-42. Dr. Buckley can identify such public properties using the same
7 methodology he used to identify private properties, Buckley Report at ¶ 42, and as discussed
8 below, Plaintiffs' notice plan will account for providing notice to these class members.

9 **B. Common Issues Proposed for Certification**

10 Plaintiffs propose to certify the liability issues common to all class members for class
11 treatment. Those issues, set out below, are based on the uniform jury instruction on liability for
12 each of Plaintiffs' claims as well as the standards in ORS 477.089 and .092. *See* Principles of the
13 Law of Aggregate Litigation § 2.03 (2010), Reporter's comment. ("Liability issues suitable for
14 class-action treatment * * * might encompass the entire range of elements necessary to establish
15 the defendant's liability to all claimants[.]").

16 Plaintiffs' proposed class issues are as follows:

- 17 1. What was the Defendants' level of culpable conduct in the operation of its utility
18 infrastructure?¹⁰
- 19 2. Was Defendants' operation of their utility infrastructure ultrahazardous or
20 abnormally dangerous?
- 21 3. Was Defendants' conduct a cause of harm to the class?

22
23 ¹⁰ To resolve this issue, the jury can be asked, for example, if Defendants' conduct was
24 negligent, reckless, grossly negligent, negligent per se, intentional, willful, malicious, or some
25 combination of all of those. In addition, if Plaintiffs successfully seek leave to add a claim for
26 punitive damages, the jury will be asked if Defendants acted with malice or have shown a
reckless and outrageous indifference to a highly unreasonable risk of harm and have acted with
a conscious indifference to the health, safety and welfare of others.

- 1 4. If Defendants’ conduct was a cause of harm to the class, was that harm reasonably
2 foreseeable?
- 3 5. Did Defendants’ action or inaction cause or contribute to the cause of the wildfire
4 or cause or contribute to the spreading of the wildfire?
- 5 6. Did the fire originate on land used or capable of being used for growing forest
6 tree species regardless of the existing use of the land?
- 7 7. Did Defendants’ action or inaction bring about an unauthorized entry into
8 property in the exclusive possession of another?
- 9 8. Did Defendants’ culpable conduct cause the trespass or, alternatively, did
10 Defendants act intentionally, knowing that a trespass would result from their
11 actions—and a trespass did indeed occur as a result of those actions.
- 12 9. Did Defendants know, or have reason to know, that their electric utility
13 infrastructure created an objectionable condition?
- 14 10. Did Defendants realize, or should they have realized, that the objectionable
15 condition created an unreasonable risk of substantial interference with the use and
16 enjoyment of the class members’ property?
- 17 11. Was the utility of maintaining the objectionable condition and the burden of
18 eliminating the objectionable condition slight compared with the risk?
- 19 12. Did defendants fail to exercise reasonable care to eliminate the risk?
- 20 13. Were Defendants acting under authority of law when they caused damage to class
21 members’ real or personal property?
- 22 14. Was the damage to class members’ property the necessary, certain, predictable, or
23 inevitable result of defendants’ actions?

24 Plaintiffs propose that, following a class-wide trial on these issues, the jury will be asked
25 to resolve the overarching liability questions using a “special verdict in the form of a special
26 written finding upon each issue” under ORCP 61 B. *See also* Principles of the Law of Aggregate

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1 Litigation § 2.03 (2010), Reporter comment (discussing use of special verdicts for issue
2 class trials); *Manual for Complex Litigation (Fourth)* (“Manual”) § 22.755 (2004) (“Use of
3 special verdict forms can provide the specificity necessary for instructing a second jury as to the
4 aspects of the litigation previously resolved.”).¹¹

5 Plaintiffs also propose that during this first phase, the jury hear evidence about and
6 decide the amount of the proposed class representatives’ damages. *See In re Copley Pharm., Inc.*,
7 161 FRD 456, 468-69 (D Wyo 1995) (adopting this approach in issue class case); *Maenner v. St.*
8 *Paul Fire & Marine Ins. Co.*, 127 FRD 488, 492 (WD Mich 1989) (adopting this approach and
9 discussing its benefits). This will not bind other class members, but it will save these
10 representatives parties from a second damages trial and may aid resolution of this matter. *See*
11 *Simon v. Philip Morris Inc.*, 200 FRD 21, 48 (EDNY 2001) (“Assisting in inducing settlement as
12 a result of bifurcation is an appropriate reason for trial courts to utilize this technique.”).
13 Plaintiffs also request that the Court resolve Plaintiffs’ injunctive relief claim at the same time
14 the jury resolves each of the above questions.

15 Assuming the jury finds in favor of the class on enough of the above questions to
16 establish liability, all that will be left for each class member to prove in a subsequent proceeding
17 is the amount of their damages.

18 VII. ARGUMENT

19 PacifiCorp’s liability in this case turns on its overwhelmingly common policies, acts, and
20 omissions. Facing extreme fire conditions statewide, PacifiCorp did not de-energize its
21 equipment anywhere. PacifiCorp failed to act despite knowing a windstorm would hit Oregon
22 during critical fire conditions. PacifiCorp knew its “disturbing” history of vegetation
23 management violations, unsafe equipment and operations, and years of indifference to fire meant
24

25 ¹¹ Alternatively, the Court could certify a subclass for each of the four fires on causation issues
26 as part of a single trial. *See* ORCP 32G.

1 the storm would cause its equipment to ignite uncontrollable fires. PacifiCorp knew or should
2 have known that Plaintiffs and the proposed class would suffer devastating losses as a result.

3 The Court should certify Plaintiffs' proposed class because doing so accords with
4 established class action precedent in Oregon, Part VII.A; because issue classes are an effective
5 tool to help drive resolution of mass tort cases like this one, Part VII.B; and because the
6 proposed class meets the requirements of ORCP 32. Part VII.C.

7 **A. Mass damage class actions are well suited to class treatment.**

8 Oregon courts have long found cases about widespread damage and harm arising from a
9 common course of conduct suitable for class treatment. Over four decades ago, the Oregon
10 Supreme Court concluded that a personal property damage case was "typical of the kind
11 contemplated by the legislature as being proper for a class action." *Hurt v. Midrex Div. of*
12 *Midland Ross Corp.*, 276 Or 925, 930, 556 P2d 1337 (1976).

13 In *Hurt*, the plaintiffs brought a class action against their employer, alleging the
14 employer's emissions at an iron-ore reduction plant were damaging the plaintiffs' cars. *Id.* at
15 927. The Supreme Court reversed the trial court's denial of class certification, concluding the
16 "action is manageable" and would not "impede the usual business of the courts[.]" *Id.* at 930.

17 The Oregon Supreme Court recently affirmed *Hurt* in *Pearson*. 358 Or at 113. In the
18 context of explaining the predominance inquiry, the court contrasted a case like *Hurt*—where
19 common issues predominated—with a case like *Bernard v. First National Bank*, 275 Or at 153,
20 where they do not. *Pearson*, 358 Or at 111-113. In the latter, resolving the key issue would
21 require adjudicating each class members' subjective knowledge of the meaning of a contract
22 term. *Id.* at 111. In *Hurt*, by contrast, variation in individual class members' subjective
23 knowledge was "theoretical" only." *Id.* at 113-14.

24 Since *Hurt* and *Pearson*, numerous Oregon courts have certified class actions involving
25 mass damage, though largely in the analogous pollution context. None, to Plaintiffs' knowledge,
26 have denied certification of such a case. For example, in *Meeker v. Bullseye Glass Co.*, No.

1 16CV07002 (Mult Co Cir Ct Feb 28, 2018) (Bushong, J), the court certified classes of
2 homeowners and renters alleging that the defendant had polluted their properties with “decades
3 of unchecked emissions.” The court certified claims for trespass, negligence, and nuisance.
4 Preusch Decl., Exh. D, Order Regarding Pls.’ Mot. for Class Certification. The Court certified
5 the class despite the defendant’s faulty, premature claims that the plaintiffs had “bad science” or
6 had not proved the “actual presence of Bullseye’s emissions on their property.” Preusch Decl.,
7 Exh. E, Bullseye’s Opp’n to Mot. for Class Certification, 1-2 (Mult Co Cir Ct Jan 21, 2018).

8 Similarly, in *Connors v. Amerities West, LLC*, No. 16CV25390 (Wasco Co Cir Ct 2016),
9 another air pollution case, an Oregon court preliminarily approved a settlement and certified a
10 settlement class under ORCP 32. In that case, the plaintiffs claimed that the defendant’s release
11 of noxious odors invaded the plaintiffs’ properties. The court certified a settlement class for
12 trespass, negligence, and nuisance claims. At the hearing for final approval of the settlement
13 class, the court noted it was “unlikely that a class member could’ve obtained the results
14 individually, given what the likely calculation of damages is versus the cost and expense
15 of getting there [.] A]nd so [a] class [action] really is the only way to do this[.]”¹²

16 **B. Certifying an issues class will materially advance this litigation.**

17 Class certification is even more straightforward here because Plaintiffs are proposing
18 certification for liability only. The certification of the overwhelmingly common liability issues
19 will materially advance this litigation by resolving expert-intensive disputes for all class
20 members once, in one trial.

21 In addition to being codified in ORCP 32, the use of issue classes is a well-recognized
22 case management tool in complex cases. As the Third Circuit noted, the “use of the class action
23 device appears to offer some hope of reducing the expenditure of time and money needed to

24 _____
25 ¹² *Audio: Amerities lawsuit settlement accepted by Circuit Court*, Gorge Country Media at 30:22-
26 36 (Sept. 7, 2018), <https://gorgenewscenter.com/2018/09/07/amerities-lawsuit-settlement-accepted-by-circuit-court/>.

1 resolve the common issues which are of substantial importance.” *In re Sch. Asbestos Litig.*,
2 789 F2d 996, 1010 (3d Cir 1986); *see also* 4 William B. Rubenstein, *Newberg on Class Actions*
3 (“Newberg”) § 4:89, Westlaw (5th ed database updated June 2021) (“The ability to certify issue
4 classes accords the courts discretion to realize the advantages and efficiencies of classwide
5 adjudication of common issues when there also exist individual issues that must be tried
6 separately.”); Manual § 22.751 (“In mass tort litigation, issues classes have been used to
7 establish liability elements, such as general causation, negligence, or breach of warranty.”);
8 Myrian Giles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, GEORGIA L
9 REV, Vol. 53:1305, at 1322 (2019) (discussing “patently obvious efficiency gains that class
10 treatment promises in mass-tort cases”).

11 Applying those principals, courts and commentators regularly recommend that the most
12 sensible separation of issues suitable for class treatment and those requiring individual
13 determination is between liability and damages. As the advisory committee notes to FRCP 23
14 explain, after a class adjudication of liability issues, “the members of the class may thereafter be
15 required to come in individually and prove the amounts of their respective claims.” Fed. R. Civ.
16 P. 23, 1966 Advisory Committee Notes. *See also, e.g.*, Newberg § 11:3 (“In class action cases,
17 this familiar split * * * often enables a case to proceed as a class action by ensuring that the
18 common liability issues predominate while the individualized damages issues are addressed in
19 some other manageable fashion.”); Principles of the Law of Aggregate Litigation § 2.03 (2010)
20 (“Issues of liability are often common across multiple claimants in that they call for the same
21 legal or factual determinations for each claim.”); Myrian Gilles & Gary Friedman, *The Issue*
22 *Class Revolution*, 101 BOSTON U L REV 133, 177 (2021) (“the issue class is well suited to decide
23 enormously consequential liability issues”).

24 That is most true when certification allows class-wide resolution to “upstream” issues
25 focused on a defendant’s conduct, leaving “downstream” issues to subsequent proceedings.
26 Principles of the Law of Aggregate Litigation, Reporter’s Notes, § 2.03; *see also Gunnells v.*

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1 *Healthplan Servs., Inc.*, 348 F3d 417, 426 (4th Cir 2003) (district courts should “take full
2 advantage of the provision in Rule 23(c)(4) permitting class treatment of separate issues to
3 reduce the range of disputed issues in complex litigation”) (internal quotation and citation
4 omitted). For example, the Fifth Circuit affirmed a district court’s certification of an issues class
5 and establishment of a phased trial plan in a case arising from a refinery explosion involving
6 claims by more than 18,000 plaintiffs. *Watson v. Shell Oil Co.*, 979 F2d 1014, 1018 (5th Cir
7 1992), *on reh’g*, 53 F3d 663 (5th Cir 1994). After discussing the need to balance procedural
8 fairness and efficiency in mass tort litigation, the Fifth Circuit affirmed certification because the
9 “class issues to be determined by the Phase 1 jury form integral elements of the claims asserted
10 by each of the more than 18,000 plaintiffs.” *Id.* at 1022.

11 This case calls for a similar resolution: to determine the common issues that are “integral
12 elements” of each class members’ claim in a single proceeding based on common proof.
13 Resolving those issues in one trial will drive the efficient resolution of this action. The
14 alternative—hundreds or perhaps thousands of trials—is not workable.

15 **C. Plaintiffs’ proposed issues class satisfies ORCP 32’s requirements.**

16 Plaintiffs’ proposed issues class satisfies ORCP 32’s requirements because it is
17 sufficiently numerous, presents common questions, will be led by representatives who are free
18 from conflicts and have claims typical of the class, and because an issues class action is the
19 superior method for securing “the just, speedy, and inexpensive determination of” class
20 members’ claims. ORCP 1 B.

21 **1. Numerosity**

22 Under ORCP 32 A(1), the Court must find that “[t]he class is so numerous that joinder is
23 impracticable.” This requirement is typically satisfied at 50 or more members. *See Liborio v. Del*
24 *Monte Fresh Produce N.A.*, No. 0710-11657, 2008 WL 8257750, at *2 (Mult Co Cir Ct Aug 8,
25 2008) (numerosity met where class included more than 50); *Newman*, 287 Or at 50 (class of at
26 least 125 townhouse owners was sufficiently numerous). Here, the class includes the owners or

1 residents of approximately 2,454 private properties across four fires. Joinder is impracticable.
2 The numerosity requirement is satisfied.

3 **2. Commonality**

4 Under ORCP 32 A(2), the Court must find that “[t]here are questions of law or fact
5 common to the class.” This is a low threshold. *See Pearson*, 358 Or at 110 (citing ORCP 32 A)
6 (“Commonality asks only if *there are* questions of law or fact common to the class. It does not
7 test how central the common questions are to the resolution of the action.”) (emphasis in
8 original). This case presents numerous common factual and legal questions that will produce
9 common answers, including the common questions upon which class certification is requested.
10 Further, exploration of PacifiCorp’s wrongful conduct is an issue common to all class members.
11 For example, whether PacifiCorp’s statewide wildfire mitigation planning fell below the standard
12 of care is a statewide issue. *See Collins v. Olin Corp.*, 248 FRD 85, 104 (D Conn 2008)
13 (polluter’s “entire course of conduct and knowledge of its potential hazards is a common
14 issue to the class”); *Bentley v. Honeywell Int’l, Inc.*, 223 FRD 471, 481 (SD Ohio 2004)
15 (“[W]hen defendants’ conduct towards the proposed class is alleged to be uniform, the
16 commonality requirement is met.”). The commonality requirement is satisfied.

17 **3. Typicality**

18 Under ORCP 32 A(3), the Court must find that “[t]he claims or defenses of the
19 representative parties are typical of the claims or defenses of the class.” This requirement is
20 satisfied if the class representatives’ claims “arise[] from the same event *or* practice *or* course of
21 conduct that gives rise to the claims [of the other members of the proposed class,] and [their]
22 claims are based on the same legal theory.” *Newman*, 287 Or at 50 (emphasis added); *see also*
23 *Hanlon v. Chrysler Corp.*, 150 F3d 1011, 1020 (9th Cir 1998) (“representative claims are
24 ‘typical’ if they are reasonably co-extensive with those of absent class members”).

25 Here, Plaintiffs propose to be class representatives for their fellow fire victims. They
26 bring trespass, negligence, gross negligence, nuisance, inverse condemnation, and

1 accounting/injunction claims. These claims arise from PacifiCorp’s practices and course of
2 conduct in failing to adequately plan for wildfires before 2020 and then failing to respond to the
3 critical fire conditions brought about by the statewide storm. The named Plaintiffs’ claims also
4 are based on the same legal theories, as shown by the nearly identical claims in the related *Allen*
5 and *Salter* actions. Pls.’ Mot. to Enter Case Mgmt. Order No. 2 Re: Consolidating Cases and
6 Bifurcating Issues (Oct. 8, 2021). Finally, “The fact that damages may differ among individual
7 plaintiffs or that some plaintiffs may have suffered no damages does not render the claims
8 atypical.” *Alsea Veneer, Inc.*, 117 Or App at 53.

9 Plaintiffs satisfy the Oregon standard for typicality.

10 **4. Adequacy of Representation**

11 ORCP 32 A(4) requires the Court to find that “[t]he representative parties will fairly and
12 adequately protect the interests of the class.” Adequacy is satisfied when “(1) there are no
13 disabling conflicts of interest between the class representatives and the class; and (2) the class is
14 represented by counsel competent to handle such matters.” *Alsea Veneer, Inc.*, 117 Or App at 53.

15 The named Plaintiffs have no “disabling conflicts of interest” with their fellow class
16 members. Everyone shares the same goals: holding PacifiCorp accountable for the damages its
17 actions caused. While a handful of class members may wish to pursue claims for grave personal
18 injury or wrongful death claims, they are free to do so, and may opt out of the proposed class if
19 they deem it necessary to do so. *See Facciola v. Greenberg Traurig LLP*, 281 FRD 363, 370 (D
20 Ariz 2012) (“In some instances, opting not to assert certain claims may be an essential part of
21 adequate representation.”). Plaintiffs are also adequate class representatives because they have
22 invested substantial time prosecuting this case on behalf of the proposed class and will continue
23 to do so, as they attested in their engagement agreements. *See Preusch Decl.*, Exh. F (sample
24 engagement agreement). In addition, Plaintiffs have engaged counsel that are competent to
25 handle this matter. Keller Rohrback L.L.P., Stoll Berne, and Nick Kahl L.L.C. are respected
26 firms with significant experience in class actions and sufficient resources to prosecute this action,

1 which the Court should appoint as Class Counsel. Preusch Decl., Exhs. G, H (firm resumes).
2 Plaintiffs are adequate class representatives.

3 **5. Adequacy of Notice Under ORCP 32 H**

4 Under ORCP 32 A(5), “[i]n an action for damages,” the Court must find that “the
5 representative parties have complied with the prelitigation notice provisions of Section H of this
6 rule.” While Plaintiffs are not now seeking to certify a damages class, Plaintiffs nonetheless
7 provided that notice. *See* Preusch Decl., Exh. K (notice letter).

8 **6. Superiority Under ORCP 32 B**

9 A court may certify a class if it finds “that a class action is superior to other available
10 methods for the fair and efficient adjudication of the controversy.” ORCP 32 B. There are eight
11 factors “pertinent” to the Court’s superiority analysis, none of which are controlling. *See* ORCP
12 32 B; *Pearson*, 358 Or at 106. Those factors are: (a) the risk of inconsistent adjudication and/or
13 whether adjudication as a class action would be dispositive of or substantially impair the
14 interests of absent class members; (b) whether the relief sought takes the form of class-wide
15 injunctive relief; (c) whether common questions of law or fact predominate; (d) whether class
16 members have any individual interest in prosecution and control; (e) whether there is any well-
17 developed litigation concerning the case; (f) the desirability of the forum; (g) management
18 difficulties created by the class action; and (h) whether the complexity and expense of the
19 litigation means that the claims of individual class members are not feasible outside of the class
20 mechanism. All eight factors favor a finding of superiority.

21 **a. *The risk of inconsistency and potential to impair interests of absent class***
22 ***members support finding superiority.***

23 ORCP 32 B(1) directs courts to consider the degree to which separate actions create a
24 risk of inconsistent adjudications and incompatible standards (particularly for defendants). If the
25 Court finds that such a risk exists, it favors finding a class action superior.

1 That risk exists in cases like this, as the Advisory Committee to Federal Rule of Civil
2 Procedure 23 noted: “individual litigations * * * of landowners’ rights and duties respecting a
3 claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against
4 a class provide a ready and fair means of achieving unitary adjudication.” FRCP 23, 1966
5 advisory committee note. Here, for the same reasons that consolidation is merited, a class action
6 is superior: multiple, parallel cases all regarding the Labor Day Fires risks inconsistent
7 adjudications and potentially inconsistent injunctive relief orders governing PacifiCorp’s
8 operations. *See Boggs v. Divested Atomic Corp.*, 141 FRD 58, 67 (SD Ohio 1991) (multiple
9 actions regarding defendants’ conduct “entirely conceivable that different remedial orders would
10 contain incompatible provisions”).

11 ORCP 32 B(1) also directs courts to consider “[t]he extent to which the prosecution of
12 separate actions by or against individual members of the class creates a risk of * * *
13 adjudications with respect to members of the class which would as a practical matter be
14 dispositive of the interests of the other members not parties to the adjudications or substantially
15 impair or impede their ability to protect their interests.” If a court finds that adjudicating claims
16 separately would be dispositive of certain absent party interests, it favors finding superiority and
17 certifying a class. Here, the prospect that Plaintiffs could pursue punitive damages could as a
18 practical matter diminish PacifiCorp’s ability to pay all claims without bankruptcy proceedings.
19 *See State ex rel. Young v. Crookham*, 290 Or 61, 72, 618 P2d 1268 (1980) (“class actions, in
20 appropriate cases, provide for unitary consideration of [punitive] damages”); *In re N. Dist. of*
21 *California Dalkon Shield IUD Prods. Liab. Litig.*, 526 F Supp 887, 895-96 (ND Cal 1981)
22 (defendant moved for punitive damages class to protect from “prejudice caused by the filing of
23 multiple suits” and the possibility of bankruptcy). Just two years ago, utility company PG&E

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25 ////

26 ////

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1 filed for bankruptcy in response to massive liability it faced from wildfire victims.¹³ The
2 presence of that same risk here merits a unitary proceeding.

3 For these reasons, this factor favors finding superiority.

4 **b. *The relief sought takes the form of class-wide injunctive relief.***

5 ORCP 32 B(2) directs courts to consider “[t]he extent to which the relief sought would
6 take the form of injunctive relief or corresponding declaratory relief with respect to the class as a
7 whole.” If a court finds that the relief sought will take the form of such relief, it favors finding a
8 class action superior.

9 This factor parallels FRCP 23(b)(2) class actions. Numerous federal courts have certified
10 classes under Rule 23(b)(2) seeking class-wide injunctive relief in nuisance or property damage
11 cases. *See, e.g., O’Connor v. Boeing N. Am., Inc.*, 184 FRD 311, 332 (CD Cal 1998) (certifying
12 class of residents who lived near testing facility seeking injunctive relief under Rule 23(b)(2));
13 *McMillon v. Hawaii*, 261 FRD 536, 547 (D Haw 2009) (certifying plaintiff class of low-income
14 public housing tenants seeking injunctive relief to remedy nuisance conditions in their
15 complexes).

16 Here, Plaintiffs’ operative complaint seeks an order requiring PacifiCorp to de-energize
17 power lines during extremely critical fire conditions and “requiring Defendants to use tools and
18 technologies to mitigate the risk of fire” in Oregon. Am. Compl. ¶¶ 254-55. This relief would
19 apply equally to the class as a whole.

20 This factor therefore supports a finding of superiority.

21 **c. *Predominance favors superiority.***

22 ORCP 32 B(3) directs courts to consider “[t]he extent to which questions of law or fact
23 common to the members of the class predominate over any questions affecting only individual

24 _____
25 ¹³ PG&E, *News Release: PG&E Files Joint Chapter 11 Plan of Reorganization* (Sept. 9, 2019),
26 https://www.pge.com/en/about/newsroom/newsdetails/index.page?title=20190909_pge_files_joint_chapter_11_plan_of_reorganization.

1 members.” As the Oregon Supreme Court explained, “[i]n practical terms, the inquiry is
2 designed to determine if proof as to one class member will be proof as to all[.]” *Pearson*, 358 Or
3 at 111; *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S Ct 1036, 1045, 194 L Ed 2d 124 (2016)
4 (common issues predominate when “the same evidence will suffice for each member [of a class]
5 to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof”)
6 (internal quotations omitted). Unlike class certification under Federal Rule of Civil Procedure
7 23(b)(3), however, predominance is not required under ORCP 32—it is one factor of eight to
8 consider. *Pearson* 358 Or at 106 (“Neither the ‘predominance’ factor nor any of the other seven
9 * * * is controlling.”). ORCP 32 does not require “predominance as a sine qua non of
10 certification of any class.” *Migis v. Autozone, Inc.*, 282 Or App 774, 786, 387 P3d 381 (2016).

11 Here, Plaintiffs’ common proof for the proposed issues generally falls into two
12 categories: Evidence that PacifiCorp’s fire mitigation work fell below the standard of care
13 (“liability”), and evidence that PacifiCorp’s actions caused or contributed to the spread of the
14 fires (“causation”).

15 (i) Plaintiffs’ Common Proof of Liability

16 Any plaintiff seeking to prove their claim against PacifiCorp would rely on the same
17 evidence that PacifiCorp failed to plan for fires, and—when a forecasted windstorm arrived—
18 failed to act. That common liability proof should be tried once, in a class issue trial.

19 Plaintiffs’ negligence claim is illustrative of this point. Courts commonly certify
20 negligence claims in mass harm cases because common questions focused on the tortfeasor’s
21 conduct predominate over any individual issues. *See Turner v. Murphy Oil USA, Inc.*, 234 FRD
22 597, 607 (ED La 2006) (extent of contamination on particular property “do[es] not require the
23 type of extensive individualized proof that would preclude class treatment of the negligence
24 claim.”); *Collins*, 248 FRD at 104 (negligence claim certified where defendant’s “entire course
25 of conduct and knowledge of its potential hazards is a common issue to the class”); *Wehner v.*
26 *Syntex Corp.*, 117 FRD 641, 645 (ND Cal 1987) (certifying negligence claim); *Stanley v. U.S.*

1 *Steel Co.*, 04-74654, 2006 WL 724569, at *4-6 (ED Mich Mar 17, 2006) (same).

2 Here, any plaintiff could use the same evidence—and same expert testimony—to prove
3 that PacifiCorp’s acts and omissions fell below the standard of care, creating a foreseeable harm.
4 That includes PacifiCorp’s failure to keep trees sufficiently clear from power lines even though
5 PacifiCorp had a “duty to foresee any contingency that reasonable foresight could anticipate.”
6 *Sullivan v. Mountain States Power Co.*, 139 Or 282, 297, 9 P2d 1038 (1932). As *Sullivan*—a
7 case about a tree falling on a power line and starting a fire—explained, utilities must “exercise a
8 very high degree of care and prudence because of the dangers which lurk in electricity.” *Id.* at
9 299. Evidence that PacifiCorp’s policies fell below that standard is common to the class.

10 Plaintiffs’ nuisance claims are likewise resolved by common proof. That is because
11 nuisance is governed by an objective standard: Whether a condition constitutes a nuisance
12 depends on its effect on “a normal person of ordinary habits and sensibilities” in the community
13 and his or her use and enjoyment of their land, not on the subjective experiences of one person or
14 another. *Penland v. Redwood Sanitary Sewer Serv. Dist.*, 156 Or App 311, 315, 965 P2d 433
15 (1998) (quoting *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 476, 575 P2d 164 (1978)); *see*
16 *also Restatement (Second) of Torts* § 821F (1979) at comment d (“If normal persons living in the
17 community would regard the invasion in question as definitely offensive, seriously annoying or
18 intolerable, then the invasion is significant.”).

19 Because Plaintiffs’ nuisance claims turn on this objective standard, they are susceptible to
20 common proof, and do not depend on the individual experiences of any particular plaintiff. The
21 question a jury will answer at the end of the trial is whether a “normal person of ordinary habits
22 and sensibilities” in the community would have the use and enjoyment of their land affected by
23 the Labor Day Fires. *See Restatement (Second) of Torts* § 821F (1979) at comment d; *Freeman v.*
24 *Grain Processing Corp.*, 895 NW2d 105 122 (Iowa 2017). That is a question that can be
25 answered with common proof, be it expert testimony about the extent of the fire, eyewitness
26 accounts, or photos or videos. Because that question can be answered with common evidence, it

1 is properly tried on a class basis. *See O'Connor*, 184 FRD at 331-32 (holding that whether
2 defendants' alleged activities constituted a nuisance was common to all members of proposed
3 class, even if damages may vary for each individual class member); *Rowe v. E.I. DuPont De*
4 *Nemours & Co.*, 262 FRD 451, 462 (DNJ 2009) ("Plaintiff's private nuisance claim is
5 appropriate for class treatment. The issues relating to this claim turn on the conduct of Defendant
6 and the objective perception of a 'normal person' in the community rather than the conduct and
7 perceptions of the individual class members.").

8 Similarly, the common liability issues will predominate for Plaintiffs' trespass claim
9 because the key issue for that claim is the geographic spread of the fires, an issue that will be
10 resolved with evidence common to all class members. In Oregon, the spread of fire onto property
11 constitutes a trespass. *Martin v. Union Pac. R. Co.*, 256 Or 563, 565, 474 P2d 739 (1970). In an
12 issue class trial, both sides will present the same evidence of ignitions and fire spread to prove—
13 or rebut—the scope of the fires. That is why courts routinely certify trespass claims in pollution
14 cases, where the overriding common issue is the scope of the pollution. *E.g., Hurt*, 276 Or at 925
15 (certifying class despite defendant's argument that individual defenses would require separate
16 adjudications); *Turner*, 234 FRD at 609 (nuisance and trespass claims "will not require the Court
17 to inquire extensively into individual cases for proof of liability").

18 Finally, common issues will predominate on the liability portion of Plaintiffs' inverse
19 condemnation claim. The answer to whether PacifiCorp was acting under authority of law when
20 its equipment caused these fires is either yes or no, for all class members. And answering
21 whether the damage to class members' property was the necessary, certain, predictable, or
22 inevitable result of PacifiCorp's actions will require a review of the same fire conditions, same
23 internal PacifiCorp records, and same state-wide wind forecast that would be at issue in any
24 individual trial.

1 **(ii) Plaintiffs’ Common Proof of Causation**

2 Plaintiffs’ common proof of causation is in most cases straightforward: PacifiCorp
3 contributed to or caused a fire, and that fire affected class members.

4 For example, as Ms. Brewer explains, for three of the fires in the putative class—Echo
5 Mountain, 242, and South Obenchain—there is evidence that PacifiCorp’s electrical equipment
6 ignited the fire at a discreet location or locations. Any class member harmed by those fires would
7 need to present this evidence to establish PacifiCorp caused the fire, and that proof likewise
8 applies to all class members in that fire. For the Santiam Canyon fire, there is evidence of over a
9 dozen electrical ignitions in the Santiam Canyon that appear to be caused by PacifiCorp. All
10 those ignitions eventually contributed to and merged into one conflagration. Any person in the
11 path of the fire could use the same evidence, about the same ignitions, to prove that PacifiCorp
12 caused *or* contributed to the spread of fire in the canyon.

13 **d. *The lack of individual interest in controlling separate actions favors***
14 ***superiority.***

15 ORCP 32 B(4) directs courts to consider the “interest of members of the class in
16 individually controlling the prosecution or defense of separate actions.” If the Court finds that
17 there is no such interest, it favors finding superiority and certifying the class. Here,
18 Plaintiffs’ proposal to certify an issues class accounts for the interest of individual class members
19 in controlling their ultimate recovery. Additionally, should any fire victim be interested in
20 pursuing clearly distinct claims, like wrongful death, he or she is free to do so. This factor favors
21 superiority.

22 **e. *The extent and nature of the litigation favors superiority.***

23 ORCP 32 B(5) directs courts to consider the “extent and nature of any litigation
24 concerning the controversy already commenced by or against members of the class.” There is a
25 paucity of case law on this factor. However, one court has cited this factor as a basis for denying
26 certification when the attorneys involved were pursuing “essentially the same claim” against the

1 same defendants in numerous other cases. *Lowdermilk v. U.S. Bank National Ass’n*, No. A0603-
2 03335, 2008 WL 4281960 (Mult Co Cir Aug. 04, 2008). Unlike the situation in *Lowdermilk*,
3 Plaintiffs and their attorneys here are not pursuing “essentially the same claim” against
4 PacifiCorp in other cases. Rather, they have endeavored to consolidate their actions and propose
5 the common issues for class treatment. For this reason, this factor favors finding a class action
6 superior.

7 **f. *The desirability of the forum favors superiority.***

8 Under ORCP 32 B(6), courts evaluate superiority based on the “desirability or
9 undesirability of concentrating the litigation of the claims in the particular forum.” Oregon courts
10 recognize that a “single adjudication * * * is preferable to piecemeal litigation and potentially
11 inconsistent awards.” *See generally, Alsea Veneer*, 117 Or App at 55 (discussing this preference
12 in the context of predominance analysis).

13 Here, it makes sense to concentrate the Labor Day fires litigation in Multnomah County,
14 where PacifiCorp is based. As described in Plaintiffs’ motion for entry of CMO No. 2,
15 all the cases against PacifiCorp—except for one in Douglas County regarding a fire not subject
16 to this Motion—are already pending here. PacifiCorp’s key witnesses are all here. And, despite
17 PacifiCorp’s fruitless—and now finally rejected—effort to transfer this case out of
18 Multnomah County, PacifiCorp’s counsel requested that Plaintiffs from around the state be
19 forced to travel here for depositions. Preusch Decl., Exh. J (Ellen Kenney Aug. 30 email).¹⁴

20 This forum is desirable and weighs in favor of finding superiority.

21 **g. *Manageability favors superiority.***

22 ORCP 32 B(7) asks courts to analyze superiority by looking at the “difficulties likely to
23 be encountered in the management of a class action that will be eliminated or significantly
24

25 ¹⁴ Plaintiffs object to this request and maintain that remote depositions are the most practicable
26 and safest course.

1 reduced if the controversy is adjudicated by other available means.” This inquiry is often
2 referred to as “manageability.”

3 The manageability inquiry balances the potential efficiencies gained from aggregation
4 against litigating cases on an individual basis. *See Hurt*, 276 Or at 930 (manageability looks to
5 whether trying the class action as proposed would “impede the usual business of the courts”);
6 *Alsea Veneer, Inc.*, 117 Or App at 55 (even where a class is large, “a single administration is
7 undoubtedly less difficult” than processing individual claims).

8 Aggregating Plaintiffs’ claims in this forum is more efficient than addressing them
9 piecemeal: Plaintiffs propose to deal with the common issues of hundreds—if not thousands—of
10 class members’ claims against PacifiCorp in one proceeding, using the same theories, supported
11 by the same expert evidence, applying Oregon law, and common proof. Doing so will benefit the
12 courts while adhering to substantive and procedural law, because Plaintiffs offer common
13 evidence to prove their substantive claims and ORCP 32’s other procedural requirements, and
14 because PacifiCorp will be able to individually challenge the amount of each class member
15 claim.¹⁵

16 The efficiencies gained from aggregation coupled with Plaintiffs’ adherence to the
17 substantive and procedural requirements for certifying their class claims shows that this class
18 action is manageable and, therefore, superior to other methods of adjudicating Plaintiffs’ claims.

19 **h. *The complexity and expense of the litigation favors superiority.***

20 ORCP 32 B(8) asks “[w]hether or not the claims of individual class members are
21 insufficient in the amounts or interests involved, in view of the complexities of the issues and the
22 expenses of the litigation, to afford significant relief to the members of the class.” This factor
23 focuses primarily on whether the potential recovery for class members so small, that the only
24 true benefactors of the litigation are the attorneys. *See generally, Bernard*, 275 Or at 151-52

25 ¹⁵ Plaintiffs maintain that a class could be certified for all purposes here but have proposed an
26 issues class here to respond to the particular case management needs of this litigation.

1 (discussing history of class actions in Oregon, focusing on relationship between Oregon’s rules
2 and the American College of Trial Lawyers, *Report and Recommendations of the Special*
3 *Committee on Rule 23 of the Federal Rules of Civil Procedure* (1972)). Here, while Plaintiffs’
4 and class members’ claims are by no means small, the legal and factual issues that attend those
5 claims will require the use of multiple experts. Except perhaps in cases of grievous personal
6 injury or wrongful death, prosecuting such expert-intensive and meritorious claims would be
7 prohibitively expensive to employ on an individual basis. This final factor also favors a finding
8 of superiority.

9 Because all the superiority factors favor class certification, and because Plaintiffs satisfy
10 the various threshold requirements, the Court should certify the class.

11 **D. Plaintiffs’ proposed notice plan exceeds ORCP 32’s standards.**

12 When a court certifies a class, it must “direct that notice be given to some or all members
13 of the class under [ORCP 32 E(2)],” determine the time and form of notice, and determine the
14 requirements for opting out of the class. ORCP 32 F(1). Plaintiffs’ expert Cameron Azari
15 explains how notice could be designed in this case using direct mail, paid media, and social
16 media “to reach virtually the entire Class and provide them with information necessary to
17 understand their rights and options.” Preusch Decl., Exh. C, Azari Decl., ¶ 23.

18 **VIII. CONCLUSION**

19 Certifying an issues class is the most efficient and fair means for resolving the claims of
20 thousands of fire victims. The Court should grant this Motion.

21 Dated this 27th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a correct copy of the foregoing **PLAINTIFFS'**
MOTION FOR ISSUES CLASS CERTIFICATION on the following named person(s) on the
date and manner indicated below, addressed to said person(s) at the address of each shown below
per UTCR 21.100 as follows:

Alison Plessman	<input type="checkbox"/> By Hand Delivery
Marshall A. Camp	<input type="checkbox"/> By Overnight Delivery
Ellen C. Kenney	<input type="checkbox"/> By Facsimile Pursuant to ORCP 9 F
Hueston Hennigan LLP	<input type="checkbox"/> By U.S. Mail with postage prepaid
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