PAC_256.07.138

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

TAMARA SPARKS, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR NICOLAUS BELMONTES AND MYA BELMONTES; KIRSTYN ZELLER, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR RYAN ZELLER AND LILLIAN ZELLER; CHARLES ZELLER; SUSAN LANE; JIM LANE; KAYDEN G. WRIGHT; BRIAN HOLLIBAUGH; FRANK KING; MICHELLE WHITNEY; CLAYTON ERWAY, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR HAWTHORNE SANDERS AND SHEPARD SANDERS; PATRICIA ERWAY; JESSICA SANDERS; DONNA GUARRERA, INDIVIDUALLY AND AS TRUSTEE OF THE GUARRERA FAMILY TRUST; LAURA SWEITZ; KERRY SWEITZ; KATHLEEN KELLEY; BREANNA SCHAFF, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR TYLIN KENDRICK, AUBREE SCHAFF AND HUNTER SCHAFF; CALGARY KENDRICK; GARY STICKROD, JR.; SUNTARA BEACHY; GARY VERTNER; JO VERTNER; TAUNYA VERTNER; AQUA TILLMAN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR QUINCY MARTINEZ, JR. AND AQUA MARTINEZ AND CO- GUARDIAN AD LITEM FOR RAVEN BELGARD, KENJI BELGARD, HUILEN BELGARD AND KHALIL BELGARD; BENNIE BELGARD INDIVIDUALLY AND AS CO GUARDIAN AD LITEM FOR RAVEN BELGARD, KENJI BELGARD, HUILEN BELGARD AND KHALIL BELGARD; TERESA ALLEN; JOHN ALLEN; ASHLEY TIETZ-OLEMAN INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR DAKOTA TIETZ OLEMAN; and CHRISTOPHER OLEMAN,	No. 21CV48022 DEFENDANTS PACIFICORP AND PACIFIC POWER'S PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES Fee Authority: (ORS 21.160(1)(e)) (Telephonic Oral Argument Requested)

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Plaintiffs,

v.

PACIFICORP, an Oregon corporation; PACIFIC POWER, an Oregon registered electric utility, and assumed business name of PACIFICORP; DOES 1-220 inclusive,

Defendants.

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for this motion under UTCR 5.010 because this motion seeks dismissal for failure to state a claim. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 30 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

PacifiCorp moves to dismiss Claims 1 ("Wildfire Liability – ORS 477.089") and 4 ("Trespass – ORS 105.815") for failure to state a claim under ORCP 21 A(8).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the 2020 Labor Day weekend, an unprecedented windstorm ignited dozens of wildfires across Oregon. This case relates to two fires that ignited in Lincoln County: the Echo Mountain and Kimberling fires (collectively, the "Echo Mountain Complex Fires"). Government authorities and PacifiCorp are still actively investigating the Echo Mountain Complex Fires, and their causes and origins have not yet been determined. Regardless, Plaintiffs allege that PacifiCorp's electrical equipment caused or contributed to the Echo Mountain Complex Fires. Plaintiffs seek $100 million in damages based on five claims: (1) "wildfire liability" under ORS 477.089; (2) negligence; (3) trespass; (4) timber trespass under ORS 105.815; and (5) nuisance.

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PacifiCorp brings this motion to dismiss Plaintiffs' first and fourth statutory claims because they both fail as a matter of law.

First, Plaintiffs' claim for "wildfire liability" under ORS 477.089 fails because that statute does not create a private right of action. Indeed, ORS 477.089(5) explicitly states that "[t]his section does not create a new cause of action or alter any existing cause of action." Moreover, the legislative history makes clear that the legislative intent behind ORS 477.089 was to "[p]rescribe damages allowed in the event of wildfire on public or private * * * forest land," not to create a right of action. (Ramfjord Decl., Exs. 2 at 1, 3 at 1.) And finally, there is no basis to infer that ORS 477.089 creates any such private right of action. To make such a determination, Oregon courts focus on two factors: (1) "whether the statute refers to civil liability in some way," and (2) "whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore, there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle v. City of Medford*, 356 Or 336, 345–46, 337 P3d 797 (2014). Here, while ORS 477.089 refers to damages, it expressly states in subsection (5) that it does *not* create a private right of action. Nor is there any need for a new private right of action because plaintiffs can assert common law claims for negligence, nuisance, and trespass, which is exactly what Plaintiffs have done in this case.

Second, Plaintiffs' claim for timber trespass damages under ORS 105.815 fails because that statute does not apply to property damages caused by wildfire. Such claims are governed by Oregon's wildfire damages statutes, ORS 477.089 and 477.092. Again, this is clear from the relevant statutory text. On its face, ORS 105.815 only applies to damages in "the trial of an action included in ORS 105.810," Oregon's primary timber trespass statute. ORS 105.815(1). That statute, in turn, specifically excludes claims governed by Oregon's wildfire damages statutes, ORS 477.089 and 477.092. ORS 105.810(1). Here, because

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Plaintiffs have not pleaded a claim under ORS 105.810, Plaintiffs cannot seek damages under ORS 105.815 and their claim under that provision necessarily fails.

For all these reasons, explained more fully below, Plaintiffs' statutory claims fail as a matter of law. An order granting this motion will still leave Plaintiffs with their remaining common law claims and thus with more than ample opportunity to seek recovery for the losses Plaintiffs allege.

II. BACKGROUND

A. PacifiCorp's Operations

PacifiCorp Defendants deliver electricity to approximately 773,000 customers in Oregon, Washington, and Northern California. In Oregon, PacifiCorp Defendants serve around 596,000 customers under the Pacific Power brand.

B. The Echo Mountain Complex Fires

Plaintiffs allege that the Echo Mountain Complex Fires resulted from two separate fire ignitions in Lincoln County on September 7, 2020. (Am. Compl. ¶ 32.) First, Plaintiffs allege that the Kimberling Fire ignited on Kimberling Road before spreading down Highway 18. (*Id*.) Second, Plaintiffs allege that the Echo Mountain Fire ignited "near a power pole on the road." (*Id*.)

The Echo Mountain Complex Fires burned approximately 2,500 acres. (Am. Compl. ¶ 5.) Plaintiffs claim that they suffered significant damages as a result of the fires, including the loss of real and personal property. (Am. Compl. ¶ 35.)

C. Plaintiffs' Claims

Plaintiffs bring five claims: (1) "wildfire liability" under ORS 477.089 (Am. Compl. ¶¶ 36–40); (2) negligence (Am. Compl. ¶¶ 41–46); (3) trespass (Am. Compl. ¶¶ 47–52); (4) timber trespass under ORS 105.815 (Am. Compl. ¶¶ 53–57); and (5) nuisance (Am. Compl. ¶¶ 58–65). Plaintiffs seek several forms of damages. For the common law negligence, trespass, and nuisance claims, Plaintiffs seek special and compensatory damages,

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attorneys' fees, and prejudgment interest, among other things. For the "wildfire liability" claim (Claim 1), Plaintiffs seek double damages under ORS 477.089. (Am. Compl. ¶ 66.) And for the timber trespass claim (Claim 4), Plaintiffs seek double economic damages, double reforestation and replanting costs, and litigation costs including attorneys' fees. (*Id*.)

III. ARGUMENT – ORCP 21 A(8) MOTIONS TO DISMISS

A. Legal Standard

To avoid dismissal, a complaint must state ultimate facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(8). Conclusory allegations, legal conclusions, or mere recitations of a claim's elements are insufficient to state a claim. *See*, *e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997) (citations omitted). When a claim as pleaded remains legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988). Similarly, where a statute does not provide a private right of action, dismissal under ORCP 21 A(8) is appropriate. *Deckard v. Bunch*, 358 Or 754, 757, 793, 370 P3d 478 (2016).

B. Plaintiffs' Claim for Relief Based on ORS 477.089 Fails as a Matter of Law Because That Statute Does Not Create a Private Right of Action.

Plaintiffs' claim for "wildfire liability" under ORS 477.089 fails under the plain text of the statute, which states that "[t]his section does not create a new cause of action or alter any existing cause of action." ORS 477.089(5). The Court need not go any further to dismiss Plaintiffs' first claim.

The relevant legislative history confirms that ORS 477.089 does not create a private right of action. ORS 477.029 was enacted as part of Senate Bill 709 (2013) ("SB 709"), introduced in response to claims brought against a landowner arising from the Moonlight

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Fire in California. (Ramfjord Decl., Ex. 2 at 1, Ex. 3 at 1, Ex. 5 at 1.) SB 709's purpose was to "clarif[y] how to calculate damages in the event of a wildfire in an effort to provide certainty to landowners. (*Id*. Ex. 2 at 1, Ex. 3 at 1.) To that end, Section 2 of SB 709 (which became ORS 477.089) clarified the types of damages available "in a civil action for property damage caused by a wildfire." (*See id.* Ex. 1 at 1-2; ORS 477.089(2).) In providing that clarification, however, the legislature made clear that it was not creating any new cause of action, but only "[p]rescrib[ing] damages allowed in the event of wildfire on public or private * * * forest land" (ORS 477.089). (*Id*. Exs. 2, 3.)

Nor is there any basis for this Court to infer a private right of action from the text of ORS 477.089. To establish that a statute creates a right of action, Plaintiffs must show that "(1) a statute imposed a duty on the defendant; (2) the legislature expressly or impliedly intended to create a private right of action for violation of the duty; (3) the defendant violated the duty; (4) the plaintiff is a member of the group that the legislature intended to protect by imposing the duty; and (5) the plaintiff suffered an injury that the legislature intended to prevent by creating the duty." *Deckard*, 358 Or at 759–60. Because Plaintiffs cannot possibly satisfy the second of these requirements, they cannot show that ORS 477.089 was intended to "expressly or impliedly * * * create a private right of action." *Id*.

To determine whether the legislature intended to create a cause of action, Oregon courts look to two factors: (1) "whether the statute refers to civil liability in some way," and (2) "whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore, there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle*, 356 Or at 345-46. As the Supreme Court has noted, however, those factors are "neither exclusive nor talismanic" and "in some instances * * * may not advance the analysis very far." *Deckard*, 358 Or at 760. As a result, the ultimate touchstone remains a "careful examination of the statutory text, context, and legislative history." *Id*.

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Looking at the first of these two factors here: although ORS 477.089 refers to civil liability, it also expressly states that it "does not create a new cause of action or alter any existing cause of action." ORS 477.089(5). It is hard to imagine a clearer expression that the legislature *did not* intend to create a cause of action by enacting ORS 477.089. And when the "legislature's intent is obvious" from the "text and context of the statute * * * 'further inquiry is unnecessary.'" *State v. Gaines*, 346 Or 160, 164, 206 P3d 1042 (2009) (quoting *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993)).

Even if the statutory text and legislative history were not dispositive (they are), Plaintiffs also cannot satisfy *Doyle*'s second factor: whether "there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle*, 356 Or at 345-46. Plaintiffs' complaint suggests that Plaintiffs believe that they may only use ORS 477.089's double damages provision (ORS 477.089(2)(b)) by pleading a statutory claim; Plaintiffs seek double economic and property damages in Claim 1, which is the statutory claim for violation of ORS 477.089, but not in Claims 2, 3, or 5, which are the common law claims for negligence, nuisance, and trespass. (Am. Compl. ¶ 66.) But ORS 477.089 provides the measure of damages in *any* "civil action for property damage caused by a wildfire." ORS 477.089(2). Dismissing Plaintiffs' improper statutory claim will thus not preclude Plaintiffs from seeking recovery under the statute in connection with those common law claims, provided that Plaintiffs (or PacifiCorp) demonstrate that this action meets the statutory definition of a "wildfire." *See* ORS 477.089(1)(e), (2), (4). Because Plaintiffs retain the ability to seek statutory damages through their common law claims, dismissing Plaintiffs' ORS 477.089 claim does not leave them without a remedy for the enhanced damages provided by the statute.

Recently, Judge Johnson of the Douglas County Circuit Court was faced with near-identical claims under Oregon's wildfire statutes and twice ordered dismissal—the second time, with prejudice. Plaintiffs in *Goforth v. PacifiCorp* (formerly captioned *Strader v.*

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PacifiCorp) initially brought a claim under the companion statute to ORS 477.089, ORS 477.092. Judge Johnson determined that "ORS 477.092 does not create a separate cause of action, but merely sets forth the evidentiary standard and method of calculating economic damages for common law claims such as negligence that remain available to Plaintiffs." (Ramfjord Decl., Ex. 6 at 3.) Nevertheless, Judge Johnson gave *Goforth* Plaintiffs leave to replead, and Plaintiffs instead brought a statutory claim under the entirety of "ORS Chapter 477," including ORS 477.064 and ORS 477.089. Judge Johnson again dismissed that claim. (Ramfjord Decl., Ex. 7 at 4.) The same result should follow here. If anything, ORS 477.092 presented a stronger case for statutory liability because—unlike Plaintiffs' claim under ORS 477.089—it does not explicitly say "[t]his section does not create a new cause of action or alter any existing cause of action." ORS 477.089(5). Because ORS 477.089 does not create a cause of action, Plaintiffs' first claim fails.

C. Plaintiffs' Claim for Timber Trespass Under ORS 105.815 Fails Because This Is Not an "Action Included in ORS 105.810"

Plaintiffs' second statutory claim for damages under ORS 105.815 fails for a different reason: ORS 105.815 only applies "upon the trial of an action included in ORS 105.810," Oregon's primary timber trespass statute. ORS 105.815(1). ORS 105.810, in turn, specifically excludes claims governed by Oregon's wildfire damages statutes, ORS 477.089 and 477.092. ORS 105.810(1). Here, given that Plaintiffs' claims are subject to ORS 477.089 and 477.092, they have not pleaded and cannot legitimately plead a claim under ORS 105.510. As a result, there is no basis for Plaintiffs to assert a claim under and ORS 105.815 and their second statutory claim should be dismissed.

This conclusion follows directly from the text of ORS 105.810 and ORS 105.815. The first of these provisions, ORS 105.810, provides for a cause of action for timber trespass and defines the context of the timber trespass tort; a timber trespass occurs "whenever any person, without lawful authority, willfully injures or severs from the land of another any

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produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub" on a variety of types of land. ORS 105.810(1). Actions under ORS 105.810 provide treble damages. *Id*. But ORS 105.810 specifically excepts cases governed by "ORS 477.089 and 477.092[.]" ORS 105.810(1). The reason for that exception is that ORS 477.089 provides "exclusive remedies for damages or injury to property caused by a wildfire" (ORS 477.089(4)). In other words, when ORS 477.089 applies, ORS 105.810's treble damages provision does not.

ORS 105.815, in turn, reduces the damages available for certain claims under ORS 105.510. It states that, "upon the trial of an action included in ORS 105.810," if the evidence shows that the trespass was "casual or involuntary," the resulting damages should be doubled, rather than trebled as they would be for willful trespasses. ORS 105.815(1). As the Court of Appeals recently explained, the measure of damages in a timber trespass case thus depends on whether the trespass was willful (in which case damages are treble under ORS 105.810) or "casual or involuntary" (in which case damages are double under ORS 105.815). *See Simington Gardens, LLC v. Rock Ridge Farms, LLC*, 308 Or App 661, 669, 481 P3d 396 (2021) ("[W]hether the plaintiff's damages are doubled or trebled will depend on whether that injury was willful.").

Here, given that Plaintiffs have not brought a claim under ORS 105.510 (and are precluded from doing so), ORS 105.515 is inapplicable on its face. Moreover, given that it is essentially a damages-limiting statute, ORS 105.515 does not create a freestanding cause of action separate and apart from ORS 105.510. Consistent with this fact, plaintiffs do not typically bring claims based on ORS 105.515 alone, but plead them simultaneously with claims under ORS 105.810. *See, e.g.*, *Wyatt v. Sweitz*, 146 Or App 723, 735, 934 P2d 544 (1997) (timber trespass pleaded as two counts, one for ORS 105.810, and one for ORS 105.815); *Bergman v. Holden*, 118 Or App 530, 532, 848 P2d 141 (1993) (same). PacifiCorp is aware of only one case suggesting that a Plaintiff may have brought a freestanding claim

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under ORS 105.815. *See Harshbarger v. Klamath County*, 294 Or App 631, 633, 432 P3d 363 (2018) ("Plaintiff sued the county for nuisance, ORS 105.505, and timber trespass, ORS 105.815."). But *Harshbarger* is distinguishable because there is no indication that the plaintiff's claims were governed by ORS 477.089 and ORS 477.092 as they are here, so there was no impediment to applying ORS 105.810—indeed, the trial court awarded attorneys' fees under ORS 105.810 clearly suggesting that it considered the action as falling under that statue. *Id*.

IV. CONCLUSION

Plaintiffs' two statutory claims have fatal flaws. Claim 1 (ORS 477.089) fails because that statute does not create a cause of action; the legislature explicitly stated that ORS 477.089 "does not create a new cause of action or alter any existing cause of action." ORS 477.089(5). Claim 4 (ORS 105.815) fails because this is not an "action under ORS 105.810"; Plaintiffs have not pled a claim under that section and are precluded from doing so. Because Plaintiffs' claims under ORS 477.089 and ORS 105.815 fail as a matter of law, the Court should dismiss them with prejudice.

DATED: February 11, 2022.

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/s/ Per A. Ramfjord

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' PACIFIC POWER AND PACIFICORP'S PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DAMAGES** on the following named person(s) on the date indicated below by

☒ mailing with postage prepaid.	☐ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.
☐ overnight delivery.	☒ eService via Odyssey File & Serve (on local counsel only).

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

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DATED: February 11, 2022.

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PAC_256.07.139

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

SEAN CADY; SUSAN CADY; JAMES COLLAR, THOMAS M. KALNINS; RENA COULTAS; LAURA LYNN GRIFFIN; KRISTI RENEE ALLEN MARK ALBERTO MARRERO JR.; JULIE MARIE HUYNH; HAROLD MOORE; BRYAN KENT LANDEN; DAYNA ANNE COLVIN; ELIAS YGELMAN LANDEN; HAYDEE LILIAN LANDEN; MARTA LEE MCKEE; PATRICK MICHAEL MCKEE; JAMES WYATT HASH; JULIE KAY STARR; BERT JOHN WOODWARD; KEVIN DARRELL WOODWARD; TERESA ANN WOODWARD, Plaintiffs, v. PACIFICORP, an Oregon Corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp, Defendants.	No. 22CV13946 DEFENDANTS' PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT (Telephonic Oral Argument Requested) Fee Authority: ORS 21.160(1)(e)

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UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for this motion under UTCR 5.010 because it seeks dismissal for failure to state claim. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 60 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

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MOTION

PacifiCorp moves to dismiss Count Four of the First Amended Complaint (Inverse Condemnation) for failure to state a claim for relief under ORCP 21 A(1)(h). This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Per A. Ramfjord ("Ramfjord Decl."), and the pleadings and papers on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the 2020 Labor Day weekend, an unprecedented windstorm hit Oregon, igniting dozens of wildfires across the state. More than a year and a half later, Plaintiffs Sean Cady; Susan Cady; James Collar, Thomas M. Kalnins; Rena Coultas; Laura Lynn Griffin; Kristi Renee Allen; Mark Alberto Marrero Jr.; Julie Marie Huynh; Harold Moore; Bryan Kent Landen; Dayna Anne Colvin; Elias Ygelman Landen; Haydee Lilian Landen; Marta Lee McKee; Patrick Michael McKee; James Wyatt Hash; Julie Kay Starr; Bert John Woodward; Kevin Darrell Woodward; Teresa Ann Woodward (collectively, "Plaintiffs") filed a Complaint alleging that PacifiCorp caused one of those fires: the Echo Mountain Complex Fire. Government authorities and PacifiCorp itself are still actively investigating this wildfire complex, and its cause and origin has not fully been determined.

Plaintiffs assert claims for inverse condemnation under both Article I, Section 18 and Article XI, Section 4 of the Oregon Constitution that are subject to dismissal for three independent reasons:

First, Plaintiffs cannot show that PacifiCorp "intentionally undertook its actions" such that "the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Dunn v. City of Milwaukee*, 355 Or 339, 358, 328 P2d 1261 (2014). As Judge Johnson of the Douglas County Circuit Court recently recognized, in the context of a wildfire inverse condemnation claim, *Dunn* requires alleging both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire

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was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. A at 4.) Because Plaintiffs fail to allege "substantial certainty" at either step, their inverse condemnation claim fails. *Dunn*, 355 Or at 358.

Second, Plaintiffs have not alleged—and cannot allege—that PacifiCorp is a "governmental defendant" or that it took Plaintiffs' property "for a public use" under Article I, Section 18. *Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 56 P3d 396 (2002). PacifiCorp is a private entity and Plaintiffs cannot allege that the damage to their property served any public purpose.

Third, Plaintiffs' Article XI, Section 4 claim similarly fails because Plaintiffs cannot allege that PacifiCorp acted "under authority of law." Oregon case law requires a direct connection between a corporation's legal "authority" and the alleged conduct, such as when railroads take property pursuant to municipal ordinances. *See, e.g.*, *Willamette Iron Works v. Oregon R. and Nav. Co.*, 26 Or 224, 225, 37 P 1016 (1894) (railroad's "right to construct a trestle" was "based upon an ordinance"). Indeed, the Supreme Court has rejected the argument that simply holding "eminent domain" power renders a corporation a state actor for constitutional purposes; a corporation must "*exercise*" state authority to be liable. *Jackson v. Metropolitan Edison Co.*, 419 US 345, 353 (1974).

II. BACKGROUND

A. PacifiCorp's Operations

PacifiCorp delivers electricity to around 773,000 customers in Oregon, Washington, and Northern California. In Oregon, PacifiCorp serves around 596,000 customers under the Pacific Power brand. As Plaintiffs acknowledge, PacifiCorp is privately owned and operated. (*See* First Amended Complaint ("FAC") ¶ 10.) PacifiCorp is regulated by the Oregon Public Utilities Commission and may only raise rates by proving to the Commission that a proposed rate increase is "fair, just and reasonable." *See* ORS 757.205, 757.210.

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B. The Echo Mountain Complex Fire

Plaintiffs allege that the Echo Mountain Complex Fire—which consisted of the Echo Mountain Fire and the Kimberling Fire—ignited when "vegetation contacted Defendants' powerlines." (FAC ¶ 38.) According to Plaintiffs, the fires were caused by PacifiCorp's alleged failure to de-energize their transmission and distribution lines during a severe wind event, to properly inspect lines that had been disabled by vegetation before re-energizing them, and/or to properly maintain vegetation near its equipment. (*Id.* ¶ 40.) Government investigators have not released an official determination of what caused the Echo Mountain Complex Fire.

The Fire burned approximately 2,500 acres. (*Id.* ¶ 5.) Plaintiffs claim that they suffered significant damages as a result of the fires, including the loss of real and personal property, personal injuries, emotional distress, and evacuation expenses. (*Id.* ¶ 45.)

C. Procedural History

Plaintiffs filed their FAC on April 28, 2022. The FAC asserts claims for (1) negligence, (2) trespass, (3) nuisance, and (4) inverse condemnation under both Article I, Section 18 and Article XI, Section 4 of the Oregon Constitution. (FAC ¶¶ 48–99.)

III. LEGAL STANDARD

To avoid dismissal, a complaint must state ultimate facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations, legal conclusions, or mere recitations of a claim's elements are insufficient to state a claim. *See*, *e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997) (citations omitted). When a claim as pleaded remains legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

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IV. ARGUMENT

The Oregon Constitution has two takings clauses. Article I, Section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, Section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

While the typical taking begins with a formal eminent domain proceeding, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Id*. In those cases, a property owner may recover under the doctrine of inverse condemnation.

But Plaintiffs cannot satisfy the elements of either Article I, Section 18 or an Article XI, Section 4 takings claim as a matter of law. *First*, Plaintiffs cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiffs' property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358. *Second*, Plaintiffs cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public purpose" as required by Article I, Section 18. *Third*, nor can Plaintiffs show that PacifiCorp acted "under authority of law" as required by Article XI, Section 18 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

A. Plaintiffs fail to allege that PacifiCorp intentionally undertook to act in a manner that necessarily caused Plaintiffs' injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation claim under Article I, Section 18 or Article XI, Section 4 of the

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Oregon Constitution only by proving that the government "intentionally undertook actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the inverse condemnation claim." *Dunn*, 355 Or at 358–59; *see also Morrison v. Clackamas Cty.*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If "plaintiff's best evidence" shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; see also *Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("a takings claim cannot be based on * * * negligent government conduct").

Dunn illustrates the high standard Plaintiffs must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. 355 Or at 341–42. Plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "natural and ordinary consequence[]" of that improvement, and so was liable for inverse condemnation. *Id*. at 345–46.

The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id*. at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiffs must

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show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id*.

As Judge Johnson of the Douglas County Circuit Court recognized in rejecting inverse condemnation claims identical to those Plaintiffs assert here, *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. A at 4.) Under *Dunn*, it is not enough to allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiffs' properties. Instead, Plaintiffs must allege that the invasion "into plaintiff's [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiffs' damages must have been "substantially certain" to occur. *Dunn*, 355 Or at 361.

Indeed, Judge Conover of Lane County recently dismissed nearly identical inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc, arising out of similar Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the plaintiffs' properties." (Ramfjord Decl., Ex. B at 30 (page 71 of the transcript); *see also* Ex. C at 1.)

Here, too, Plaintiffs cannot allege that any of the necessary causal steps to damage their specific property were "substantially certain" to occur. Start with the alleged ignition. Plaintiffs allege a nine-point list of conduct ranging from "[f]ailing to conduct reasonably prompt, proper and frequent inspections," "[f]ailing to inspect, repair and/or maintain equipment," "[f]ailing to properly inspect and maintain vegetation," "[f]ailing to promptly deenergize their electric utility infrastructure," and "[f]ailing to properly train and supervise employees." (FAC ¶ 55-56.) Plaintiffs then conclusorily allege that the "necessary, substantially certain, and/or inevitable consequence" of that conduct was "damages to

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Plaintiffs' property." (*Id.* ¶ 96.) But this generalized list of actions that are not even tied to any geographic location that is a "conclusion[] of law" that does not suffice to state "ultimate facts" entitling Plaintiffs to relief. *Huang*, 147 Or App at 332.

Nor have Plaintiffs alleged any other specific facts supporting a finding of "substantial certainty." Indeed, the fact that Plaintiffs' factual allegations center on fire "risk" confirm that Plaintiffs cannot do so. The FAC refers to "risk" or "fire risk" at least more than a dozen times, alleging, for example, that there was a "risk of fire danger" and "foreseeable risk of fire," among other things. (FAC ¶¶ 20, 32, 35, 36, 55, 58, 77. 78.) The reason Plaintiffs focus on "risk" is that it is the best they can do; it is implausible (at best) to suggest that actions like failing to "supervise employees" or "inspect vegetation" are *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, etc.) are necessary for an ignition to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id*. at 1377. The court rejected plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "direct, natural, or probable" result of government conduct to state a claim. *Id*. at 1378. As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id*. For that reason, "[l]iability for damage caused by" fire "has traditionally been

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determined under tort law," not inverse condemnation." *Thune v. United States*, 41 Fed Cl 49, 53 (Fed Cl 1998); *see also Dunn*, 355 Or at 356 n.13 (citing *Thune* with approval).

Even if Plaintiffs could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiffs make no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358–59. At best, Plaintiffs allege that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of a larger fire that was the but-for cause of Plaintiffs' damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiffs' property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id*. at 361 (emphasis added). Plaintiffs have not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiffs' properties in particular, and they cannot do so.

Nor have Plaintiffs met their burden by alleging that PacifiCorp has filed regulatory reports acknowledging prior electrical fire ignitions or were otherwise aware of prior utility-caused fires. Indeed, the report cited in Plaintiffs' complaint demonstrates why Plaintiffs' allegations fail to show that PacifiCorp's acts were substantially certain to invade Plaintiffs' properties in particular. That fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors is not a problem Plaintiffs can fix with amendment. It is how fires work. *See City of Austin v. Liberty Mut. Ins*., 431 SW3d 817, 825 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). As a result, even with "intentionally set fires" that "escape[] because of intervening winds" or other causes, liability "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because

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Plaintiffs do not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiffs in particular "for purposes of a takings claim," they fail to state a claim for inverse condemnation. *Dunn*, 355 Or at 356.

B. Plaintiffs' Article I, Section 18 inverse condemnation claim fails because PacifiCorp is not a public entity and did not take property for public use.

1. PacifiCorp is not a public entity.

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, Section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." *Vokoun*, 335 Or at 27–28; *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiffs' invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072, 1075 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp).

PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the Oregon Public Utilities Commission finds that a rate increase would be "fair, just and reasonable," ORS 757.210. Nor would PacifiCorp qualify as a "government body" under Oregon's tort claim statute. *See* ORS 30.260 ("'Public body' means [a] public body as defined in ORS 174.109"), 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies"); 174.117 (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiffs' Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiffs' Article I, Section 18 claim. *Vokoun*, 335 Or at 28.

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2. Plaintiffs do not allege that PacifiCorp took property for "public use."

Plaintiffs' Article I, Section 18 inverse condemnation claim also fails for the independent reason that Plaintiffs cannot demonstrate that their property was taken "for a public use," as they must. *Vokoun*, 335 Or at 19. Plaintiffs allege only that PacifiCorp's electrical equipment constitutes "public improvements for the supplying of electricity to the public for public use." (FAC ¶ 89.) Plaintiffs confuse public "use" with public "benefit." As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Or.*, 240 Or App 490, 500–501, 247 P3d 331 (2011). In other words, Plaintiffs must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. They have not and cannot do so.

Again, Judge Conover of Lane County recently dismissed nearly identical inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc, arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * further, there was no intent to put the plaintiffs' property to public use." (Ramfjord Decl., Ex. B at 30 (page 71 of the transcript); *see also* Ex. C at 1.)

The same is true here. Plaintiffs must meet the ordinary test for public use set forth in *Mossberg*: they must allege that "the government took private property intending to put that property to public use," 240 Or App at 501. Because Plaintiffs cannot make that showing, they make no effort to do so, and thus fail to state an inverse condemnation claim under Article I, Section 18 of the Oregon Constitution.

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C. Plaintiffs' Article XI, Section 4 inverse condemnation claim fails because Plaintiffs do not allege that PacifiCorp acted under authority of law.

Plaintiffs' Article XI, Section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiffs contend damaged them. By its own terms, Article XI, Section 4's takings clause only applies to a "corporation under authority of law." Plaintiffs may attempt to meet that showing by arguing that PacifiCorp has the general power of condemnation or that it operates as a public utility. Here, Plaintiffs merely allege that PacifiCorp "exercised" its "legislatively-granted power" (FAC ¶ 88), but they fail to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because they cannot do so, their inverse condemnation claim under Article XI, Section 4 fails.

Again, this conclusion is directly reinforced by Judge Conover's ruling in Lane County. In that case, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, Section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs' property." (Ramfjord Decl., Ex. B at 30 (page 71 of the transcript); *see also* Ex. C at 1).

Nor can Plaintiffs cite any authority to the contrary. Article XI, Section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*, 185 Or App 425, 60 P3d 557 (2002)—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiffs allege).[1] *Id*. at

[1] A handful of other modern cases have addressed Article XI, Section 4 takings claims, but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Natural Gas Co. v. City of Portland*, 300 Or 291, 312–13, 711 P2d 119 (1985) (no

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443 n.5 (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, [S]ection 4").

Nevertheless, the only Oregon cases permitting Article XI, Section 4 claims to go forward have involved a direct connection between corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, Section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city counsel of Oregon City"); *Kurtz v. Southern Pac. Co*., 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). In contrast, PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" within the meaning of Article XI, Section 4 whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

It makes sense that the phrase "under authority of law" requires a direct connection between a corporation's legal authority and the alleged taking, because unlike Article I, Section 18's takings clause, Article XI, Section 4 contains no textual "public use" requirement. The "under authority of law" requirement thus fulfills the same limiting

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liability under either Article I, Section 18 or Article XI, Section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of West Linn*, 204 Or App 655, 671, 131 P3d 805 (2006) (rejecting Article XI, Section 4 claim in passing, and collecting cases doing the same thing).

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function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiffs' complaint were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "would be absurd to attribute to the framers" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek*, 196 Or at 147).[2]

The Court may also look to the analogous federal state action doctrine, which leads to the same result. In *Jackson v. Metropolitan Edison Co.*, 419 US 345 (1974), a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Id*. at 350, 368 n.1. The Supreme Court nevertheless found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id*. at 353. And although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan v. State Hwy. Comm.*, 274 Or 49, 52 n.2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States"); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n.5, 656 P2d 306 (1982).

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[2] If the Court interprets Article XI, Section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, Section 4—and Plaintiffs' claim would then fail for the same reason that their Article I, Section 18 claim fails, as described above. *See, e.g., Thompson v. Tualatin Hills Park and Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980) (Article XI, Section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I Section 18" (citing *MacVeagh v. Multnomah County*, 126 Or 417, 270 P 502 (1927)).

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Properly construed, Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fire at issue here, nor do Plaintiffs attempt to do so. Plaintiffs do not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires; they allege that PacifiCorp *violated* those regulations. Plaintiffs similarly do not allege that PacifiCorp used the power of eminent domain to take their property, nor to take any relevant land at issue in this case. The most Plaintiffs allege is that PacifiCorp generally has the "power of condemnation"—not that PacifiCorp used that power in any relevant way to their takings claim. (FAC ¶ 88.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other early Oregon cases—and Plaintiffs do not allege any connection, let alone a direct one—Plaintiffs' Article XI, Section 4 claim fails as a matter of law.

V. CONCLUSION

For all the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiffs' inverse condemnation claim.

DATED: June 13, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' PARTIAL MOTION TO DISMISS FIRST AMENDED COMPLAINT** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid.
- ☐ email (courtesy copy only).
- ☐ hand delivery.
- ☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.
- ☐ overnight delivery.
- ☐ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CLIFFORD LOGAN; JESSICA LOGAN; JESSICA COLLINS; HANNAH MARIE WHITFIELD, individually and as guardian ad litem for THOMAS STUDER IV; and JULIE HUYNH dba JULIE'S DAHLIAS, Plaintiffs, v. PACIFICORP, an Oregon Corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp, Defendants.	No. 22CV29859 22CV13946 (Consolidated) **DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT** Fee Authority: ORS 21.160(1)(e) Assigned to: Hon. Steffan Alexander

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Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") answer Plaintiffs' First Amended Complaint ("Complaint") as follows.

ANSWER

PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

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1.

Paragraph 1 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 1, and on that basis denies them.

2.

PacifiCorp admits that before September 7, 2020, the National Weather Service issued fire weather messages regarding fire weather conditions in the state of Oregon. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations of Paragraph 2, and on that basis denies them.

3.

In the first sentence of Paragraph 3 Plaintiffs allege that PacifiCorp is the "parent company of defendant Pacific Power." Pacific Power is an assumed business name and not a separate corporate entity. PacifiCorp denies the rest of the allegations in Paragraph 3.

4.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 4, and on that basis denies them.

5.

The last sentence of Paragraph 5 recites the nature of Plaintiffs' claims for relief and/or states a legal conclusion and therefore does not require a response. To the extent a response is required, PacifiCorp denies the allegations of the last sentence of Paragraph 5. PacifiCorp lacks knowledge or information sufficient to form a belief about the rest of the allegations in Paragraph 5, and on that basis denies them.

6.

Paragraph 6 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 6, and on that basis denies them.

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7.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 7, and on that basis denies them.

8.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 8, and on that basis denies them.

9.

Paragraph 9 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 9.

10.

PacifiCorp admits that is a utility that services parts of Oregon with its principal place of business in Portland, Oregon, in the county of Multnomah. PacifiCorp is unable to assess what Plaintiffs mean by "a large network" or that it "does regular, sustained business throughout Oregon," and accordingly denies the allegation as to the same. PacifiCorp also denies that Pacific Power is "wholly owned by PacifiCorp." Pacific Power is an assumed business name and not a separate corporate entity. PacifiCorp denies the remaining allegations of Paragraph 10.

11.

PacifiCorp admits the allegations of the first sentence of Paragraph 11, except to the extent that Plaintiffs allege that PacifiCorp is the "parent company of defendant Pacific Power." Pacific Power is an assumed business name and not a separate corporate entity. PacifiCorp admits the rest of the allegations of Paragraph 11.

12.

PacifiCorp admits in the second sentence that it supplies electricity to parts of Oregon. PacifiCorp lacks knowledge or information sufficient to form a belief about whether

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it supplies electricity "in and around the ignition point for the Echo Mountain Complex Fire," and on that basis denies the remaining allegations in Paragraph 12.

13.

Paragraph 13 consists entirely of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 13.

14.

Paragraph 14 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 14.

15.

Paragraph 15 consists of conclusions of law to which no response is necessary or appropriate. Paragraph 15 also recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 15.

16.

Paragraph 16 consists of conclusions of law to which no response is necessary or appropriate. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 16, and on that basis denies them.

17.

PacifiCorp admits the allegations of the first sentence of Paragraph 17 except to the extent that Plaintiffs allege that PacifiCorp provides public utility services, including the generation, transmission and distribution of electricity to customers "throughout Oregon." PacifiCorp's service territory within the state of Oregon is limited. PacifiCorp lacks knowledge or information sufficient to form a belief about whether it supplies electricity "in

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and around the ignition point for the Echo Mountain Complex Fire," and on that basis denies the remaining allegations of Paragraph 17.

18.

Paragraph 18 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 18.

19.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 19, and on that basis denies them.

20.

Paragraph 20 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 20.

21.

PacifiCorp admits that it designed its powerlines to transport electricity. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 21, and on that basis denies them.

22.

PacifiCorp denies the allegations of Paragraph 22.

23.

PacifiCorp denies the allegations of Paragraph 23.

24.

PacifiCorp admits that some of its powerlines are constructed above ground. PacifiCorp denies the remaining allegations in Paragraph 24.

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25.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis denies them.

26.

Paragraph 26 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 26.

27.

PacifiCorp denies the allegations of the first sentence of Paragraph 27 and lacks knowledge or information sufficient to form a belief about the rest of the allegations of Paragraph 27, and on that basis denies the remaining allegations in Paragraph 27.

28.

No response is required to Paragraph 28 because the contents of PacifiCorp's statements speak for themselves. .

29.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis denies them.

30.

PacifiCorp admits that, on September 2, 2020, the National Weather Service issued a fire weather message regarding fire weather conditions along the West Coast. No response is required to the remaining allegations of Paragraph 30 because the contents of those warnings speak for themselves and are the best evidence of their contents. To the extent a response is required, PacifiCorp denies the remaining allegations in Paragraph 30.

31.

PacifiCorp admits that, on September 4, 2020, the National Weather Service issued a fire weather message regarding fire weather conditions along the West Coast. No response is

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required to the remaining allegations of Paragraph 31 because the contents of those warnings speak for themselves and are the best evidence of their contents. To the extent a response is required, PacifiCorp denies the remaining allegations in Paragraph 31.

32.

PacifiCorp admits that, on September 5, 2020, the National Weather Service issued a fire weather message regarding fire weather conditions along the West Coast. No response is required to the remaining allegations of Paragraph 32 because the contents of those warnings speak for themselves and are the best evidence of their contents. To the extent a response is required, PacifiCorp denies the remaining allegations in Paragraph 32.

33.

PacifiCorp admits that before September 7, 2020, including September 6, 2020, the National Weather Service issued a fire weather message regarding fire weather conditions along the West Coast. No response is required to the remaining allegations of Paragraph 33 because the contents of those warnings speak for themselves and are the best evidence of their contents. To the extent a response is required, PacifiCorp denies the remaining allegations in Paragraph 33.

34.

PacifiCorp admits that, on September 7, 2020, the National Weather Service issued a fire weather message regarding fire weather conditions along the West Coast. No response is required to the remaining allegations of Paragraph 34 because the contents of those warnings speak for themselves and are the best evidence of their contents. To the extent a response is required, PacifiCorp denies the remaining allegations in Paragraph 34.

35.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis denies them.

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36.

PacifiCorp denies the allegations in Paragraph 36.

37.

PacifiCorp denies the allegations in Paragraph 37.

38.

Paragraph 38 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 38.

39.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis denies them.

40.

Paragraph 40 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 40.

41.

Paragraph 41 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 41.

42.

PacifiCorp denies the allegations in Paragraph 42.

43.

Paragraph 43 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of the first sentence of Paragraph 43 and further denies the allegations in the second sentence of

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Paragraph 43 because it lacks knowledge or information sufficient to form a belief about those allegations.

44.

Paragraph 44 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 44 to the extent they allege that PacifiCorp caused a wildfire. As to the remaining allegations of Paragraph 44, PacifiCorp lacks knowledge or information sufficient to form a belief about those allegations, and on that basis denies them.

45.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations Paragraph 45, and on that basis denies them.

46.

The first sentence of Paragraph 46 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, denies those allegations. The second sentence of Paragraph 46 (including its subparts (a) through (d)) consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information to form a sufficient basis to form a belief about the remaining allegations in Paragraph 46, and on that basis denies them.

47.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 47, and on that basis denies them.

48.

In response to Paragraph 48, PacifiCorp incorporates its responses to Paragraphs 1 to 47 as though fully stated herein.

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49.

Paragraph 49 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 49.

50.

Paragraph 50 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 50.

51.

Paragraph 51 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 51.

52.

Paragraph 52 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 52.

53.

Paragraph 53 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 53.

54.

Paragraph 54 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 54.

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55.

Paragraph 55 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 55.

56.

Paragraph 56 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 56.

57.

Paragraph 57 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 57.

58.

In response to Paragraph 58, PacifiCorp incorporates its responses to Paragraphs 1 to 47 as though fully stated herein.

59.

The allegations in Paragraph 59 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 59 because it lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 59, and on that basis denies them.

60.

The allegations in Paragraph 60 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 60.

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61.

The allegations in Paragraph 61 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 61.

62.

The allegations in Paragraph 62 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63.

The allegations in Paragraph 63 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64.

The allegations in Paragraph 64 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65.

Paragraph 65 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 65.

66.

In response to Paragraph 66, PacifiCorp incorporates its responses to Paragraphs 1 to 47 as though fully stated herein.

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67.

The allegations in Paragraph 67 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

68.

The allegations in Paragraph 68 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 68.

69.

The allegations in Paragraph 69 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 69.

70.

The allegations in Paragraph 70 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 70.

71.

The allegations in Paragraph 71 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72.

The allegations in Paragraph 72 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 72.

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73.

The allegations in Paragraph 73 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 73.

74.

The allegations in Paragraph 74 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 74.

75.

The allegations in Paragraph 75 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76.

The allegations in Paragraph 76 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 76.

77.

The allegations in Paragraph 77 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp states that ORS 477.064 speaks for itself.

78.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 78, and on that basis denies them. The second sentence of Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in the second sentence of Paragraph 78.

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79.

The allegations in Paragraph 79 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 79.

80.

The allegations in Paragraph 80 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 80.

81.

The allegations in Paragraph 81 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82.

Paragraph 82 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83.

In response to Paragraph 83, PacifiCorp incorporates its responses to Paragraphs 1 to 47, 59 to 64, and 67 to 81 as though fully stated herein.

84.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 84, and on that basis denies them.

85.

The allegations in Paragraph 85 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp states that ORS

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chapter 35 and the Oregon Constitution speak for themselves and denies the remaining allegations of Paragraph 85.

86.

The allegations in Paragraph 86 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 86.

87.

Paragraph 87 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 87.

88.

Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

89.

Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90.

Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91.

Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

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92.

Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93.

Paragraph 93 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 93.

94.

Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

95.

Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 95.

96.

Paragraph 96 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

GENERAL DENIAL

97.

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

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AFFIRMATIVE DEFENSES

PacifiCorp expressly incorporates all allegations of its Answer as if fully set forth in each of the following Affirmative Defenses.

Without admitting any wrongful conduct on the part of PacifiCorp, and without admitting that Plaintiffs have suffered any loss, damage, or injury, PacifiCorp alleges the following Affirmative Defenses to the First Amended Complaint. By designating the following as Affirmative Defenses, PacifiCorp does not in any way waive or limit any defenses which are or may be raised by the denial, allegations, and averments set forth herein. Certain Affirmative Defenses are asserted for completeness and refer to facts and proof which also negate required elements of Plaintiffs' claims, and by raising such Affirmative Defenses PacifiCorp does not admit that Plaintiffs lack the burden of proof and/or the burden of persuasion for any or all facts underlying any of those Affirmative Defenses or suggest that Plaintiffs are not required to carry the burden as to such elements.

The Affirmative Defenses are pleaded in the alternative, are raised to preserve the rights of PacifiCorp to assert such Affirmative Defenses and are without prejudice to PacifiCorp's ability to raise other and further Affirmative Defenses.

Investigations into the events alleged in the First Amended Complaint are currently being undertaken by the parties as well as by third parties. In addition to the Affirmative Defenses set forth below, PacifiCorp reserves the right to allege additional Affirmative Defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

98.

Plaintiffs' Complaint and each of the claims alleged therein fail to state a claim upon which any relief can be granted.

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SECOND AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

99.

Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged in the Complaint by reason of their failure to mitigate such alleged damages.

THIRD AFFIRMATIVE DEFENSE

(No Proximate Cause)

100.

Plaintiffs may be barred from recovering damages, in whole or in part, because PacifiCorp's acts or omissions were not the proximate cause of Plaintiffs' injuries.

FOURTH AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

101.

Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the unforeseeable intervening or superseding acts or omissions of others over whom PacifiCorp had no control and for whose conduct PacifiCorp is not responsible, or other unforeseeable, independent, intervening, or superseding event(s) or circumstance(s) beyond the control of PacifiCorp.

FIFTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

102.

Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties who PacifiCorp had neither the right, duty or opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp.

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SIXTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Parties)

103.

Plaintiffs' Complaint is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

SEVENTH AFFIRMATIVE DEFENSE

(Unavoidable Accident / Act of God)

104.

Plaintiffs' damages, if any, were caused by an avoidable accident or Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance with Duty of Care)

105.

Plaintiffs' claims are barred because PacifiCorp complied with the law and acted reasonably with the intent to obey the law and such compliance demonstrates that PacifiCorp exercised due care and reasonable prudence.

NINTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

106.

Plaintiffs' claims are barred because PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the complaint.

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TENTH AFFIRMATIVE DEFENSE

(No Negligence)

107.

Plaintiffs' claims are barred, in whole or in part, because PacifiCorp was not negligent, and no conduct of PacifiCorp resulted in any injury or damage to Plaintiffs.

ELEVENTH AFFIRMATIVE DEFENSE

(Justification/Necessity)

108.

In connection with the acts and omissions alleged by Plaintiffs, PacifiCorp was justified in its actions or acting out of necessity; therefore, Plaintiffs may not recover against PacifiCorp.

TWELTH AFFIRMATIVE DEFENSE

(Contributory/Comparative Negligence)

109.

At all times mentioned herein Plaintiffs or third parties were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to Plaintiffs' alleged injuries and damages, if any. The fault of Plaintiffs and third-parties bars, in whole or in part, the damages which Plaintiffs seek to recover herein.

THIRTHEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

110.

Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

FOURTEENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

111.

Plaintiffs may not recover on claims of damages or losses paid by any other sources.

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FIFTEENTH AFFIRMATIVE DEFENSE

(No Duty to De-Energize)

112.

To the extent Plaintiffs' claims rest on PacifiCorp's alleged failure to de-energize its power lines, Plaintiffs' claims fail because Oregon law does not impose an affirmative duty to proactively de-energize power lines.

SIXTEENTH AFFIRMATIVE DEFENSE

(Authorization by Statute or Regulation)

113.

Plaintiffs' claims are barred, in whole or in part, because the actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission.

SEVENTEENTHAFFIRMATIVE DEFENSE

(Compliance with Statutes and Regulations)

114.

Plaintiffs' claims are barred, in whole or in part, because Defendants neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

115.

Plaintiffs' claims are barred, in whole or in part, under the doctrine of waiver.

NINETEENTH AFFIRMATIVE DEFENSE

(No Punitive Damages—Unconstitutionality)

116.

To the extent Plaintiffs reserve the right to assert a claim for punitive damages, PacifiCorp alleges that such claim for punitive damages is barred, in whole or in part, because it

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violates PacifiCorp's state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and that any claim for punitive damages is limited by state and federal law, including but not limited to the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

TWENTITH AFFIRMATIVE DEFENSE

(No Punitive Damages—Insufficient Facts)

117.

To the extent Plaintiffs reserve the right to assert a claim for punitive damages, PacifiCorp alleges that such claim for punitive damages is barred, in whole or in part, because the allegations in the Complaint fail to state facts sufficient to support an award of exemplary or punitive damages or other statutory fines or penalties against PacifiCorp.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Offset)

118.

Plaintiffs may not recover damages, in whole or in part, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers. PacifiCorp alleges that such compensation may constitute an offset.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Liability Several Only)

119.

If the Court enters judgment for Plaintiffs, PacifiCorp expressly requests and does not waive apportionment of Plaintiffs' total damages, if any, among all parties and persons against whom Plaintiffs have asserted a claim or any party has asserted a third-party complaint, with the liability of each party being several only pursuant to ORS 31.600 and ORS 31.610.

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TWENTY-THIRD AFFIRMATIVE DEFENSE

(Pre-Judgment Interest, Expert Fees or Attorneys' Fees)

120.

Plaintiffs fail to state a claim for which prejudgment interest, expert fees, or attorneys' fees may be awarded.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Preemption)

121.

Plaintiffs' claims and requested remedies, including the claim for an injunction, are preempted by the Oregon Public Utility Commission ("PUC")'s rules, regulations, and oversight of utility operations, including but not limited to under ORS 756.610 and ORS 183.480. PacifiCorp's compliance with the PUC's rules and regulations precludes such claims and any request for damages or an injunction.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

122.

The Court lacks jurisdiction to adjudicate Plaintiffs' claims or award Plaintiffs the remedies requested, including the request for an injunction, because the PUC has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Reservation of Right to Amend to Add Further Affirmative Defenses)

123.

PacifiCorp presently has insufficient knowledge or information to form a belief as to whether it may have additional, as yet unstated, defenses available and therefore reserves the

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right to assert such additional defenses that are proper based on discovery, investigation or further analysis.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Complaint, Defendants PacifiCorp and Pacific Power request that the Court enter judgment in their favor on all claims asserted by Plaintiffs in their complaint, award Defendants their costs in this action, and grant such other relief as the Court deems just and proper.

DATED: March 13, 2024

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/s/ Reilley D. Keating
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT** on the following named person(s) or party(ies) on the date and by the method(s) indicated below.

☐ mailing with postage prepaid.	☒ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.
☐ overnight delivery.	☒ eService via Odyssey File & Serve. (if registered)

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

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DATED: March 13, 2024.

/s/ Reilley D. Keating
REILLEY D. KEATING, OSB No. 073762
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN, MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual, and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

DEFENDANT PACIFICORP'S ANSWER TO FIRST AMENDED COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiff's First Amended Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiff and Plaintiff's agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiff or Plaintiff's agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiff.

I. FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiff, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiff's recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiff, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiff and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiff seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiff's and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiff are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiff is barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiff's injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiff seeks reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiff is not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff lacks compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiff and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiff take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: September 26, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On September 26, 2022, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO FIRST AMENDED COMPLAINT

on the interested parties in this action as below:

Gerald Singleton
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Tommy H. Vu
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SINGLETON SCHREIBER McKENZIE & SCOTT, LLP
1414 K Street, Suite 470
Sacramento, CA 95814
Tel. (916) 248-8478

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 26, 2022, at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.142

BY FAX

FILED
Superior Court Of California,
Sacramento
11/07/2022
tbaldwin1
By ..... , Deputy
Case Number:
34-2022-00327426

Alison L. Plessman (SBN 250631)
aplessman@hueston.com
Douglas J. Dixon (SBN 275389)
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Attorneys for Defendant
PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JERRY LOWE, individually and as trustee of the LOWE FAMILY TRUST,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, and DOES 1-100, inclusive,

Defendant.

Case No. 34-2022-00327426

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

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15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

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16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

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17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

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18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 7, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On November 7, 2022, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as stated below:

Tobin Ellis
Santo Riccobono
Courtney Vasquez
ELLIS RICCOBONO, LLP
317 Rosecrans Avenue, Suite 100
Manhattan Beach, CA 90266

E-MAIL: fire@ertriallawyers.com

[X] (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 7, 2022, at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.143

FILED
Superior Court Of California,
Sacramento
01/28/2023
tpressdt
By _____, Deputy
Case Number:
34-2022-00329804

HUESTON HENNIGAN LLP
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aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
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Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RONALD FRASER et al,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual, and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00329804

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Complex Civil Dept. 28
Judge: Lauri A. Damrell

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information

on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: January 26, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On January 26, 2023, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as stated below:

MCNICHOLAS & MCNICHOLAS, LLP Patrick McNicholas Sophia B. Arim 10866 Wilshire Blvd., Suite 1400 Los Angeles, CA 90024 mc@mcnicholaslaw.com sba@mcnicholaslaw.com	THE BECKER LAW GROUP Todd B. Becker Brian E. Shear 117 E. Colorado Blvd., Suite 500 Pasadena, CA 91105 becker@beckerlawgroup.com shear@beckerlawgroup.com

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 26, 2023, at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.144

FILED
Superior Court Of California,
Sacramento
03/01/2023
bpeasadt
By _____, Deputy
Case Number:
34-2023-00333171

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
ddixon@hueston.com
William M. Larsen, State Bar No. 314091
wlarsen@hueston.com
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Los Angeles, CA 90014
Telephone: (213) 788-4340
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Attorneys for Defendant PacifiCorp

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BARBARA MUELRATH; PAUL MUELRATH, Plaintiffs, vs. PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual, and DOES 1 through 200, inclusive, Defendants.	Case No. 34-2023-00333171 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: March 1, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On March 1, 2023, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as below:

Gerald Singleton
gsingleton@singletonschreiber.com
John C. Lemon
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SINGLETON SCHREIBER McKENZIE & SCOTT, LLP
1414 K Street, Suite 470
Sacramento, CA 95814
Tel. (916) 248-8478

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 1, 2023, at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.145

By Fax

FILED/ENDORSED
MAR 13 2023
By: K. Johnson
Deputy Clerk

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
ddixon@hueston.com
William M. Larsen, State Bar No. 314091
wlarsen@hueston.com
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

SHIRLEY SHOOPMAN, individually, and as personal representative for KATHY SHOOPMAN; KLAMATH RIVER COMMUNITY HALL ASSOCIATION; TAYLOR ROSS, individually and as co-trustee for THE ROSS FAMILY REVOCABLE TRUST DATED APRIL 14, 2006; TAMERA C. ROSS; individually and as co-trustee for THE ROSS FAMILY REVOCABLE TRUST DATED APRIL 14, 2006; KATHLEEN HODGSON; CHRIS HODGSON; JILL LIVINGSTON; GEORGE LIVINGSTON; LIVING GOLD PRESS; ERVIN ORELLANA; RONALD TORRES; MARLENY LUNA; JUAN CASTILLO; MARJORIE PEREZ, a minor, by and through Guardian Ad Litem, JUAN CASTILLO; REYNA P. RENDEROS; DARRELL COLLIER; MARIE ELENA COLLIER; VALERIE LINFOOT; CHARLES LINFOOT; MICHAEL NOWDESHA, individually and as co-trustee for THE NOWDESHA TRUST; BRENDA NOWDESHA, individually and as co-trustee for THE NOWDESHA TRUST; HANNAH PRUKOP; ANDREW L. MORRISON; SYLVIA BELENA; JOSEPH CROSS; STEVEN WONG; ERIC H. LENZ, individually and as trustee for THE ERIC H. LENZ TRUST DATED DECEMBER 28, 2003; BRADLEY NASIF MALOOF; NASIF MALOOF

Case No. 34-2022-00326139

DEFENDANT PACIFICORP'S ANSWER TO FIRST AMENDED COMPLAINT

FURNITURE MAKER; KATHRYN MALOOF; SAMUEL AARON MALOOF; MICHAEL STORY; SUSAN STORY; SHARON CALENE GREER; STEVEN TWEED, individually and as co-trustee for THE TWEED FAMILY TRUST; CECILIA TWEED, individually and as co-trustee for THE TWEED FAMILY TRUST; MELISSA ARONSON; DAVID ARONSON; DAVID GUSTAFSON; KELLI BURNETT; THOMAS GARBAN; SCOTT MORGAN; THE OAKS MOBILE HOME & RV PARK; ALISHA ROSHAK; ILLUMINATION STATION; ADAM POTTER; KURT SEXTON; CHERYL SCHMIEDEBERG; JEROME SCHMIEDEBERG; JONATHAN CUMMINGS; HEIDI CUMMINGS; DESOMER STABLES, INC.; VIRGINIA SHAMEL; MICHAEL SHAMEL; DAVID TY MALOOF; YUYUE HUA; YVONNE RIDER; MAX JONES; MEGAN JONES; BARBARA C. BEARSDLEY, individually and as Trustee of the BARBARA C. BEARDSLEY REVOCABLE LIVING TRUST DATED September 25, 2009; IAN MORRISON; CIERRA COX; CYNTHIA ANN BULLOCK; MELINDA BLEDSOE; CHEYENNE ALARI; ANTHONY ARMSTRONG a minor, by and through his Guardian Ad Litem, CHEYENNE ALARI DEB MULLANEY-SLINEY; STANLEY MEIGS; LEEANN MEIGS; ALEXANDER CHARLES MEIGS; LUANA MEIGS-CARTER; JAMIE SIMMS; DAVID NELSON, a minor, by and through his Guardian Ad Litem, JAMIE SIMMS NINA AUGUSTINE; ASHER AUGUSTINE; APPLE PIE ANTIQUES; ANTHONY A. KJELLGREN; MICHELLE MEADOWS; MARYLEEN S. WELLS; MARJORIE LAWRENCE; DITA TAVENNER; HAROLD SMITH; SAMUEL JUSTICE; JACOB LIVINGSTON; JAMIE LIVINGSTON; CODY TORRES; RENEE KLUG; JENNIFER JOHNSON; KAYLEIGH BETTENCOURT, a minor, by and through her Guardian Ad Litem, HANNAH PRUKOP; WARREN BETTENCOURT, a minor, by and through his Guardian Ad Litem, HANNAH PRUKOP;

ORION HUBBER, a minor, by and through his Guardian Ad Litem, ALISHA ROSHAK; ANGELA SWEET-LICH; FRANK LICH; DONALD G. HANSEN III; DONALD G. HANSEN JR.; ANN E. HANSEN; HELEN SUI; THOMAS GARBAN; KAY HODGES; CECIL MININGEN; SIERRA MININGEN; WARREN KLOMP; DAVID KLOMP; DEBORAH N. THOMPSON; ROBYN T. WALSH; HEATHER RIDER; JOHN RIDER; STEVEN F. CARY; JASPER BEATY; ADRIAN KRAUSS; KEVIN HARKER; TYLER HARKER; KLAMATH HIGHLANDS HOMEOWNERS ASSOCIATION; JENS ARENDTTHORP; JAMES ERIC NUSBAUM; MATTHEW J. CONNELLY, individually and as trustee for THE MATTHEW J. CONNELLY TRUST; SUSAN M. CONNELLY; and CHRIS RUNGE,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, and DOES 1 through 200, inclusive,

Defendants.

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the First Amended Complaint ("FAC") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the FAC, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the FAC are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the FAC are barred, in whole or in part, because matters alleged and complained about in the FAC were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the FAC is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the FAC; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the FAC and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that allege that the FAC fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the FAC, PacifiCorp alleges that the claim in the FAC for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the FAC, Defendant alleges that the Court lacks jurisdiction to adjudicate Plaintiffs'

claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' FAC as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the FAC, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their FAC herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: March 13, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On March 13, 2023, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO FIRST AMENDED COMPLAINT

on the interested parties in this action as stated below:

David A. Fox
Joanna L. Fox
FOX LAW, APC
225 W. Plaza Street, Suite 102
Solana Beach, CA 92075
dave@foxlawapc.com
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Christopher S. Sieglock
Kristen Reano
SIEGLOCK LAW, A.P.C.
1221 Camino Del Mark
Del Mark, CA 92014
chris@sieglocklaw.com
kristen@sieglocklaw.com

☒ (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 13, 2023, at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.146

E-Served: Jul 12 2023 3:30PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
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ddixon@hueston.com
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Telephone: (213) 788-4340
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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

STEVE HICKEY, individually and as co-trustee of the Mary Hickey Trust; MICHAEL J. HICKEY, individually and as co-trustee of the Mary Hickey Trust; TERESA A. HICKEY, individually; and BECK J. HICKEY, individually, Plaintiffs, vs. PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual, and DOES 1-100, Defendants.	Case No. 23CV001296 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: July 12, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On July 12, 2023, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as below:

Frank M. Pitre
fpitre@cpmlegal.com
Donald J. Magilligan
dmagilligan@cpmlegal.com
Nabilah A. Hossain
nhossain@cpmlegal.com
Andrew W. Britton
abritton@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Tel. (650) 697-6000

[X] (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

[X] (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 12, 2023, at Newport Beach, California.

Sarah Jones
(Type or print name)

Sarah Jones
(Signature)

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On July 12, 2023, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 12, 2023, at Newport Beach, California.

Sarah Jones

PAC_256.07.147

E-Served: Jul 12 2023 3:30PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
ddixon@hueston.com
William M. Larsen, State Bar No. 314091
wlarsen@hueston.com
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CHARLES VOLCKHAUSEN, individually, Plaintiff, vs. PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual, and DOES 1-100, Defendants.	Case No. 23CV001300 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: July 12, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On July 12, 2023, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as below:

Frank M. Pitre *fpitre@cpmlegal.com* Donald J. Magilligan *dmagilligan@cpmlegal.com* Nabilah A. Hossain *nhossain@cpmlegal.com* Andrew W. Britton *abritton@cpmlegal.com* COTCHETT, PITRE & McCARTHY, LLP San Francisco Airport Office Center 840 Malcolm Road Burlingame, CA 94010 Tel. (650) 697-6000 Attorneys for Plaintiff	P. Terry Anderlini *tanderlini@amlawoffice.com* ANDERLINI & McSWEENEY 66 Bovet Road, #285 San Mateo, CA 94402 Tel: (650) 212-0001 Attorneys for Plaintiff

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 12, 2023, at Newport Beach, California.

Sarah Jones
(Type or print name)

Sarah Jones
(Signature)

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On July 12, 2023, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 12, 2023, at Newport Beach, California.

Sarah Jones

PAC_256.07.148

E-Served: Jul 18 2023 12:43PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
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William M. Larsen, State Bar No. 314091
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523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RANDY MURIEEN, et al.,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual, and DOES 1-100,

Defendants.

Case No. 23CV000181

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

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6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

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10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

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THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

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FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

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18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

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19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

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20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

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21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

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22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

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25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: July 18, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On July 18, 2023, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 18, 2023, at Newport Beach, California.

Sarah Jones

PAC_256.07.149

E-Served: Aug 21 2023 2:11PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
ddixon@hueston.com
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Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

SYNDEY CORRALES, et al., Plaintiffs, vs. PACIFICORP, an Oregon Corporation dba PACIFIC POWER; RICHARD HARRIS, an individual, and DOES 1 through 100, inclusive, Defendants.	Case No. 34-2023-00337511 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: August 21, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On August 21, 2023, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 21, 2023, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.150

E-Served: Nov 14 2023 1:16PM PST Via Case Anywhere

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA, Plaintiffs, vs. PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive, Defendants.	Case No. 34-2022-00325257 Relates to: *Theresa Jo Cogan et al. v. PacifiCorp et al.;* Case No. 34-2022-00325630 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

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16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 14, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
William M. Larsen
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On November 14, 2023, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 14, 2023, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.151

E-Served: Nov 14 2023 1:16PM PST Via Case Anywhere

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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Blaine Huber et al. v. PacifiCorp et al.;* Case No. 23CV007084

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

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12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

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13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 14, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On November 14, 2023, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 14, 2023, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.152

BY FAX

Filed
Superior Court of California,
Sacramento
05/02/2024
liderok
By _____, Deputy
34-2022-00325257-CU-MT-GDS

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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Gabriel Hamilton, et al. v. PacifiCorp, et al.;* Case No. 24CV004099

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

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19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

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TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: May 2, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On May 2, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.153

E-Served: May 2 2024 2:21PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Gabriel Hamilton, et al. v. PacifiCorp, et al.;* Case No. 24CV004099

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: May 2, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On May 2, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.154

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Attorneys for Defendants PacifiCorp and Richard Harris

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Loretta D. Bartlett, et al. v. PacifiCorp, et al.;* Case No. 24CV008199

DEFENDANTS PACIFICORP AND RICHARD HARRIS'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendants PacifiCorp and Richard Harris (collectively, "PacifiCorp") for themselves, and no other Defendants, hereby answer the Complaint ("Complaint") and generally and specifically deny and allege as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: June 27, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendants PacifiCorp and Richard Harris

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On June 27, 2024, I caused to be served the following document(s) described as:

DEFENDANTS PACIFICORP AND RICHARD HARRIS'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 27, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.155

E-Served: Sep 13 2024 1:45PM PDT Via Case Anywhere

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Attorneys for Defendants PacifiCorp and Richard Harris

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Sharon Andersen, et al. v. PacifiCorp, et al.;* Case No. 24CV014740

DEFENDANTS PACIFICORP AND RICHARD HARRIS'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendants PacifiCorp and Richard Harris (collectively, "PacifiCorp") for themselves, and no other Defendants, hereby answer the Complaint ("Complaint") and generally and specifically deny and allege as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp and Harris pray for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp and Harris herein;
3. That PacifiCorp and Harris be awarded its costs of suit incurred herein; and
4. That PacifiCorp and Harris be awarded such other and further relief as the Court may deem just and equitable.

Dated: September 13, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendants PacifiCorp and Richard Harris

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On September 13, 2024, I caused to be served the following document(s) described as: **DEFENDANTS PACIFICORP AND RICHARD HARRIS'S ANSWER TO COMPLAINT** on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 27, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.156

E-Served: Sep 13 2024 1:45PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Charles Christopher Coolidge, et al. v. PacifiCorp, et al.;* Case No. 24CV014409

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: September 13, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On September 13, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 13, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.157

E-Served: Sep 20 2024 2:55PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
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Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Evonne B. Billingsley, et al. v. PacifiCorp, et al.;* Case No. 24CV015117

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: September 20, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On September 20, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 20, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

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GDSSC COURTHOUSE
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYNETTE MARIE ADAMS; KAROL GENE ADAMS; RYAN PATRICK GILMAN; DAVID TODD GRIFFIN; DENNIS CALHOUN MARLER; MARION JAMES RATLIFF, JR.; DOUGLAS FRANKLIN RYAN; DANYELL SECREST; KRYSTAL MARIE THOM; E.C.T., a minor, by and through her Guardian Ad Litem KRYSTAL MARIE THOM; K.M.T., a minor, by and through his Guardian Ad Litem KRYSTAL MARIE THOM; KENNETH CHARLES WHITNEY; Plaintiffs, vs. PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 100, inclusive,	Case No. 24CV008300 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: October 1, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On October 1, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 1, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.159

ELECTRONICALLY FILED
Superior Court of California
County of Sacramento
10/10/2024
By: K. Lideros Deputy

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Attorneys for Defendants PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Antwane Bolden, et al. v. PacifiCorp, et al.;* Case No. 24CV014997

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

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NINTH AFFIRMATIVE DEFENSE

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TENTH AFFIRMATIVE DEFENSE

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TWELFTH AFFIRMATIVE DEFENSE

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THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

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18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

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19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

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21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: October 10, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendants PacifiCorp

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

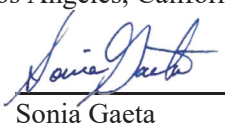
On October 10, 2024, I caused to be served the following document(s) described as:

DEFENDANTS PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 10, 2024, at Los Angeles, California.



Sonia Gaeta

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BY FAX

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Attorneys for Defendant PacifiCorp

FILED/ENDORSED
OCT 10 2024
By: L. Baldwin
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Casey Rainey, et al. v. PacifiCorp, et al.;* Case No. 24CV015037

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: October 10, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

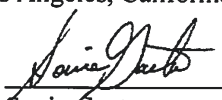
On October 7, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 10, 2024, at Los Angeles, California.



Sonia Gaeta

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Attorneys for Defendants PacifiCorp and Richard Harris

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; RICHARD HARRIS, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Alix Cloutman, et al. v. PacifiCorp, et al.;* Case No. 24CV014996

DEFENDANTS PACIFICORP AND RICHARD HARRIS'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendants PacifiCorp and Richard Harris (collectively, "PacifiCorp") for themselves, and no other Defendants, hereby answer the Complaint ("Complaint") and generally and specifically deny and allege as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp and Harris pray for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp and Harris herein;
3. That PacifiCorp and Harris be awarded its costs of suit incurred herein; and
4. That PacifiCorp and Harris be awarded such other and further relief as the Court may deem just and equitable.

Dated: October 25, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendants PacifiCorp and Richard Harris

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On October 25, 2024, I caused to be served the following document(s) described as: **DEFENDANTS PACIFICORP AND RICHARD HARRIS'S ANSWER TO COMPLAINT** on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 25, 2024, at Newport Beach, California.

Sarah Jones

PAC_256.07.162

E-Served: Oct 30 2024 5:43PM PDT Via Case Anywhere

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
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Los Angeles, CA 90014
Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation; and DOES 1-200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Adriana Meier, et al. v. PacifiCorp, et al.;* Case No. 24CV015309

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: October 30, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On October 30, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 30, 2024, at Newport Beach, California.

/s/ Sarah Jones
Sarah Jones

PAC_256.07.163

BY FAX

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2024 NOV 15 PM 3:42
SSSC CLERK/EXEC
SUPERIOR COURT
SACRAMENTO

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Attorneys for Defendants PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, et al.,

Defendants.

Case No. 34-2022-00325257

Relates to: *Nels Propp, et al. v. PacifiCorp, et al.;* Case No. 24CV015560

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 15, 2024

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Craig A. Fligor
Attorneys for Defendant PacifiCorp

McKINNEY FIRE LITIGATION

Lead Case No. 34-2022-00325257 (Bridges)

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On November 15, 2024, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2024, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.164

E-Served: Jan 10 2025 3:06PM PST Via Case Anywhere

BY FAX

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SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

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Attorneys for Defendants PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Brian Hegler, et al. v. PacifiCorp, et al.;* Case No. 24CV015116

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: January 10, 2025

HUESTON HENNIGAN LLP

By: _____

Douglas J. Dixon
Alison L. Plessman
Craig A. Fligor
Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On January 10, 2025, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 10, 2025, at Newport Beach, California.

/s/ Sarah Jones
Sarah Jones

PAC_256.07.165

E-Served: Jan 10 2025 3:06PM PST Via Case Anywhere

BY FAX

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GORDON D. SCHABER
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

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Attorneys for Defendants PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BEVERLY U. BRIDGES; AMELIA ANDERSON; ROBERT V. CLOYD; SHAWN KAZEN; MICHAEL NOWDESHA,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, an individual; and DOES 1 through 200, inclusive,

Defendants.

Case No. 34-2022-00325257

Relates to: *Matthew Howe, et al. v. PacifiCorp, et al.;* Case No. 24CV015048

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to Plaintiffs' negligence claim, PacifiCorp alleges that Plaintiffs' statutory duty and/or negligence per se theories of liability based on California statues enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to Plaintiffs' inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate

Plaintiffs' claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiffs' claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: January 10, 2025

HUESTON HENNIGAN LLP

By: _____

Douglas J. Dixon
Alison L. Plessman
Craig A. Fligor
Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed by Hueston Hennigan LLP whose business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On January 10, 2025, I caused to be served the following document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 10, 2025, at Newport Beach, California.

/s/ Sarah Jones
Sarah Jones

PAC_256.07.166

HUESTON HENNIGAN LLP
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Los Angeles, CA 90014
Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SUZANNE WHITE,

Plaintiff,

vs.

PACIFICORP, an Oregon Corporation; and DOES 1-200, inclusive,

Defendant.

Case No. 2:24-cv-01112-KJM-DMC

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Defendant PacifiCorp, by and through its undersigned counsel, and on behalf of no other party, hereby respectfully submits this Answer to Plaintiff's Complaint:

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in said Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and deny each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

1. PacifiCorp admits that the McKinney Fire ignited on or about July 29, 2022. PacifiCorp denies the remaining allegations of Paragraph 1.

2. PacifiCorp denies the allegations in the first sentence of Paragraph 2. The remainder of Paragraph 2 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 2.

3. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 3 and on that basis denies them.

4. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 4 and on that basis denies them.

5. Paragraph 5 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 5.

6. Paragraph 6 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 6.

7. Paragraph 7 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 7.

8. Paragraph 8 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 8.

9. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 9 and on that basis denies them.

10. PacifiCorp admits that it is an Oregon corporation headquartered in Portland, Oregon and that PacifiCorp distributes electricity in Siskiyou County. PacifiCorp admits that Pacific Power is a division of PacifiCorp. The remainder of Paragraph 10 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 10.

11. PacifiCorp admits that it distributes electricity in Siskiyou County through its utility infrastructure. The remainder of Paragraph 11 consists of conclusions of law to which no response is necessary or appropriate.

12. Paragraph 12 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 12.

13. Paragraph 13 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 13.

14. Paragraph 14 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 14.

15. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15 and on that basis denies them.

16. PacifiCorp admits that it owns and operates a transmission line that runs near Highway 96 and McKinney Creek Road. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 16 and on that basis denies them.

17. PacifiCorp admits that it filed a report with the California Public Utilities Commission on August 4, 2022, and that the report stated that PacifiCorp's 5G40 distribution circuit out of its

Scott Bar Substation was located in the area of the McKinney Fire. PacifiCorp denies the remaining allegations of Paragraph 17.

18. Paragraph 18 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 18.

19. Paragraph 19 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 19.

20. Paragraph 20 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 20.

21. Paragraph 21 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 21.

22. PacifiCorp denies the last sentence of Paragraph 22. PacifiCorp lacks knowledge or information sufficient to form a belief about the other allegations in Paragraph 22 and on that basis denies them.

23. In response to Paragraph 23, PacifiCorp incorporates by reference and reasserts each and every response to Paragraphs 1 through 22.

24. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 24 and on that basis denies them.

25. PacifiCorp admits that it owns and operates a transmission line that runs near Highway 96 and McKinney Creek Road and it operates that line to provide electrical services to its customers. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 25 and on that basis denies them.

26. Paragraph 26 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 26.

27. Paragraph 27 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 27.

28. Paragraph 28 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 28.

29. Paragraph 29 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 29.

30. Paragraph 30 describes the nature of Plaintiff's claims and no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 30.

31. Paragraph 31 describes the nature of Plaintiff's claims and no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 31.

32. In response to Paragraph 32, PacifiCorp incorporates by reference and reasserts each and every response to Paragraphs 1 through 31.

33. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 33 and on that basis denies them.

34. Paragraph 34 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 34 as to PacifiCorp and lacks knowledge or information sufficient to form a belief about the allegations as to Plaintiff and on that basis denies them.

35. Paragraph 35 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 35 and on that basis denies them.

36. Paragraph 36 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 36 and on that basis denies them.

37. Paragraph 37 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 37 as to PacifiCorp.

38. In response to Paragraph 38, PacifiCorp incorporates by reference and reasserts each and every response to Paragraphs 1 through 37.

39. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39 and on that basis denies them.

40. Paragraph 40 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 40 as to PacifiCorp and lacks knowledge or information sufficient to form a belief about the allegations as to Plaintiff and on that basis denies them.

41. Paragraph 41 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 41 and on that basis denies them.

42. Paragraph 42 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 42 and on that basis denies them.

43. Paragraph 43 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 43 and on that basis denies them.

44. Paragraph 44 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 44.

45. Paragraph 45 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 45 and on that basis denies them.

46. Paragraph 46 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 46.

47. Paragraph 47 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 47 as to PacifiCorp.

48. In response to Paragraph 48, PacifiCorp incorporates by reference and reasserts each and every response to Paragraphs 1 through 47.

49. Paragraph 49 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 49.

50. Paragraph 50 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 50.

51. Paragraph 51 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 51.

52. Paragraph 52 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 52.

53. Paragraph 53 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 53.

54. Paragraph 54 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 54 as to PacifiCorp and lacks knowledge or information sufficient to form a belief about the allegations as to Plaintiff and on that basis denies them.

55. Paragraph 55 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 55 as to PacifiCorp.

56. In response to Paragraph 56, PacifiCorp incorporates by reference and reasserts each and every response to Paragraphs 1 through 55.

57. Paragraph 57 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 57.

58. Paragraph 58 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 58 as to PacifiCorp and lacks knowledge or information sufficient to form a belief about the allegations as to Plaintiff and on that basis denies them.

59. Paragraph 59 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 59 as to PacifiCorp.

60. In response to Paragraph 60, PacifiCorp incorporates by reference and reasserts each and every response to Paragraphs 1 through 22 and Paragraphs 32 through 59.

61. Paragraph 61 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 61.

62. Paragraph 62 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63. Paragraph 63 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64. Paragraph 64 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65. Paragraph 65 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 65 as to PacifiCorp and lacks knowledge or information sufficient to form a belief about the allegations as to Plaintiff and on that basis denies them.

66. Paragraph 66 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 66 as to PacifiCorp.

67. Paragraph 67 describes the nature of Plaintiff's claims and no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies Paragraph 67.

68. Paragraph 68 describes the nature of Plaintiff's claims and no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies Paragraph 68.

AFFIRMATIVE DEFENSES

69. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has not yet commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation,

and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

70. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

71. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

72. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiff and Plaintiff's agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiff or Plaintiff's agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

73. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

74. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

75. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

76. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiff, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiff's recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

77. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiff, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

78. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

79. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether Plaintiff and its agents,

who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiff seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiff's and its agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

80. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

81. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiff are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

82. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

83. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

84. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiff is barred

from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

85. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiff's injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which Plaintiff seeks reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

86. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

87. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to noneconomic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiff is not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

88. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of

action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

89. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

90. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff lacks compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

91. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiff, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

92. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

93. As a twenty-fourth and separate affirmative defense to Plaintiff's negligence claim, PacifiCorp alleges that Plaintiff's statutory duty and/or negligence per se theories of liability based on California statutes enacted after the Klamath National Forest became a federal enclave in 1905 are barred under the federal enclave doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

94. As a twenty-fifth and separate affirmative defense to Plaintiff's inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because PacifiCorp is not a government actor.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

95. As a twenty-sixth and separate affirmative defense to Plaintiff's inverse condemnation claim, PacifiCorp alleges that Plaintiff cannot recover because the alleged damage to their properties was not the direct, natural, or probable result of PacifiCorp's acts.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

96. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that the Court lacks jurisdiction to adjudicate Plaintiff's claims because the California Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiff's Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

97. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the Complaint, Defendant alleges that Plaintiff's claims are preempted by the California Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under Public Utilities Code section 1759.

TWENTY-NINTH AFFIRMATIVE DEFENSE

98. PacifiCorp presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiff takes nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: June 5, 2024

HUESTON HENNIGAN LLP

By: _____
Craig A. Fligor
Attorneys for PacifiCorp

PAC_256.07.167

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STROH COASTAL HOLDINGS LLC, an Oregon limited liability company, Plaintiff, v. PACIFICORP, an Oregon corporation, Defendant.	No. 22CV29695 DEFENDANT'S PARTIAL MOTION TO DISMISS COMPLAINT Fee Authority: ORS 21.160(1)(d)

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for this motion under UTCR 5.010 because it seeks dismissal for failure to state a claim.

MOTION

PacifiCorp moves to dismiss Claim Three (Inverse Condemnation) of the Complaint for failure to state a claim for relief under ORCP 21 A(8). This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Per A. Ramfjord ("Ramfjord Decl."), and the pleadings and papers on file in this action.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the 2020 Labor Day weekend, an unprecedented windstorm hit Oregon, igniting dozens of wildfires across the state. Nearly two years later, Plaintiff Stroh Coastal Holdings LLC ("Plaintiff") filed a Complaint ("Complaint") alleging that PacifiCorp caused one of those fires: the Pike Road Fire. Government authorities and PacifiCorp itself are still actively investigating these wildfires, and their causes and origins have not fully been determined.

Plaintiff asserts a claim for inverse condemnation under Article XI, Section 4 of the Oregon Constitution. At this point, multiple trial courts in other counties have dismissed similar inverse condemnation claims in cases arising out of the Labor Day Fires. (*See* Ramfjord Decl., Exs. A–E.) Here, too, the inverse condemnation claims are subject to dismissal for multiple reasons:

First, Plaintiff cannot show that PacifiCorp "intentionally undertook its actions" such that "the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Dunn v. City of Milwaukee*, 355 Or 339, 358, 328 P2d 1261 (2014). As Judge Johnson of the Douglas County Circuit Court recognized, in the context of a wildfire inverse condemnation claim, *Dunn* requires alleging both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. E at 4.) Because Plaintiff fails to allege "substantial certainty" at either step, its inverse condemnation claim fails. *Dunn*, 355 Or at 358.

Second, while Plaintiff correctly recognizes that the takings clause in Article I, Section 18 of the Oregon Constitution does not apply here (because PacifiCorp is not the "state"), Plaintiff's Article XI, Section 4 inverse condemnation claim similarly fails because Plaintiff cannot allege that PacifiCorp acted "under authority of law," as the plain text of that clause requires. Oregon case law requires a direct connection between a corporation's legal

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"authority" and the alleged conduct, such as when railroads take property pursuant to municipal ordinances. *See, e.g.*, *Willamette Iron Works v. Oregon R. and Nav. Co.*, 26 Or 224, 225, 37 P 1016 (1894) (railroad's "right to construct a trestle" was "based upon an ordinance" and supported inverse claim). Indeed, the Supreme Court has rejected the argument that simply holding "eminent domain" power renders a corporation a state actor for constitutional purposes; a corporation must "*exercise*" state authority to be liable. *Jackson v. Metropolitan Edison Co.*, 419 US 345, 353 (1974). Allowing Article XI, Section 4 to create an inverse condemnation claim for any corporate conduct, whether or not undertaken under "authority of law," would transform that clause into a generalized private right of action for a broad range of corporate conduct, and the Court should not permit the expansive reading Plaintiff advances.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers in Oregon, Washington, and Northern California. In Oregon, PacifiCorp serves around 596,000 customers under the Pacific Power brand. PacifiCorp is privately owned and operated. PacifiCorp is regulated by the Oregon Public Utilities Commission and may only raise rates by proving to the Commission that a proposed rate increase is "fair, just and reasonable." *See* ORS 757.205, 757.210.

Plaintiff alleges damages arising out of the Pike Road Fire. According to Plaintiffs, the fire ignited when "a diseased and rotten spruce tree that Plaintiff had previously brought to Defendant's attention fell into a charged transmission line and ignited the Pike Road Fire." (Complaint ¶ 1.) Government investigators have not released an official determination of what caused these fires. Plaintiff claims that as a result, it "suffered catastrophic property damage." (*Id*.)

Plaintiff filed its Complaint on September 1, 2022. The Complaint asserts claims for (1) negligence, (2) gross negligence, and (3) inverse condemnation under Article XI, Section 4 of the Oregon Constitution. (Complaint ¶¶ 46–65.)

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III. LEGAL STANDARD

To avoid dismissal, a complaint must state ultimate facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(8). Conclusory allegations, legal conclusions, or mere recitations of a claim's elements are insufficient to state a claim. *See*, *e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997) (citations omitted). When a claim as pleaded remains legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. Plaintiff's Inverse Condemnation Claim Fails As A Matter of Law

The Oregon Constitution has two takings clauses. Article I, Section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, Section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347. Here, Plaintiff asserts its inverse condemnation claim under Article XI, Section 4.

While the typical taking begins with a formal eminent domain proceeding, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Id*. In those cases, a property owner may recover under the doctrine of inverse condemnation.

But Plaintiff cannot satisfy the elements of an Article XI, Section 4 takings claim as a matter of law. *First*, Plaintiff cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable

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result of those actions, in the ordinary course of events, was the invasion of the plaintiffs' property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358. *Second*, Plaintiff cannot show that PacifiCorp acted "under authority of law" as required by Article XI, Section 4 in any relevant respect to its claims here. Because none of these problems can be fixed by amendment, Plaintiff's inverse condemnation claim should be dismissed with prejudice.

1. Plaintiff fails to allege that PacifiCorp intentionally undertook to act in a manner that necessarily caused Plaintiff's injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation claim under Article XI, Section 4 of the Oregon Constitution only by proving that the government "intentionally undertook actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the inverse condemnation claim." *Dunn*, 355 Or at 358–59; *see also Morrison v. Clackamas Cty*., 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If "plaintiff's best evidence" shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; see also *Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("a takings claim cannot be based on * * * negligent government conduct").

Dunn illustrates the high standard Plaintiff must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. 355 Or at 341–42. Plaintiff argued that she

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had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "natural and ordinary consequence[]" of that improvement, and so was liable for inverse condemnation. *Id*. at 345–46.

The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id*. at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiff must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id*.

As Judge Johnson of the Douglas County Circuit Court recognized in rejecting inverse condemnation claims identical to those Plaintiff asserts here, *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. E at 4.) Under *Dunn*, it is not enough to allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiff's properties. Instead, Plaintiff must allege that the invasion "into plaintiff's [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiff's damages must have been "substantially certain" to occur. *Dunn*, 355 Or at 361.

Indeed, Judge Conover of Lane County recently dismissed nearly identical inverse condemnation claims in the *Anderson* case against Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of similar Labor Day 2020 wildfires, specifically finding

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"that there was no intent by either defendant to damage the plaintiffs' properties." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims as well. (Ramfjord Decl., Ex. B.)

Likewise, Judge Johnson of Douglas County recently dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case. (Ramfjord Decl., Ex. A.) In doing so, Judge Johnson suggested that the plaintiffs there had failed to "allege ultimate facts that would support a claim that ***damage to defendants' property*** was an inevitable or natural result of the Plaintiffs' intentional act that was not dependent on other intervening factors." (*Id*. (emphasis added).) Plaintiffs in the *Roseburg* case have recently repleaded, and PacifiCorp is evaluating its response.

Here, too, Plaintiff cannot allege that any of the necessary causal steps to damage their specific property were "substantially certain" to occur. Start with the alleged ignition. Plaintiff alleges a seven-point list of conduct ranging from failing to conduct inspections to failing to de-energize power lines. (Complaint ¶ 47.) Plaintiff then conclusorily alleges that the "necessary, substantially certain, or inevitable consequence" of that conduct was the "wildfire." (*Id.* ¶ 62.) But this generalized list of actions that is a "conclusion[] of law" that does not suffice to state "ultimate facts" entitling Plaintiff to relief. *Huang*, 147 Or App at 332.

Nor has Plaintiff alleged any other specific facts supporting a finding of "substantial certainty." Indeed, the fact that Plaintiff's factual allegations center on fire "risk" confirm that Plaintiff cannot do so. The Complaint refers to "risk" or "fire risk" at least a dozen times, alleging, for example, that there was a "risk of fire danger" and "foreseeable risk of fire," among other things. (*See, e.g.,* Complaint ¶¶ 1, 14, 15, 21, 22, 24.) The reason Plaintiff focuses on "risk" is that it is the best they can do; it is implausible (at best) to suggest that actions like failing to "supervise employees" or "inspect vegetation" are *certain*

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to ignite a fire when other intervening causes (competent ignition source, wind events, etc.) are necessary for an ignition to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id*. at 1377. The court rejected plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "direct, natural, or probable" result of government conduct to state a claim. *Id*. at 1378. As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id*. For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation." *Thune v. United States*, 41 Fed Cl 49, 53 (Fed Cl 1998); *see also Dunn*, 355 Or at 356 n.13 (citing *Thune* with approval).

Even if Plaintiff could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiff makes no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358–59. At best, Plaintiff alleges that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of a larger fire that was the but-for cause of Plaintiff's damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have

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intended *the invasion of plaintiffs' property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id*. at 361 (emphasis added). Plaintiff has not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiff's properties in particular, and they cannot do so.

Finally, Plaintiff has not met its burden by alleging that PacifiCorp has filed regulatory reports acknowledging prior electrical fire ignitions or were otherwise aware of prior utility-caused fires. Indeed, the report cited in Plaintiff's complaint demonstrates why Plaintiff's allegations fail to show that PacifiCorp's acts were substantially certain to invade Plaintiff's properties in particular. That fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors is not a problem Plaintiff can fix with amendment. It is how fires work. *See City of Austin v. Liberty Mut. Ins*., 431 SW3d 817, 825 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). As a result, even with "intentionally set fires" that "escape[] because of intervening winds" or other causes, liability "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiff does not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiff in particular "for purposes of a takings claim," it fails to state a claim for inverse condemnation. *Dunn*, 355 Or at 356.

2. The Article XI, Section 4 inverse condemnation claim fails because Plaintiff does not allege that PacifiCorp acted under authority of law.

Plaintiff's Article XI, Section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiff cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiff contends damaged it. By its own terms, Article XI, Section 4's takings clause only applies to a "corporation under authority of law." Plaintiff may attempt to meet that showing by arguing that PacifiCorp has the general power of condemnation or

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that it operates as a public utility. Here, Plaintiff merely alleges that PacifiCorp is an entity "with the power of condemnation, including but not limited to powers granted under ORS Chapter 35 and the Oregon Constitution" (Complaint ¶ 60), but it fails to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because it cannot do so, their inverse condemnation claim under Article XI, Section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiff cannot state an Article XI, Section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, Section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs' property." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1).

Nor can Plaintiff cite any authority to the contrary. Article XI, Section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*, 185 Or App 425, 60 P3d 557 (2002)—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiff alleges).[1] *Id*. at 443 n.5 (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, [S]ection 4").

[1] A handful of other modern cases have addressed Article XI, Section 4 takings claims, but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Natural Gas Co. v. City of Portland*, 300 Or 291, 312–13, 711 P2d 119 (1985) (no liability under either Article I, Section 18 or Article XI, Section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of West Linn*, 204 Or App 655, 671, 131 P3d 805 (2006) (rejecting Article XI, Section 4 claim in passing, and collecting cases doing the same thing).

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Nevertheless, the only Oregon cases permitting Article XI, Section 4 claims to go forward have involved a direct connection between corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, Section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city counsel of Oregon City"); *Kurtz v. Southern Pac. Co*., 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). In contrast, PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" within the meaning of Article XI, Section 4 whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

It makes sense that the phrase "under authority of law" requires a direct connection between a corporation's legal authority and the alleged taking, because unlike Article I, Section 18's takings clause, Article XI, Section 4 contains no textual "public use" requirement. The "under authority of law" requirement thus fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiff's complaint were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "would be absurd to

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attribute to the framers" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek*, 196 Or at 147).[2]

The Court may also look to the analogous federal state action doctrine, which leads to the same result. In *Jackson v. Metropolitan Edison Co.*, 419 US 345 (1974), a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Id*. at 350, 368 n.1. The Supreme Court nevertheless found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id*. at 353. And although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan v. State Hwy. Comm.*, 274 Or 49, 52 n.2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States"); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n.5, 656 P2d 306 (1982).

Properly construed, Plaintiff cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fire at issue here, nor does Plaintiff attempt to do so. Plaintiff does not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires; it alleges that PacifiCorp *violated* those regulations. Plaintiff similarly does not allege that PacifiCorp used the power of eminent domain to take their property, nor to take any

[2] If the Court interprets Article XI, Section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, Section 4. *See, e.g., Thompson v. Tualatin Hills Park and Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980) (Article XI, Section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I Section 18" (citing *MacVeagh v. Multnomah County*, 126 Or 417, 270 P 502 (1927)).

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relevant land at issue in this case. The most Plaintiff alleges is that PacifiCorp generally has the "power of condemnation"—not that PacifiCorp used that power in any relevant way to their takings claim. (Complaint ¶ 60.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other early Oregon cases—and Plaintiff does not allege any connection, let alone a direct one— Plaintiff's Article XI, Section 4 claim fails as a matter of law.

DATED: October 10, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled DEFENDANT'S PARTIAL MOTION TO DISMISS COMPLAINT on the following named person(s) on the date indicated below by

☒ mailing with postage prepaid. ☒ email (courtesy copy only).

☐ hand delivery. ☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.

☐ overnight delivery. ☐ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

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I'IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STROH COASTAL HOLDINGS LLC, an Oregon limited liability company,

Plaintiff,

v.

PACIFICORP, an Oregon corporation,

Defendant.

No. 22CV29695

DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT

Motions Judge: Hon. Beth A. Allen

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Defendant PacifiCorp hereby submits its answer to Plaintiff's Complaint for Fire Damage ("Complaint") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in said Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that

such headings and groupings are conclusions of law or fact and deny each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

1.

With respect to the first Paragraph 1 (which runs from page 1 (lines 19-end of page) to page 2 (lines 1-9)), PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first Paragraph 1 and on that basis denies them.

With respect to the second Paragraph 1 (which runs from lines 11-13 on page 2), PacifiCorp admits that it is an Oregon corporation with its principal business office in Multnomah County. The first sentence of the second Paragraph 1 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of that sentence. PacifiCorp lacks knowledge or information sufficient to form a belief about whether Plaintiff is an Oregon corporation.

2.

PacifiCorp admits that it maintains its principal business office in Multnomah County. The remainder of Paragraph 2 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies those allegations.

3.

PacifiCorp admits that it is an Oregon corporation doing business as a public utility in Oregon. PacifiCorp admits that, as of 2020, PacifiCorp's annual revenue as reported on Berkshire Hathaway Energy's Form 10-K was $5.341 billion. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 3.

4.

PacifiCorp admits the allegations of Paragraph 4.

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5.

PacifiCorp admits the allegations of Paragraph 5.

6.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 6, and on that basis denies them.

7.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 7, and on that basis denies them.

8.

PacifiCorp admits that, as of 2020, PacifiCorp's annual revenue as reported on Berkshire Hathaway Energy's Form 10-K was $5.341 billion. PacifiCorp admits that it "owns, builds, operates, and maintains power lines and other electrical equipment and infrastructure to transmit power" in "six western states, including Oregon." PacifiCorp admits that it "owns, maintains, and operates electrical equipment" in Tillamook County. Except as expressly admitted herein, PacifiCorp denies any remaining allegations of Paragraph 8.

9.

PacifiCorp admits that it holds a right of way easement (dated April 8, 1955) over Plaintiff's property. PacifiCorp further states that the document speaks for itself.

10.

PacifiCorp admits that Paragraph 10 accurately quotes from the right of way easement dated April 8, 1955. PacifiCorp further states that the document speaks for itself. Except as expressly admitted herein, PacifiCorp denies any remaining allegations in paragraph 10.

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11.

PacifiCorp admits that Paragraph 11 accurately quotes from the right of way easement dated April 8, 1955. PacifiCorp further states that the document speaks for itself. Except as expressly admitted herein, PacifiCorp denies any remaining allegations in paragraph 11.

12.

PacifiCorp admits that it constructed a powerline across the easement portion of Plaintiff's property. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations of Paragraph 12, and on that basis denies them.

13.

Paragraph 13 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 13.

14.

Paragraph 14 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 14.

15.

PacifiCorp admits that David Lucas, PacifiCorp's Vice President of Transmission and Distribution Operations, appeared at a special public meeting of the Oregon Public Utility Commission on June 18, 2019, and that Paragraph 15 accurately quotes portions of Mr. Lucas's statements. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 15.

16.

PacifiCorp admits that Heide Caswell, PacifiCorp's Director of Transmission and Distribution Asset Performance, appeared at a special public meeting of the Oregon Public

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Utility Commission on June 18, 2019, and that Paragraph 16 accurately quotes portions of Ms. Caswell's testimony. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 16.

17.

PacifiCorp admits that it presented a slide regarding "Situational Awareness" during the June 18, 2019, special meeting regarding PG&E's and PacifiCorp's wildfire mitigation plans before the Oregon Public Utility Commission, and that a portion of that slide presentation is accurately quoted in Paragraph 17. PacifiCorp further states that the slide presentation speaks for itself. Except as expressly admitted herein, PacifiCorp denies any remaining allegations in paragraph 17.

18.

PacifiCorp admits that it published a June 25, 2019, document titled "Wildfire Safety and Preparedness Frequently Asked Questions," and that Paragraph 18 accurately quotes from that document. PacifiCorp further states that the document speaks for itself. Except as expressly admitted herein, PacifiCorp denies any remaining allegations in paragraph 18.

19.

PacifiCorp admits that it has published a presentation containing "Public Safety Power Shut-off Key Points," and that Paragraph 19 accurately quotes portions of that document. PacifiCorp further states that the presentation speaks for itself. Except as expressly admitted herein, PacifiCorp denies any remaining allegations in paragraph 19.

20.

PacifiCorp admits that Paragraph 20 accurately quotes a portion from reporting of PacifiCorp Vice President Scott Bolton speaking with KATU News. Except as expressly admitted herein, PacifiCorp denies the remaining allegations in paragraph 20.

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21.

PacifiCorp admits that Paragraph 21 accurately quotes a portion of the Executive Summary of PacifiCorp's 2020 California Wildfire Mitigation Plan. PacifiCorp further admits that PacifiCorp's Vice President of Transmission and Distribution, David Lucas, signed the 2020 California Wildfire Mitigation Plan. PacifiCorp further states that the document speaks for itself. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 21.

22.

PacifiCorp admits that Paragraph 22 accurately quotes a portion of a document that appears to be published by the Oregon Public Utilities Commission titled "Wildfire and the Oregon Electricity System: Common Questions Asked of the PUC." PacifiCorp further states that the document speaks for itself. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 22.

23.

Paragraph 23 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 23.

24.

PacifiCorp admits that Paragraph 24 accurately quotes portions of the "Public Safety Power Shutoff" section of PacifiCorp's website, located at https://www.pacificpower.net/outages-safety/wildfire-safety/public-safety-power-shutoff.html. Except as expressly admitted herein, PacifiCorp denies the allegations of Paragraph 24.

25.

PacifiCorp denies the allegations of Paragraph 25.

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26.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 26, and on that basis denies them.

27.

PacifiCorp admits that, on September 6, 2020, the National Weather Service issued a fire weather outlook and that a portion of that weather outlook is accurately quoted in Paragraph 27. PacifiCorp further states that the weather outlook speaks for itself. Except as expressly admitted herein, PacifiCorp denies the allegations in Paragraph 27.

28.

PacifiCorp admits that, on September 6, 2020, the National Weather Service issued a fire weather outlook and that a portion of the weather outlook is accurately quoted in Paragraph 28. PacifiCorp further states that the weather outlook speaks for itself. Except as expressly admitted herein, PacifiCorp denies the allegations in Paragraph 28.

29.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29 that "reports along Highway 22 in Santiam Canyon show that Defendant's power lines ignited fires." PacifiCorp denies the remaining allegations of Paragraph 29.

30.

PacifiCorp admits that its @PacificPower_OR Twitter account quote-tweeted a September 7, 2020, tweet by the National Weather Service Portland's @NWSPortland Twitter account and that portions of both the @NWSPortland's tweet and @PacificPower_OR's quote tweet are accurately quoted in Paragraph 30. PacifiCorp further states that the tweets speak for themselves. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 30.

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31.

PacifiCorp admits that it utilizes weather information in deciding whether to de-energize power lines. PacifiCorp denies the remaining allegations of Paragraph 31.

32.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 32 and on that basis denies them.

33.

PacifiCorp admits that a right of way easement (dated April 8, 1955) exists over Plaintiff's property. PacifiCorp further states that the document speaks for itself. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 33.

34.

Paragraph 34 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 34.

35.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35 and on that basis denies them.

36.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36 and on that basis denies them.

37.

Portions of Paragraph 37 contain conclusions of law to which no response is necessary or appropriate. To the extent a response is required to those allegations, PacifiCorp denies them. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 37 and on that basis denies them.

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38.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 38 and on that basis denies them.

39.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39 and on that basis denies them.

40.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 40 and on that basis denies them.

41.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 41 and on that basis denies them.

42.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 42 and on that basis denies them.

43.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 43 and on that basis denies them.

44.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 44 and on that basis denies them.

45.

PacifiCorp denies that it caused the "2020 Labor Day wildfire" (i.e. Pike Road Fire) identified in Paragraph 45 and further denies that it caused any damages to Plaintiff. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 45 and on that basis denies them.

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46.

In response to Paragraph 46, PacifiCorp incorporates its responses to Paragraphs 1 through 45.

47.

PacifiCorp denies the allegations of Paragraph 47.

48.

PacifiCorp denies the allegations of Paragraph 48.

49.

Paragraph 49 consists of conclusions of law and allegations concerning the relief sought by Plaintiff to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 49.

50.

In response to Paragraph 50, PacifiCorp incorporates its responses to Paragraphs 1 through 49.

51.

PacifiCorp denies the first sentence of Paragraph 51. PacifiCorp admits that its fire mitigation plans contemplate the de-energization of power lines under high wind conditions, although no single factor, including high winds, would require a Public Safety Power Shutoff. The remainder of Paragraph 51 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies those allegations.

52.

PacifiCorp denies the allegations of Paragraph 52.

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53.

PacifiCorp denies the first sentence of Paragraph 53. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 53 and on that basis denies them.

54.

PacifiCorp denies the allegations of Paragraph 54.

55.

Paragraph 55 consists of conclusions of law and allegations concerning the relief sought by Plaintiff in this action to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 55.

56.

Paragraph 56 consists of conclusions of law and allegations concerning the relief sought by Plaintiff in this action to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 56.

57.

In response to Paragraph 57, PacifiCorp incorporates its responses to Paragraphs 1 through 56.

58.

Paragraph 58 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp admits that Article XI, Section 4 of the Oregon Constitution speaks for itself and denies the allegations of Paragraph 58 to the extent they are inconsistent therewith.

59.

PacifiCorp admits that it is an Oregon corporation doing business as a public utility. The remainder of Paragraph 59 consists of conclusions of law to which no response is

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necessary or appropriate. To the extent a response is required, PacifiCorp denies these allegations.

60.

Paragraph 60 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp admits that ORS chapter 35 and the Oregon Constitution speak for themselves, and PacifiCorp denies the allegations of Paragraph 60 to the extent they are inconsistent with ORS chapter 35 and the Oregon Constitution.

61.

Paragraph 61 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 61.

62.

PacifiCorp admits that the third sentence of Paragraph 62 accurately quotes a portion from reporting of PacifiCorp Vice President Scott Bolton speaking with KATU News. PacifiCorp admits that the fifth sentence of Paragraph 62 accurately quotes a portion from the National Weather Service's September 6, 2020, fire weather outlook. Except as expressly admitted herein, PacifiCorp denies the remaining allegations of Paragraph 62.

63.

Paragraph 63 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64.

Paragraph 64 consists of conclusions of law and allegations concerning the relief sought by Plaintiff to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

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65.

Paragraph 65 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 65.

GENERAL DENIAL

66.

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

PacifiCorp expressly incorporates all allegations of its Answer as if fully set forth in each of the following Affirmative Defenses.

Without admitting any wrongful conduct on the part of PacifiCorp, and without admitting that Plaintiff has suffered any loss, damage, or injury, PacifiCorp alleges the following Affirmative Defenses to the Complaint. By designating the following as Affirmative Defenses, PacifiCorp does not in any way waive or limit any defenses which are or may be raised by the denial, allegations, and averments set forth herein. Certain Affirmative Defenses are asserted for completeness and refer to facts and proof which also negate required elements of Plaintiff's claims, and by raising such Affirmative Defenses PacifiCorp does not admit that Plaintiff lacks the burden of proof and/or the burden of persuasion for any or all facts underlying any of those Affirmative Defenses or suggest that Plaintiff is not required to carry the burden as to such elements.

The Affirmative Defenses are pleaded in the alternative, are raised to preserve the rights of PacifiCorp to assert such Affirmative Defenses, and are without prejudice to PacifiCorp's ability to raise other and further Affirmative Defenses.

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as by third parties. In addition to the Affirmative Defenses set forth

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below, PacifiCorp reserves the right to allege additional Affirmative Defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

67.

Plaintiff may be barred from recovering damages, in whole or in part, for the harm alleged in the complaint by reason of its failure to mitigate such alleged damages. On information and belief, Plaintiff and/or its agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages, such as (but not limited to) by failing to take steps to salvage harvestable timber on Plaintiff's properties.

SECOND AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

68.

Plaintiff may be barred from recovery because the injuries or losses it sustained were caused, in whole or in part, by the unforeseeable intervening or superseding acts or omissions of others over whom PacifiCorp had no control and for whose conduct PacifiCorp is not responsible, or other unforeseeable, independent, intervening, or superseding event(s) or circumstance(s) beyond the control of PacifiCorp. On information and belief, negligent forestry practices, negligent firefighting, Plaintiff's and/or its agents' lack of compliance with Oregon's Defensible Space Law, or another currently unknown superseding event caused or contributed to Plaintiff's damages.

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THIRD AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

69.

Plaintiff may be barred from recovery because the injuries or losses it sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties who PacifiCorp had neither the right, duty or opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. On information and belief, negligent forestry practices, negligent firefighting, Plaintiff's and/or its agents' lack of compliance with Oregon's Defensible Space Law, or another currently unknown superseding event caused or contributed to Plaintiff's damages.

FOURTH AFFIRMATIVE DEFENSE

(Unavoidable Accident/Act of God)

70.

Plaintiff's damages, if any, were caused by an unavoidable accident or Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiff. One or more of the alleged ignitions in this case may have been caused by an unavoidable Act of God, such as a lightning strike.

FIFTH AFFIRMATIVE DEFENSE

(Compliance with Duty of Care)

71.

Plaintiff's claims are barred because PacifiCorp complied with the law and acted reasonably with the intent to obey the law and such compliance demonstrates that PacifiCorp exercised due care and reasonable prudence. Among other things, PacifiCorp alleges that its deenergization policies and practices complied with the Oregon Public Utility Commission's requirements and Oregon law.

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SIXTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

72.

Plaintiff's claims are barred because PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the complaint. Among other things, PacifiCorp alleges that its deenergization policies and practices met or exceeded industry standards for utility operation in Oregon.

SEVENTH AFFIRMATIVE DEFENSE

(Justification/Necessity)

73.

In connection with the acts and omissions alleged by Plaintiff, PacifiCorp was justified in its actions or acting out of necessity; therefore Plaintiff may not recover against PacifiCorp. Among other things, PacifiCorp acted reasonably in the face of urgent requirements to restore power during a historic windstorm in its inspection and reenergization actions.

EIGHTH AFFIRMATIVE DEFENSE

(Contributory/Comparative Negligence)

74.

At all times mentioned herein Plaintiff were or may have been wholly or partially at fault, and conducted itself so as to contribute partially, substantially, or wholly to its alleged injuries and damages, if any. The fault of Plaintiff bars, in whole or in part, the damages which Plaintiff seeks to recover herein. Among other things, on information and belief, Plaintiff failed to comply with the requirements of Oregon's Defensible Space Law and/or otherwise failed to maintain its properties in a fire safe condition.

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NINTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

75.

Plaintiff may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

76.

Plaintiff may not recover on claims of damages or losses paid by any other sources.

ELEVENTH AFFIRMATIVE DEFENSE

(Statutory Limit on Damages)

77.

Plaintiff may not recover damages, in whole or part, to the extent that ORS 477.089 prohibits such recovery.

TWELFTH AFFIRMATIVE DEFENSE

(Requirement to Show Negligence)

78.

To the extent Plaintiff seeks to recover without showing that PacifiCorp was negligent or acted with a higher degree of fault, Plaintiff's claims are barred, in whole or in part, by ORS 477.092.

THIRTEENTH AFFIRMATIVE DEFENSE

(No Duty to De-Energize)

79.

To the extent Plaintiff's claims rest on PacifiCorp's alleged failure to de-energize its power lines, Plaintiff's claims fail because Oregon law does not impose an affirmative duty in tort to proactively de-energize power lines distinct from PacifiCorp's general obligation

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under ORS 757.020 to furnish adequate and safe service and under ORS 757.035(1) to construct, maintain, and operate its electrical facilities to protect and safeguard the health and safety of all employees, customers and the public.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorization by Statute or Regulation)

80.

Plaintiff's claims are barred, in whole or in part, because the actions and conditions complained of by Plaintiff are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission, including but not limited to because PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Compliance with Statutes and Regulations)

81.

Plaintiff's claims for negligence per se and negligence (to the extent based on purported statutory or regulatory violations) are barred, in whole or in part, because PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation, including but not limited to because (1) PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements and vegetation management program and recordkeeping requirements set forth in OAR 860-024-0016, (2) PacifiCorp constructed, operated, and maintained its electrical facilities in compliance with the 2017 NESC code requirements pursuant to OAR 860-024-0010, (3) PacifiCorp complied with the requirements of OAR 860-024-0011(1)(a)-(b) by conducting detailed inspections at least every ten years and filing reports with the PUC, (4) PacifiCorp maintained adequate written records of policies, plans and schedules to demonstrate its

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compliance with the OAR, and (5) PacifiCorp performed routine safety patrols of overhead electrical supply lines and accessible facilities in compliance with OAR 860-024-0011(2).

SIXTEENTH AFFIRMATIVE DEFENSE

(Negligence Per Se)

82.

Plaintiff's claim for negligence per se is barred because none of the relevant statutes or regulations, including ORS 757.020 or applicable rules, regulations or orders by the Oregon Public Utilities Commission, fix the standard of conduct applicable to PacifiCorp or were implemented to prevent the harm Plaintiff alleges or to protect the class of persons including Plaintiff. Among other things, liability exists under a negligence per se theory only when a "governmental rule * * * though it was not itself meant to create a civil claim, nevertheless so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout ex rel. Shahtout v. Emco Garbage Co.*, 298 Or 598, 602, 695 P2d 897 (1985). Many, if not all, of the statutes and regulations cited by Plaintiff do not fix the legal standard, such as OAR 757.035(1), which requires PacifiCorp to "construct, maintain and operate every line, plant, system, equipment or apparatus in such a manner as to protect and safeguard the health and safety of all employees, customers and the public."

SEVENTEENTH AFFIRMATIVE DEFENSE

(No Punitive Damages—Unconstitutionality)

83.

To the extent Plaintiff reserves the right to assert a claim for punitive damages, PacifiCorp alleges that such claim for punitive damages is barred, in whole or in part, because it violates PacifiCorp's state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; and the right not to be subjected to excessive awards

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and multiple punishments; and that any claim for punitive damages is limited by state and federal law, including but not limited to the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

EIGHTEENTH AFFIRMATIVE DEFENSE

(Offset)

84.

Plaintiff may not recover damages, in whole or in part, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiff and/or its insurers. PacifiCorp alleges that such compensation may constitute an offset.

NINETEENTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

85.

The Court lacks jurisdiction to adjudicate Plaintiff's claims because the Oregon Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiff's Complaint as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTIETH AFFIRMATIVE DEFENSE

(Preemption)

86.

Plaintiff's claims are preempted by the Oregon Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under ORS 756.610 and ORS 183.480.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

(Reservation of Right to Amend to Add Further Affirmative Defenses)

87.

PacifiCorp presently has insufficient knowledge or information to form a belief as to whether it may have additional, as yet unstated, defenses available and therefore reserves the right to assert such additional defenses that are proper based on discovery, investigation or further analysis.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Complaint, PacifiCorp requests that the Court enter judgment in its favor on all claims asserted by Plaintiff in its complaint, award PacifiCorp its costs in this action, and grant such other relief as the Court deems just and equitable.

DATED: July 6, 2023

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s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT** on the following named person(s) on the date indicated below by

☐ mailing with postage prepaid. ☒ email (courtesy copy only).
haglund@hk-law.com
mmalmsheimer@hk-law.com cgriffith@hk-law.com

☐ hand delivery. ☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.

☐ overnight delivery. ☒ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

Michael E. Haglund,
Matthew E Malmsheimer
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DATED: July 6, 2023

s/ Reilley D. Keating
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PAC_256.07.169

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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Case No. 34-2021-00293621

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JERRY POESCHEL, DIANA POESCHEL; KATHY PRICE; CONNIE RASMUSSEN; JASON H. RASMUSSEN; RYAN RASMUSSEN, DENEGE RASMUSSEN; FRANK REECE, WILVERNA REECE; KENNETH RICHARDS, SHERRY RICHARDS; KIRA RILEA, CHRIS WILSON; RENE ROBERTS; CHRISTINA MARIE ROBINSON; DOUGLAS A. ROBINSON, GINA M. ROBINSON; RICHARD ROBISON; TANYA ROSENGREN; JOHN ROTH; PHLISHA SCOHY; TERRI SEAGRAVER; CHRISTINA SHERBURN, GREGORY SHERBURN; CRYSTAL SHERBURN, JORDAN OLIVERGREY, ROBERT PAUL GREY; ANDREE SILVA; TIMOTHY L. SIMS; FRANK SNIDER, SYDNEY SNIDER; APRIL SPENCE; ROBERT SPENCE, SARA SPENCE, SPENCE'S GUIDE SERVICE; ELLIOT H. STEELE; CARL STEWART, CIMERON GOGGIN; AMANDA STRAIN; LUCINDA STURDEVANT; JANINE SUATOWSKI; DINAH SULIPECK; SALVADOR TELLO; ANN G. THOMASON; EILEEN TIRATERRA, LOUIS TIRATERRA, CASEY TIRATERRA; JAMES TIRATERRA; NELLARIE J. TITUS; PHILLIP B. TITUS; DOUGLAS TOWER; HAROLD TOWER, APRIL TOWER; CATHERINE TURNER, RON DRAKE; AARON TUTTLE; ALBERT M. VANDERHOOF; BAXTER VIRTUE, DEBBIE VIRTUE; JOSEPH WADDELL, JUDY WADDELL; VICKIE MARIE WALDEN; TARA WARE, CHRIS WARE; LISA WEST; ROBERT S. WHITE, PARTICIA C. WHITE; THOMAS D. WHITE, MARY WHITE, WHITE LOGGING CO.; DONALD E. WILHITE, GINGER WILHITE; JESSICA WILSON, RAYMOND WILSON; ROSALYNN YAMAMOTO; LYNNE M HETHERINGTON REVOCABLE TRUST DATED DEC 27, 1999; BERNARD G. LOWRY REVOCABLE TRUST 2004; THE WILLIAM G. ADAMS TRUST- 2019; WENDY BUCHANAN; BAXTER VIRTUE AND DEBORAH VIRTUE TRUST DATED 2016; THE MIKE CONKEY AND LYNETTE TOTANS LIVING TRUST; 2018 LEEON C. HILLMAN AND ERIN C. HILLMAN REVOCABLE TRUST; PHLISHA G. SCOHY TRUSTEE OF RUSSELL E. SCOHY TRUST; TESTAMENTARY TRUST OF MABEL C. SMITH; CHARLES R. HUG AND ANNETTE D. HUG REVOCABLE TRUST; KAREN DAVIS; MARVIN DUNCAN; EVAN GARRAHAN; GARRAHAN

CONSTRUCTION; SANA MINIUM; EARL MINIUM; CARMYNNE NEIMOYER; MAKAYLA SPENCE; CARRIE DAVIS; CHERI WHITE; ALVIN WHITE; JOHN BARNETT; TAMARA BARNETT; CARL BAUDER; KARUK TRIBE; RUSSELL ATTEBERY; DEBIE MEYER; MICHAEL T. SMITH; MARDEE TOWER; DORA ELSTON; HUG RENTAL; BRIAN SPENCE,

Plaintiffs,

vs.

PACIFICORP and DOES 1 through 50, inclusive,

Defendants.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant PacifiCorp ("PacifiCorp" or "Defendant"), by and through its attorneys of record, and on behalf of no other party, hereby respectfully submits this Answer and Affirmative Defenses to the Complaint of Plaintiffs Erin Hillman; Leeon Hillman; King Fisher Market; Denise Deneaux; Robert W. Waddell, Debra R. Waddell; Grant Abo; William George Adams; Ballei Allec; Mara Lei Allec, Rodney W. Allec, Sr.; Lonnie Anderson, Elizabeth Cushman; Duane Armbruster; Candace Louise Atto; Antone Aubrey, Jr.; Earl Aubrey, Jr., Lisa Aubrey; Lester Aubrey; John T. Bain, Ruth a. Bain; John Bankston; Francine Banzali, Faris Real Estate; Kathleen Marie Barger-Mccovey; John Barnett; Tamara Barnett; Edwin Charles Bartosiewski, Sally Jo Bartosiewski; Carl Bauder; James Bayes; Linda Bibbs; Rosemary Bley, Robert Bley; Wendy Beth Buchanan; Gary Burnett; Anna Mae Cantrell; Matt Cartensen, Ayela Cartensen; Arthur Chacon; Bruce Chapman; Sebethia Coleman; Michael R. Conkey, Lynette L. Totans; Bhrett Cross; Barry Davis, Linda S. Davis; Dean a. Davis; Marta M. De Tello; Alan Decoux, Tina Decoux, Al's Garage; Jose F. Delannoy, Janice E. Lemon; Elvis Douglas, Josselyn Hillenburg; Melody Duncan, Michael Duncan, Barbara Black, Indian Creek Trail Park, Naturegraph Publishers; Kirk a. Eadie, Robyn Eadie; Forrest Emerson; Joe B. Emerson; Brittany Ettleman; John Vincent Evans, Rebecca Lea Evans; Diane Felicicchia; Brandon Garcia, Christina Garcia; Pamela Geiger, Patrick J. Reimer; Gail L. Goodrich; Richard Goodwin; Robert a. Goodwin, Elsa R. Goodwin; David a. Gordon; Leonard Guinther, Marlaina P. Guinther; Dalanea

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M. Hetherington Revocable Trust Dated Dec 27, 1999; Bernard G. Lowry Revocable Trust 2004; the William G. Adams Trust- 2019; Wendy Buchanan; Baxter Virtue and Deborah Virtue Trust Dated 2016; the Mike Conkey and Lynette Totans Living Trust; 2018 Leeon C. Hillman and Erin C. Hillman Revocable Trust; Phlisha G. Scohy Trustee of Russell E. Scohy Trust; Testamentary Trust of Mabel C. Smith; Charles R. Hug and Annette D. Hug Revocable Trust; Karen Davis; Marvin Duncan; Evan Garrahan; Garrahan Construction; Sana Minium; Earl Minium; Carmynne Neimoyer; Makayla Spence; Carrie Davis; Cheri White; Alvin White; John Barnett; Tamara Barnett; Carl Bauder; Karuk Tribe; Russell Attebery; Debie Meyer; Michael T. Smith; Mardee Tower; Dora Elston; Hug Rental; and Brian Spence (collectively, "Plaintiffs").

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly. Each affirmative defense set forth below applies as a separate defense to each and every cause of action stated in the Complaint unless expressly stated otherwise.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

3. Plaintiffs' complaint and each of the claims alleged therein fail to state a claim upon which any relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Particularity/Indefiniteness)

4. Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

5. Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged in the complaint by reason of their failure to mitigate such alleged damages.

FOURTH AFFIRMATIVE DEFENSE

(Act of God)

6. Plaintiffs may be barred from recovering damages, in whole or in part, because Plaintiffs' damages, if any, were caused by an uncontrollable force or Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

(No Breach of Duty)

7. Plaintiffs may be barred from recovering damages, in whole or in part, because Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

(Reasonable Conduct)

8. PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and

complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

(Intervening and Superseding Acts)

9. Plaintiffs may be barred from recovering damages, in whole or in part, because Plaintiffs' damages, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(No Proximate Cause)

10. Plaintiffs may be barred from recovering damages, in whole or in part, because PacifiCorp's acts or omissions were not the proximate cause of Plaintiffs' injuries.

NINTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

11. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the unforeseeable intervening or superseding acts or omissions of others over whom PacifiCorp had no control and for whose conduct PacifiCorp is not responsible, or other unforeseeable, independent, intervening, or superseding event(s) or circumstance(s) beyond the control of PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

(Comparative Negligence)

12. Plaintiffs may be barred from recovery because Plaintiffs and their agents acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint, and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

(Control of Agency or Instrumentality)

13. Plaintiffs may be barred from recovery because the agency or instrumentality causing the incidents alleged in the Complaint was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Name Necessary Defendants)

14. Plaintiffs' claims are subject to dismissal for Plaintiffs' failure to join necessary and/or indispensable parties.

THIRTEENTH AFFIRMATIVE DEFENSE

(Compliance with Duty of Care)

15. Plaintiffs' claims are barred because PacifiCorp complied with the law and acted reasonably with the intent to obey the law and such compliance demonstrates that PacifiCorp exercised due care and reasonable prudence.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorization of California & Its Public Utilities Commission)

16. Plaintiffs' claims are barred because the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

FIFTEENTH AFFIRMATIVE DEFENSE

(Authorization of Governmental Authorities)

17. Plaintiffs' claims are barred because PacifiCorp's use of properties, equipment, and/or other activities was at all times lawful and authorized by agreement; license; easement; the County of Siskiyou, California; the County of Del Norte, California; the County of Josephine, Oregon; respective city governments within said Counties; the State of California; the California Public Utilities Commission; the United States of America; the United States Forest Service; and/or the aforementioned authorities' agencies, and pursuant to law.

SIXTEENTH AFFIRMATIVE DEFENSE

(Conformance with Industry Standards)

18. Plaintiffs' claims are barred because PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Justification/Necessity)

19. In connection with the acts and omissions alleged by Plaintiffs, PacifiCorp was justified in its actions or acting out of necessity; therefore Plaintiffs may not recover against PacifiCorp.

EIGHTEENTH AFFIRMATIVE DEFENSE

(No Double Recovery)

20. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs are not entitled to double recovery on claims of damages or losses.

NINETEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

21. Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTIETH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

22. Plaintiffs may not recover on claims of damages or losses paid by any other sources.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Statutory Limit on Damages)

23. To the extent Plaintiffs claim Oregon damages or damages that are governed by Oregon law, Plaintiffs may not recover damages, in whole or part, to the extent that Oregon Revised Statutes section ORS 477.089 prohibits such recovery.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Requirement to Show Negligence)

24. To the extent Plaintiffs assert claims governed by Oregon law, to the extent that Plaintiffs seek to recover without showing that Defendants were negligent, Plaintiffs' claims are barred, in whole or in part, by Oregon Revised Statutes section 477.092.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(No Duty to De-Energize)

25. To the extent Plaintiffs' claims rest on PacifiCorp's alleged failure to de-energize its power lines, Plaintiffs' claims fail because Oregon and California law do not impose an affirmative duty to proactively de-energize power lines.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(No Negligence Per Se)

26. Plaintiffs' claim for negligence per se is barred because none of the relevant statutes or regulations, including California Public Utilities Code section 2106; California Public Utilities Commission General Order 95; California Public Utilities Commission General Order 95; any other applicable rules, regulations, and orders of the California Public Utilities Commission; Oregon Revised Statutes section 757.020; and/or any applicable rules, regulations or orders by the Oregon Public Utilities Commission, fix the standard of conduct applicable to PacifiCorp or were implemented to prevent the harm Plaintiffs allege or to protect the class of persons including Plaintiffs.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Public Benefit)

27. Plaintiffs' claim for nuisance is barred, in whole or in part, because Defendants provide a public benefit or socially useful service.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Recovery Limited to Reasonable Damages)

28. If PacifiCorp is responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully

incurred. PacifiCorp denies that the injuries, damages, and expenses for which Plaintiffs seek reimbursement are either reasonable or lawfully incurred.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Joint Liability)

29. Pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation. Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(No Interest or Fees)

30. Plaintiffs' damages are barred, in whole or in part, because the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(No Punitive Damages—Unconstitutionality)

31. Plaintiffs' claims for punitive damages are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and that any claim for punitive damages is limited by state and federal law, including but not limited to the U.S. Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

THIRTIETH AFFIRMATIVE DEFENSE

(No Punitive Damages—Insufficient Facts)

32. Plaintiffs' claims for punitive damages are barred, in whole or in part, because the allegations in the Complaint fail to state facts sufficient to support an award of exemplary or punitive damages or other statutory fines or penalties against PacifiCorp. No alleged act or omission of PacifiCorp was oppressive, fraudulent, or malicious under California Civil Code § 3294(a), and therefore, any award of punitive damages is barred. Any claim for punitive damages also is barred under California Civil Code § 3294(b). No alleged act or omission of PacifiCorp was willful under California Public Utilities Code § 2106, and therefore, any award of punitive damages is barred.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Inverse Condemnation—Violation of Fifth and Fourteenth Amendments)

33. Plaintiffs' claims for inverse condemnation are barred, in whole or in part, because they violate PacifiCorp's state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Inverse Condemnation—No Compensable Interest)

34. Plaintiffs' claims for inverse condemnation are barred, in whole or in part, because Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Inverse Condemnation—Offset)

35. Plaintiffs' claims for inverse condemnation are barred in whole or in part, because to the extent that PacifiCorp has provided or may provide compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation constitutes an offset.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Federal Preemption)

36. Plaintiffs' claims are barred, in whole or in part, by express, implied, or conflict preemption under federal law under the Supremacy Clause of the United States Constitution, Article VI, clause 2, and by the laws of the United States, including federal common law, the Indian Reorganization Act (25 U.S.C. § 461 *et seq*.), the Act of Mar. 3, 1901, ch. 832, 31 Stat. 1058 *et seq*. (including, but not limited to, 25 U.S.C. § 357), the Indian General Allotment Act of 1887 (25 U.S.C. § 331 *et seq*.), the Indian Trade and Intercourse Act (25 U.S.C. § 177 *et seq*.), and regulations promulgated thereunder.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(First-Filed Rule)

37. Plaintiffs' claims are barred, in whole or in part, under the first-filed rule.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

38. PacifiCorp presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. PacifiCorp therefore reserves the right to assert such additional defenses as are proper based on discovery, investigation, or further analysis.

PRAYER FOR JUDGMENT

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of the Complaint herein;

2. That judgment be entered in favor of PacifiCorp;

3. That PacifiCorp be awarded its costs of suit; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: May 10, 2021

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Derek R. Flores
William Larsen

Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660

On May 10, 2021, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO PLAINTIFFS' COMPLAINT

on the interested parties in this action as stated:

LAW OFFICES OF SHAWN E. CAINE, A.P.C. Shawn Caine *scaine@cainelaw.com* Jessica Kirshner *jkirshner@cainelaw.com* 1221 Camino Del Mar Del Mar, CA 92014 Tel: 858-350-1660 *Counsel for Plaintiffs*	**SIEGLOCK LAW, A.P.C.** Christopher C. Sieglock *chris@sieglocklaw.com* Kristen Reano *kristen@sieglocklaw.com* 1221 Camino Del Mar Del Mar, CA 92014 Tel: 858-793-0380 *Counsel for Plaintiffs*
FOX LAW, A.P.C. Dave Fox *dave@foxlawapc.com* Joanna Fox *joanna@foxlawapc.com* 225 W. Plaza St., #102 Solana Beach, CA 92075 Tel: 858-256-7616 *Counsel for Plaintiffs*	

☒ (BY MAIL) By placing true copies of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 10, 2021, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.170

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYLA HITCHCOCK; CATHERINE BARNINGHAM; SAMUEL BRIDGES; JOHNNY BRIDGES; COLLEEN BRIDGES; SEAN CAMPBELL; DIANNA EKIS; BREANN CORTES; ANTHONY MOEHRING; ROBERT CRAMER; SAMI DIFUNTORUM; DALE ERICKSON; BRITTANY ETTLEMAN; DELYLE HACKETT; REBECCA FERRERO; MARIA FLOREZ; ADRIAN GUY; ALVIN GUY; GLADYS GUY; BONNIE GARCIA; JAIRO GOMEZ; DONNA GOODWIN; ANGELA GRAVES; ELIJAH GRAVES; FRANKLIN MOEHRING; ADRIANNA GUY; BRITTANY HANSEN; MISTY MAIN; JEREMY HARRISON; BILL JACKSON; HALLEE JOBE; JONATHAN HULSE; CHERI JOHNSON; JENNIFER JONES; ASHLEY LARSON; KALEB LLOYD; MICHAEL MCDONALD; MONETTE MCDONALD; ADAM MEIVES; CRADEA MOEHRING; JODIE MOSKIOS; PHILLIP MOSKIOS; DARLENE NOWAK; DONALD NOWAK; ALYSSA PEPPER; MICHAEL MOEHRING; GLORIA JIMENEZ; RALPH PEREZ; TRENTON PETERSON; QUENTIN PETERSON; TRENTON PETERSON AS PERSONAL REPRESENTATIVE AND/OR SUCCESSOR IN INTEREST OF THE ESTATE OF MARTIN RAY PETERSON; KASSANDRA POLMATEER; FAWN RENSINK; DALTON ALLEC; BREANNA ROWAN; SARA SAENZ; STEVEN SAENZ; WALTER SLATER; ANATHEA SPARROW;

Case No. 34-2020-00290833

DEFENDANT PACIFICORP'S ANSWER TO PLAINTIFFS' COMPLAINT

BETHANY WILSON; RH TILLEY; MARLYN WADDELL; THOMAS WADDELL; JUSTIN WEST; EMILEE WILCHECK; MICHAEL WILBOURN; ISMAEL WILLIAMS; CHRISTOPHER WILSON; SILAS YAMAMOTO,

Plaintiffs,

vs.

PACIFICORP and DOES 1-200, inclusive,

Defendants.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant PacifiCorp ("PacifiCorp" or "Defendant"), by and through its attorneys of record, and on behalf of no other party, hereby respectfully submits this Answer and Affirmative Defenses to the Complaint of Plaintiffs Lyla Hitchcock, Catherine Barningham, Samuel Bridges, Johnny Bridges, Colleen Bridges, Sean Campbell, Dianna Ekis, Breann Cortes, Anthony Moehring, Robert Cramer, Sami Difuntorum, Dale Erickson, Brittany Ettleman, Delyle Hackett, Rebecca Ferrero, Maria Florez, Adrian Guy, Alvin Guy, Gladys Guy, Bonnie Garcia, Jairo Gomez, Donna Goodwin, Angela Graves, Elijah Graves, Franklin Moehring, Adrianna Guy, Brittany Hansen, Misty Main, Jeremy Harrison, Bill Jackson, Hallee Jobe, Jonathan Hulse, Cheri Johnson, Jennifer Jones, Ashley Larson, Kaleb Lloyd, Michael Mcdonald, Monette Mcdonald, Adam Meives, Cradea Moehring, Jodie Moskios, Phillip Moskios, Darlene Nowak, Donald Nowak, Alyssa Pepper, Michael Moehring, Gloria Jimenez, Ralph Perez, Trenton Peterson, Quentin Peterson, Trenton Peterson as Personal Representative and/or Successor in Interest of the Estate of Martin Ray Peterson, Kassandra Polmateer, Fawn Rensink, Dalton Allec, Breanna Rowan, Sara Saenz, Steven Saenz, Walter Slater, Anathea Sparrow, Bethany Wilson, RH Tilley, Marlyn Waddell, Thomas Waddell, Justin West, Emilee Wilcheck, Michael Wilbourn, Ismael Williams, Christopher Wilson, and Silas Yamamoto (collectively, "Plaintiffs").

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and

disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly. Each affirmative defense set forth below applies as a separate defense to each and every cause of action stated in the Complaint unless expressly stated otherwise.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

3. Plaintiffs' complaint and each of the claims alleged therein fail to state a claim upon which any relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Particularity/Indefiniteness)

4. Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

5. Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged in the complaint by reason of their failure to mitigate such alleged damages.

FOURTH AFFIRMATIVE DEFENSE

(Act of God)

6. Plaintiffs may be barred from recovering damages, in whole or in part, because Plaintiffs' damages, if any, were caused by an uncontrollable force or Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

(No Breach of Duty)

7. Plaintiffs may be barred from recovering damages, in whole or in part, because Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

(Reasonable Conduct)

8. PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

(Intervening and Superseding Acts)

9. Plaintiffs may be barred from recovering damages, in whole or in part, because Plaintiffs' damages, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(No Proximate Cause)

10. Plaintiffs may be barred from recovering damages, in whole or in part, because PacifiCorp's acts or omissions were not the proximate cause of Plaintiffs' injuries.

NINTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

11. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the unforeseeable intervening or superseding acts or omissions of others over whom PacifiCorp had no control and for whose conduct PacifiCorp is not responsible, or other unforeseeable, independent, intervening, or superseding event(s) or circumstance(s) beyond the control of PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

(Comparative Negligence)

12. Plaintiffs may be barred from recovery because Plaintiffs and their agents acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint, and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

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(Control of Agency or Instrumentality)

13. Plaintiffs may be barred from recovery because the agency or instrumentality causing the incidents alleged in the Complaint was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Name Necessary Defendants)

14. Plaintiffs' claims are subject to dismissal for Plaintiffs' failure to join necessary and/or indispensable parties.

THIRTEENTH AFFIRMATIVE DEFENSE

(Compliance with Duty of Care)

15. Plaintiffs' claims are barred because PacifiCorp complied with the law and acted reasonably with the intent to obey the law and such compliance demonstrates that PacifiCorp exercised due care and reasonable prudence.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorization of California & Its Public Utilities Commission)

16. Plaintiffs' claims are barred because the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

FIFTEENTH AFFIRMATIVE DEFENSE

(Authorization of Governmental Authorities)

17. Plaintiffs' claims are barred because PacifiCorp's use of properties, equipment, and/or other activities was at all times lawful and authorized by agreement; license; easement; the County of Siskiyou, California; the County of Del Norte, California; the County of Josephine, Oregon; respective city governments within said Counties; the State of California; the California Public Utilities Commission; the United States of America; the United States Forest Service; and/or the aforementioned authorities' agencies, and pursuant to law.

SIXTEENTH AFFIRMATIVE DEFENSE

(Conformance with Industry Standards)

18. Plaintiffs' claims are barred because PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Justification/Necessity)

19. In connection with the acts and omissions alleged by Plaintiffs, PacifiCorp was justified in its actions or acting out of necessity; therefore Plaintiffs may not recover against PacifiCorp.

EIGHTEENTH AFFIRMATIVE DEFENSE

(No Double Recovery)

20. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs are not entitled to double recovery on claims of damages or losses.

NINETEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

21. Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTIETH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

22. Plaintiffs may not recover on claims of damages or losses paid by any other sources.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Statutory Limit on Damages)

23. To the extent Plaintiffs claim Oregon damages or damages that are governed by Oregon law, Plaintiffs may not recover damages, in whole or in part, to the extent that Oregon Revised Statutes section ORS 477.089 prohibits such recovery.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Requirement to Show Negligence)

24. To the extent Plaintiffs assert claims governed by Oregon law, to the extent that Plaintiffs seek to recover without showing that Defendants were negligent, Plaintiffs' claims are barred, in whole or in part, by Oregon Revised Statutes section 477.092.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(No Duty to De-Energize)

25. To the extent Plaintiffs' claims rest on PacifiCorp's alleged failure to de-energize its power lines, Plaintiffs' claims fail because Oregon and California law do not impose an affirmative duty to proactively de-energize power lines.

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(No Negligence Per Se)

26. Plaintiffs' claim for negligence per se is barred because none of the relevant statutes or regulations, including California Public Utilities Code section 2106; California Public Utilities Commission General Order 95; California Public Utilities Commission General Order 95; any other applicable rules, regulations, and orders of the California Public Utilities Commission; Oregon Revised Statutes section 757.020; and/or any applicable rules, regulations or orders by the Oregon Public Utilities Commission, fix the standard of conduct applicable to PacifiCorp or were implemented to prevent the harm Plaintiffs allege or to protect the class of persons including Plaintiffs.

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(Public Benefit)

27. Plaintiffs' claim for nuisance is barred, in whole or in part, because Defendants provide a public benefit or socially useful service.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Recovery Limited to Reasonable Damages)

28. If PacifiCorp is responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully incurred. PacifiCorp denies that the injuries, damages, and expenses for which Plaintiffs seek reimbursement are either reasonable or lawfully incurred.

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(No Joint Liability)

29. Pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and

humiliation. Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

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30. Plaintiffs' damages are barred, in whole or in part, because the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(No Punitive Damages—Unconstitutionality)

31. Plaintiffs' claims for punitive damages are barred, in whole or in part, because they violate state and federal constitutional rights including, but not limited to, due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and that any claim for punitive damages is limited by state and federal law, including but not limited to the U.S. Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

THIRTIETH AFFIRMATIVE DEFENSE

(No Punitive Damages—Insufficient Facts)

32. Plaintiffs' claims for punitive damages are barred, in whole or in part, because the allegations in the Complaint fail to state facts sufficient to support an award of exemplary or punitive damages or other statutory fines or penalties against PacifiCorp. No alleged act or omission of PacifiCorp was oppressive, fraudulent, or malicious under California Civil Code § 3294(a), and therefore, any award of punitive damages is barred. Any claim for punitive damages also is barred under California Civil Code § 3294(b). No alleged act or omission of PacifiCorp was willful under California Public Utilities Code § 2106, and therefore, any award of punitive damages is barred.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Inverse Condemnation—Violation of Fifth and Fourteenth Amendments)

33. Plaintiffs' claims for inverse condemnation are barred, in whole or in part, because they violate PacifiCorp's state and federal constitutional rights including, but not limited to, due

process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Inverse Condemnation—No Compensable Interest)

34. Plaintiffs' claims for inverse condemnation are barred, in whole or in part, because Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Inverse Condemnation—Offset)

35. Plaintiffs' claims for inverse condemnation are barred in whole or in part, because to the extent that PacifiCorp has provided or may provide compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation constitutes an offset.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Inverse Condemnation—No Loss Spreading)

35. Plaintiffs' claims for inverse condemnation are barred in whole or in part because PacifiCorp is not a public entity with the independent ability to spread costs.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Federal Enclave Doctrine)

36. Plaintiffs' claim for negligence is barred, in whole or in part, to the extent Plaintiffs assert statutory duty and/or negligence per se theories of liability based on California states enacted after the Klamath National Forest became a federal enclave. PacifiCorp alleges that the Klamath National Forest is a federal enclave under the operative cession statute in effect at the time. *See* Cal. Stats. 1891, Ch. 181, §§ 1–2; *People v. Hoyt*, 8 Cal. 5th 892, 913 (Cal. 2020).

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

37. PacifiCorp presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. PacifiCorp

therefore reserves the right to assert such additional defenses as are proper based on discovery, investigation, or further analysis.

PRAYER FOR JUDGMENT

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of the Complaint herein;

2. That judgment be entered in favor of PacifiCorp;

3. That PacifiCorp be awarded its costs of suit; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: October 22, 2021

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
Derek R. Flores
William Larsen

Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660

On October 22, 2021, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO PLAINTIFFS' COMPLAINT

on the interested parties in this action as stated:

Gerald Singleton
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[X] (BY MAIL) By placing true copies of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 22, 2021, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.171

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
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Attorneys for Defendant PacifiCorp

FILED BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SISKIYOU

ERIC FRANKLIN; KERRY EMMERSON; KATRINA GARCIA; DIANNIA MARIE-LOUISE GLASS; JAMES DALLAS GLASS; RICHARD JAMES GOODWIN; GREEN DIAMOND RESOURCE COMPANY; TERESA GRIFFIN; KAREN HAAS; EDWARD GREGORY HEAD, individually and as PERSONAL REPRESENTATIVE AND/OR SUCCESSOR IN INTEREST OF THE ESTATE OF VIRGINIA R. HEAD; BRENTLEY HORTON; ALAINE JOHNSON; LAURIE JOHNSON; BLANCHE PAYE KELLER; KEVIN LINDER; TYLER MARTIN; DENISE ESTES; MICHAEL J. HARRISON MCCONNELL; BOWDY MINIUM; EARL MINIUM; SANA MINIUM; SANTELLE MINIUM; BRIAN JOSEPH MOEHRING; LAVERN MOEHRING; IAN ALBERT SAENZ; DAN SHEETS; AUDREY HENKE; SADIE SUE SMITH; BRIAN SPINTZ; HENRY DAMON STACY; DANIEL STEWART; STEVEN CLAYBORNE; MICHAEL O'HANLON; NORMA O'HANLON; CHRISTINA MARIE WADDELL; CHRISTOPHER EARL WADDELL; JAMES TIVIS; TERESA WELCH; ALEXIS WILLIAMS; ERIK WHEATON; PEGGY WHEATON; TATINA REBEKAH WOOD,

Plaintiffs,

vs.

Case No. CVCV22-165

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

BY FAX

PACIFICORP and DOES 1 through 200, inclusive,

Defendants.

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PACIFICORP for itself alone, and no other Defendant, hereby answers Plaintiffs' Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in

compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are

reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States

Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: March 10, 2022

HUESTON HENNIGAN LLP

By:

Alison L. Plessman
Derek R. Flores
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660

On March 10, 2022, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as stated:

Gerald Singleton (SBN: 208783)
gsingleton@singletonschreiber.com
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SINGLETON SCHREIBER, LLP
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Tel. (916) 246-6527

☒ (BY MAIL) By placing true copies of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 10, 2022, at Newport Beach, California.

Sarah Jones

Sarah Jones

From: RingCentral
To: Sarah Jones
Subject: Fax Message Transmission Result to +1 (530) 5724014 - Sent
Date: Thursday, March 10, 2022 4:34:47 PM

Fax Transmission Result

Here are the results of the 12-page fax you sent from your phone number **(800) 977-9870, Ext. 6742**

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5305724014@rcfax.com	+1 (530) 5724014	Thursday, March 10, 2022 at 4:34 PM	Sent

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File Name	Result
2022-03-10 PacifiCorp - Fax Transmission-Info-Answer.pdf	Success

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HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

FILED BY FAX

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SISKIYOU

MAY 19 2022

BY: ENDORSED - M. INGLE
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SISKIYOU

FRANK ORMSBY; CHERYL A. WAGNER; WILLIAM THOMAS VANCIEL; MARJORIE ANN LEMON,

Plaintiffs,

vs.

PACIFICORP and DOES 1 through 200, inclusive,

Defendants.

Case No. CVCV 22-00383

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

BY FAX

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiffs' Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an

uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been

defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: May 19, 2022

HUESTON HENNIGAN LLP

By:

Alison L. Plessman
Derek R. Flores
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660

On May 19, 2022, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as stated:

Gerald Singleton (SBN: 208783)
gsingleton@singletonschreiber.com
Tommy Vu (SBN: 273760)
tvu@singletonschreiber.com
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J. Ross Peabody (SBN: 98190)
rpeabody@singletonschreiber.com
John C. Lemon (SBN: 175847)
jlemon@singletonschreiber.com
SINGLETON SCHREIBER, LLP
2300 N Street, Suite 3
Sacramento, CA 95816
Tel. (916) 246-6527

☒ (BY MAIL) By placing true copies of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 19, 2022, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.173

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
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Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

SISKIYOU COUNTY, a political subdivision of the State of California, duly organized and existing by virtue of the laws of the State of California, Plaintiff, vs. PACIFICORP, and DOES 1 through 50, Defendants.	Case No. 34-2022-00324977 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT**

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiff's Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiff and Plaintiff's agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiff or Plaintiff's agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were caused by an

uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiff, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiff's recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiff, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiff and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiff seeks recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiff's and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiff are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiff is barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiff's injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiff seeks reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been

defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiff is not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff lacks compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiff and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the doctrine of inverse condemnation does not apply to a suit by a political subdivision of the state against a private entity, and that extending the doctrine of inverse condemnation to such a case violates longstanding constitutional principles.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiff take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: September 8, 2022

HUESTON HENNIGAN LLP

By:

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On September 8, 2022, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as stated below:

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☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 8, 2022, at Newport Beach, California.

Sarah Jones
(Type or print name)

Sarah Jones
(Signature)

PAC_256.07.174

FILED
Superior Court Of California,
Sacramento
09/15/2022
lcrowther
By _____, Deputy
Case Number:
34-2020-00290833

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BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYLA HITCHCOCK, et al.

Plaintiffs,

vs.

PACIFICORP and DOES 1-200, inclusive,

Defendants.

Case No.: 34-2020-00290833-CU-MT-GDS;
Related Case Nos.: 34-2022-00324570;
34-2022-00324678

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Relates to: *Ormsby et al. v. PacifiCorp et al.*, No. 34-2022-00324570

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiffs' Complaint ("Complaint") in the action *Ormsby, et al. v. PacifiCorp, et al.*, No. 34-2022-00324570, consolidated with lead case *Hitchcock v. PacifiCorp*, No. 34-2020-00290833, and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an

uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been

defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;
2. That judgment be entered in favor of PacifiCorp herein;
3. That PacifiCorp be awarded its costs of suit incurred herein; and
4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: September 15, 2022

HUESTON HENNIGAN LLP

By:

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PAC_256.07.175

E-Served: Sep 29 2022 5:39PM PDT Via Case Anywhere

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DAVID R. HODGES; MARTHA T. HODGES; DONALD ROBERT YOUNG, Individually and as Trustee of the DONALD R. YOUNG LIVING TRUST; GEORGE W. THORWARD; RONALD D. SHARP; TAFT TINNIN; SHARI TINNIN; TRACY LEDBETTER; TERESA LEDBETTER; ALAINA LEDBETTER; ERIK A. WHEATON; PEGGY L. WHEATON; RAY MORGAN; MARGARET MORGAN; SUSAN IRENE TERRAN, Individually and as Trustee of the SUSAN I. TERRAN FAMILY TRUST DATED JANUARY 9, 2006; DAVID KENDALL; LYDIA KENDALL; PERRY ERVIN MURPHY; SANDRA JEAN MORGAN; DAVID LOUIS POESCHEL; STORMY SPRINGER; KONRAD GALECKI; SUSAN TARPLEY; STEVEN WHITE; CIERRA RHODES-STLVA; and KAREN HAAS,

Plaintiffs,

vs.

PACIFICORP and DOES 1-200, inclusive,

Defendants.

Case No. 34-2022-00325617

DEFENDANT PACIFICORP'S NOTICE OF MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Lauri A. Damrell
Courtroom: 28

No Oral Argument Requested

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MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant PacifiCorp hereby moves to dismiss the claims of Oregon-resident Plaintiffs pursuant to Code of Civil Procedure sections 410.30 and 418.10, as follows:

Dismissal is justified because California is an "inconvenient forum" for the claims between Oregon-resident Plaintiffs and an Oregon Defendant. (Cal. Code Civ. Proc. § 418.10.) In the "interest of substantial justice," Oregon Plaintiffs' claims "should be heard in a forum outside this state." (Cal. Code Civ. Proc. § 410.30 (recognizing dismissal in whole or "in part" may be appropriate on inconvenient forum grounds.) Oregon is a "suitable" forum, and the "private interests . . . and the interests of the public" at stake favor trial in Oregon. (*Stangvik v. Shiley Inc.* (1991) 54 Cal. 3d 744, 751, 819 P.2d 14.) A motion to sever the Oregon Plaintiffs' claims from the California Plaintiffs' claims has been filed concurrently.

This Motion to Dismiss is made pursuant to Code of Civil Procedure sections 410.30 and 418.10, and is based on the Motion to Dismiss, Memorandum of Points and Authorities in Support of Motion, the Declaration of Alison L. Plessman, the pleadings and record in this action, and such other matters as may be relevant and which may be properly adduced at the hearing on this matter.

DATED: September 29, 2022.

HUESTON HENNIGAN LLP

ALISON L. PLESSMAN
DOUGLAS J. DIXON
WILLIAM LARSEN

Attorneys for Defendant PacifiCorp

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The *Hodges* action improperly joins Oregon and California-resident Plaintiffs and should be severed—just as the Court (Judge Sueyoshi) ordered last year with respect to the related *Hitchcock* case. Plaintiffs seek to recover damages for Oregon and California real and personal property in connection with the Slater Fire, a wildfire spanning 157,000 acres that began in Siskiyou County, California in September 2020 before spreading into Del Norte County, California and Josephine County, Oregon. Plaintiffs allege that PacifiCorp failed to properly inspect and maintain its electrical equipment and failed to maintain sufficient clearance with vegetation, and assert six causes of action for inverse condemnation, negligence, trespass, nuisance, and violations of Public Utilities Code Section 2106 and Health & Safety Code Section 13007.

The Complaint improperly joins Oregon residents ("Oregon Plaintiffs") and California residents ("California Plaintiffs") notwithstanding California's strong public policy that the state with the greater interest in litigation should bear the burden of adjudicating a plaintiff's claims. Accordingly, PacifiCorp brings concurrent motions to (1) sever Oregon Plaintiffs' claims and (2) dismiss Oregon Plaintiffs' claims on inconvenient forum grounds under Code of Civil Procedure sections 418.10 and 410.30.

Dismissing Oregon Plaintiffs' claims on inconvenient forum grounds is appropriate because Oregon is a "suitable" forum, and the "private interests . . . and the interests of the public" at stake favor trial in Oregon. (*Stangvik v. Shiley Inc.* (1991) 54 Cal. 3d 744, 751, 819 P.2d 14 (*Stangvik*).) Oregon is a "suitable forum" because PacifiCorp is "subject to [Oregon's] jurisdiction" and Oregon Plaintiffs' claims are not "barred by the statute of limitations." (*Aghaian v. Minassian* (2015) 234 Cal. App. 4th 427, 431, 183 Cal. Rptr. 3d 822 (*Aghaian*).) The public interests favor trial in Oregon because "neither [of the parties] are California" citizens and the California "local community" has little interest in resolving damages to Oregon property (*Quanta Computer Inc. v. Japan Commc'ns Inc.* (2018) 21 Cal. App. 5th 438, 448, 230 Cal. Rptr. 3d 334 (*Quanta Computer*)), and the private interests favor Oregon because both parties reside there and relevant witnesses and evidence are located in Oregon (*see Stangvik*, *supra*, 54 Cal. 3d at 751).

Put simply, Oregon Plaintiffs' claims present a dispute between Oregon Plaintiffs and an Oregon Defendant (PacifiCorp) which involve alleged damages to Oregon property and will require the application of Oregon law. As the California Court of Appeal has explained, because "California has no interest in adjudicating the disparate claims of non-residents under sister state laws against non-California defendants . . . it would be an abuse of discretion for a trial court to do anything other than dismiss" Oregon Plaintiffs' claims. (*Baltimore Football Club, Inc. v. Superior Ct.* (1985) 171 Cal. App. 3d 352, 364–65, 215 Cal. Rptr. 323 (*Baltimore Football Club*).) Dismissing Oregon Plaintiffs' claims will still allow Plaintiffs to pursue relief in Oregon state court, and thus ample opportunity to seek recovery for the losses alleged in the Complaint. Indeed, in March 2021, Judge Sueyoshi reached the same conclusion in the *Hitchcock* case, granting PacifiCorp's motions to sever and dismiss Oregon Plaintiffs from that case. This case should be no different.

II. BACKGROUND

A. PacifiCorp's Operations

PacifiCorp delivers electricity to approximately 773,000 customers in California, Oregon, and Washington. In California, PacifiCorp serves around 45,000 customers in Siskiyou, Del Norte, Modoc, and Shasta Counties. PacifiCorp is an Oregon corporation headquartered in Portland, Oregon. (Compl. ¶ 14.)

B. The Slater Fire

Plaintiffs allege that the Slater Fire ignited near the Slater Butte Fire Lookout north of Happy Camp, California. (Compl. ¶ 19.) According to Plaintiffs, the Slater Fire was "started by sparks from high-voltage transmission lines, distribution lines, appurtenances, and other electrical equipment within PacifiCorp's utility infrastructure that ignited surrounding vegetation." (Compl. ¶ 44.) After igniting in Siskiyou County, the Slater Fire spread to Del Norte County, California, and Josephine County, Oregon, ultimately burning more than 157,000 acres. (Compl. ¶¶ 1, 7.) Government investigators have not released an official investigation report or otherwise determined what caused the Slater Fire, and PacifiCorp's own investigation into the origin and cause of the Slater Fire is ongoing.

C. Plaintiffs' Complaint

Plaintiffs filed this six-count Complaint on August 23, 2022 and served PacifiCorp on August 30, 2022. Plaintiffs assert causes of action for (1) inverse condemnation, (2) trespass, (3) nuisance, (4) violations of Cal. Pub. Util. Code section 2106, (5) violations of Cal. Health & Safety Code section 13007, and (6) negligence. (Compl. ¶¶ 46–90.)

Plaintiffs are "individuals and other legal entities" who reside either in California ("California Plaintiffs") or Oregon ("Oregon Plaintiffs"). (Compl. ¶ 12.) Plaintiffs do not allege where, specifically, each of the "individuals or other legal entities" reside. PacifiCorp conducted a public records search and hired an investigator to determine each Plaintiffs' residency; based on PacifiCorp's investigation, there are at least 14 California Plaintiffs and 11 Oregon Plaintiffs, in addition to one Plaintiff PacifiCorp could not locate. (Plessman Decl. ¶ 2.)

D. Other Slater Fire Complaints

In addition to this case (*Hodges et al v. PacifiCorp*, No. 34-2022-00325617), multiple other groups of plaintiffs have filed suit against PacifiCorp alleging damages from the Slater Fire, including Oregon residents filing suit in Oregon state court. For example, in March 2022, a group of Oregon residents filed suit in *Black v. PacifiCorp* for alleged damages arising out of the Slater Fire. (Plessman Decl. ¶ 5.) And earlier this month, two additional groups of Oregon residents filed suit in *Denny v. PacifiCorp* and *Sparks v. PacifiCorp*, also alleging damages arising out of the Slater Fire. (*Id*.) Moreover, as the Court is aware, several pending cases have now been consolidated with the lead *Hitchcock* case, totaling hundreds of individual claims against PacifiCorp.

On February 5, 2021, PacifiCorp moved to sever and dismiss in *Hitchcock*. The Court (Judge Sueyoshi) granted those motions on March 29, 2021. (Plessman Decl., Ex. A.) In doing so, the Court ruled that each claim would "need to be proven through evidence specific to each and every Plaintiff," which would eventually require application of "differing legal standards to those claims in the instance of variance between the laws of California and those of Oregon." (*Id*. at 2.) The Court further ruled that dismissal of the Oregon claims was warranted because Oregon was a suitable alternative forum, the relevant witnesses were located in Oregon, and although "California has substantial interest in adjudicating damages of its own citizens occasioned within the border of the

state," "its interest s markedly less (if any) where the damage, even if arising from the same incident, occurred outside the state to non-California residents and was occasioned by a non-California resident." (*Id*. at 4–5.) After that, the parties disputed which kinds of Plaintiffs were subject to the dismissal order, but ultimately agreed on a stipulation to dismiss 19 plaintiffs on June 7, 2021. (Plessman Decl., Ex. B.)

III. LEGAL STANDARD

A California court may "stay or dismiss [an] action in whole or in part" when it "finds that in the interest of substantial justice an action should be heard in a forum outside" California, also known as forum non conveniens. (Cal. Code Civ. Proc. § 410.30(a); *see also id.* § 418.10(a)(2) (authorizing the court to "dismiss the action on the ground of inconvenient forum" on or before defendant's time to plead).) A court analyzing a motion under Sections 410.30 and 418.10 must analyze (1) "whether the alternate forum is a 'suitable' place for trial," and (2) whether the "private interests of the litigants and the interests of the public" favor "retaining the action for trial in California." (*Stangvik*, *supra*, 54 Cal. 3d at 751.)

In determining whether to stay or dismiss an action for forum non conveniens, a court may "weigh and interpret evidence" submitted by the parties. (*Nat'l Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal. App. 4th 902, 918, 215 Cal. Rptr. 323 (affirming stay of California action in favor of proceeding in New York) (*Nat'l Football League*).) But forum non conveniens motions do "not require an extensive evidentiary showing"; instead, the "principal evidentiary showing" required is "that the trial may be had in the alternative forum and that some form of relief may be granted." (*Campbell v. Parker-Hannifin Corp.* (1999) 69 Cal. App. 4th 1534, 1542, 82 Cal.Rptr.2d 202 (*Campbell*).)

IV. ARGUMENT

The Court should dismiss Oregon Plaintiffs' actions because Oregon is a "suitable" forum—indeed, a preferable one—and the "private interests of the litigants and the interests of the public" favor that this suit by Oregon Plaintiffs against an Oregon corporation should proceed in Oregon. (*Stangvik*, *supra*, 54 Cal. 3d at 751.) As the Court of Appeal has held, when both Plaintiffs and Defendant are out-of-state residents and out-of-state law governs, the "doctrine of forum non

conveniens compels dismissal," and "it would be an abuse of discretion for a trial court to do anything other than dismiss[.]" (*Baltimore Football Club*, 171 Cal. App. 3d at 364–65.) Indeed, this Court previously dismissed nearly identical claims by Oregon residents arising from the Slater Fire in the case *Hitchcock et al. v. PacifiCorp* (Case No. 34-2020-00290833). (Plessman Decl., Ex. A.)

A. Oregon Is a Suitable Forum Because PacifiCorp Is Subject to Jurisdiction in Oregon and Plaintiffs' Claims Are Not Barred

"An alternative forum is suitable if the defendant is subject to its jurisdiction and the cause of action is not barred by the statute of limitations." (*Aghaian*, *supra*, 234 Cal. App. 4th at 431.) Determining whether a forum is suitable does not involve "balancing of interests" or "discretion to be exercised"; instead, "so long as there is jurisdiction and no statute of limitations bar, a forum is suitable where an action 'can be brought,' although not necessarily won." (*Shiley Inc. v. Superior Ct.* (1992) 4 Cal. App. 4th 126, 132, 6 Cal.Rptr.2d 38 (citation omitted).)

Oregon is a suitable forum because PacifiCorp is subject to jurisdiction in Oregon, and Oregon Plaintiffs' claims for the September 2020 Slater Fire will not be barred by the statute of limitations.[1] PacifiCorp is an Oregon corporation headquartered in Portland, so it is subject to personal jurisdiction as a "corporation created by or under the law of" Oregon. (Compl. ¶ 14; Or. R. Civ. Proc. 4 A(3); *see also Ranza v. Nike, Inc.* (9th Cir. 2015) 793 F.3d 1059, 1069 ("The paradigmatic locations where general jurisdiction is appropriate over a corporation are its place of incorporation and its principal place of business.").) Because Plaintiffs' claims can be brought in Oregon without being subject to any legal bar, the "answer is clear" that Oregon is a suitable forum for Oregon Plaintiffs' claims. (*Stangvik*, *supra*, 54 Cal. 3d at 752 (Norway and Sweden were "suitable" when neither lack of jurisdiction nor the statute of limitations would bar plaintiffs' claims).)

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[1] "For purposes of this motion, PacifiCorp does not take a position on which statutes of limitations apply to which components of Plaintiffs' claims. *See* Or. Rev. State. §§ 12.080 (six-year statute of limitations for certain property damage claims), 12.110 (two-year statute of limitations for personal injury and claims not covered by other Oregon statutes of limitations). Instead, to the extent that any Oregon statute of limitations would bar Oregon Plaintiffs' claims, PacifiCorp hereby waives any defense based on the statute of limitations for the individual Oregon Plaintiffs in this case for a period of six months following the date of resolution of PacifiCorp's motions to sever and dismiss in the event that Oregon Plaintiffs choose to refile their claims in Oregon state court."

B. The Public Interest Favors Trying This Case Between Oregon Plaintiffs and an Oregon Defendant in Oregon

Next, the Court weighs the "interests of the California public in retaining the trial of the actions in this state" against Oregon's competing interests. (*Stangvik*, *supra*, 54 Cal. 3d at 757.) "[T]he jurisdiction with the greater interest should bear the burden of entertaining the litigation." (*Ibid*.) Because California has "little or no interest in litigation involving injuries incurred outside of California by non-residents," and Oregon has significant interest in applying its law to claims between Oregon-resident Plaintiffs and an Oregon-resident defendant, the public interest factors favor dismissal. (*Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal. App. 4th 753, 760, 59 Cal.Rptr.2d 229 (*Hansen*).)

1. Oregon's interest in adjudicating this dispute outweighs California's.

Because both Oregon Plaintiffs and PacifiCorp are Oregon residents, the "competing interests of California and [Oregon] strongly weigh in favor of litigating in" Oregon. (*Hansen*, *supra*, 51 Cal. App. 4th at 760.) With respect to Oregon Plaintiffs, California courts have long recognized that states have "a strong interest in assuring [their] own residents an adequate forum for the redress of grievances." (*Stangvik*, *supra*, 54 Cal. 3d at 754–55.) Similarly, when the "defendant is a resident of" a given state, that state has a strong "interest in deterring future wrongful conduct" of resident defendants. (*Morris v. AGFA Corp.* (2006) 144 Cal. App. 4th 1452, 1466, 51 Cal.Rptr.3d 301 (*Morris*) (quoting *Stangvik*, *supra*, 54 Cal. 3d at 753, n.4).)

In contrast, California has little interest in adjudicating Oregon Plaintiffs' claims against an Oregon-resident defendant. California has "little or no interest in litigation involving injuries incurred outside of California by non-residents." (*Hansen*, *supra*, 51 Cal. App. 4th at 760; *see also Guimei v. Gen'l Elec. Co.* (2009) 172 Cal. App. 4th 689, 703, 91 Cal.Rptr.3d 178, as modified on denial of reh'g (Mar. 24, 2009) ("[I]nasmuch as defendants are not California corporations, California has little interest in keeping the litigation in this state to deter wrongful conduct.") (*Guimei*).) Indeed, the Court of Appeal has held that because "California has no interest in adjudicating the disparate claims of non-residents under sister state laws against non-California defendants . . . it would be an abuse of discretion for a trial court to do anything other than dismiss the actions" in such a case.

(*Baltimore Football Club*, *supra*, 171 Cal. App. 3d at 364–65.) Put another way, Oregon has a strong interest in both sides of the "v.", while California has no interest on either side.

That the Slater Fire allegedly ignited in California does not change the analysis, because California's interest will be more than adequately vindicated by California Plaintiffs' actions against PacifiCorp.[2] Against the binding authority of *Hansen* and *Baltimore Football Club*, Plaintiffs may argue that California maintains some interest even in Oregon Plaintiffs' claims because the alleged wrongful conduct here occurred in California. But the California Supreme Court in *Stangvik* considered and rejected this precise argument. *Stangvik* affirmed the grant of a forum non conveniens motion against plaintiffs from Sweden and Norway arising out of a California corporation's allegedly defective heart valve implants. Of the 235 then-pending actions against defendant, approximately 30 were brought by California residents while 108 were brought by foreign plaintiffs. The Supreme Court noted the significant burden on California courts those 108 actions would bring (as discussed below, the same is true here), and held that despite California's interest in regulating the conduct of its corporate resident defendant, that interest "would be amply vindicated if the actions filed by California resident plaintiffs resulted in judgments in their favor." (*Stangvik*, *supra*, 54 Cal. 3d at 763.) The same is true here. Dismissing Oregon Plaintiffs' claims to be refiled in Oregon does not dismiss any interest California may have in deterring PacifiCorp's alleged conduct, because California Plaintiffs' claims against PacifiCorp will proceed either way.

Adjudicating Oregon Plaintiffs' claims in Oregon is also appropriate because Oregon law applies to Oregon Plaintiffs' claims. (*See Fox Factory, Inc. v. Superior Ct.* (2017) 11 Cal. App. 5th 197, 204, 217 Cal.Rptr.3d 366 (courts weigh the "interest in trying the case in a forum familiar with the applicable law, and the interest in avoiding unnecessary conflicts of laws.").) Oregon has a greater interest than California in having its law applied to claims involving an Oregon defendant and Oregon Plaintiffs, which include alleged injuries to real and personal property in Oregon.

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[2] As noted above, PacifiCorp concurrently moves to sever Oregon Plaintiffs' claims. But if the court denies the motion to sever or otherwise determines it cannot dismiss only the Oregon Plaintiffs' claims, the court should dismiss the entire action. Plaintiffs can then refile their claims in the appropriate states. (*See, e.g.*, *David v. Medtronic, Inc.* (2015) 237 Cal. App. 4th 734, 740, 188 Cal. Rptr. 3d 103 (*David*) (describing the Court's "two options": to "dismiss the entire action for inconvenient forum" or "sever" the California parties from the out-of-state parties).

(*Kearney v. Salomon Smith Barney* (2006) 39 Cal. 4th 95, 107–08, 45 Cal.Rptr.3d 730 (*Kearney*) (describing California's choice of law principles, including comparing the "nature and strength of the interest in each jurisdiction" to determine "which state's interest would be more impaired" if the other state's law governed."); *see also Hurtado v. Superior Ct.* (1974) 11 Cal. 3d 574, 580, 114 Cal.Rptr. 106 ("When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied." (citation omitted)).) California's interests will be amply vindicated by California Plaintiffs' action, and Oregon has substantial interest in applying its comprehensive wildfire statutes made to ensure that Oregon corporations do not face open-ended liability in cases like these. (*See, e.g.*, Or. Rev. Stat. §§ 477.089 (limiting allowable damages in wildfire suits), 477.092 (requiring negligence showing to prevail on wildfire claims); *see also* Or. Rev. Stat. § 14.040 ("Actions and suits" for "injuries to real property" "shall be commenced and tried in the county in which" the land is located)); *see also Century Indem. Co. v. Bank of Am.* (1997) 58 Cal. App. 4th 408, 413, 68 Cal.Rptr.2d 132 (affirming grant of forum non conveniens motion because Hawaii's "significant state interest in interpreting insurance contracts issued in that state" outweighed California's "countervailing public interest in interpreting policies . . . offered by a resident insurer[] to insureds in other states").)[3]

2. Dismissal avoids overburdening local courts with the claims of at least twenty Oregon Plaintiffs.

The "court congestion factor will usually weigh in favor of trial in the alternate jurisdiction." (*Stangvik*, *supra*, 54 Cal. 3d at 753 n.4.) Such is the case here. Of the 26 Plaintiffs in this action, at least 11 appear to be Oregon residents. (*See* Plessman Decl. ¶ 2.) Plaintiffs seek to proceed individually, so each of those 11 plaintiffs "would contribute to court congestion, as there are [11]

[3] As in other wildfire litigation, this case is likely to involve significant dispute over causation and individual damages, and requiring this Court to resolve both Oregon and California law is more likely to lead to inconsistent results with decisions by Oregon Courts, including litigation in Oregon that includes the Slater Fire. (*See Black et al. v. PacifiCorp et al.,* No. 22CV08622 (Multnomah Cty, Cir. Ct.).) In any event, California's strong public policy that the "jurisdiction with the greater interest should bear the burden of entertaining the litigation" outweighs any such concerns. (*Stangvik*, *supra*, 54 Cal. 3d at p. 757.)

separate plaintiffs whose damages would have to be considered." (*Campbell*, *supra*, 69 Cal. App. 4th at 1544 (finding that presence of "20 separate plaintiffs" who were not California residents favored granting motion for forum non conveniens).) Allowing Oregon Plaintiffs' claims to proceed in California would contribute to the "unchecked and unregulated importation" of out-of-state claims into California, directly contrary to the admonitions of the California Supreme Court in *Stangvik*, *supra*, 54 Cal. 3d at 751.

As the Court is aware, against PacifiCorp arising out of the Slater Fire are not confined to this case. Several pending cases have now been consolidated with the lead *Hitchcock* case, totaling hundreds of individual claims against PacifiCorp. As the California Supreme Court has explained, this Court can—and indeed must—consider the congestion to California courts that additional Oregon-resident plaintiffs will impose in determining the proper forum for Oregon Plaintiffs' claims here. (*See Stangvik*, *supra*, 54 Cal. 3d at 763 ("If we hold that the present cases may be tried in California, it will mean that the remaining 108 [foreign] cases involving the Shiley valve will also be tried here. The burden on the California courts of trying these numerous complex actions is considerable.").) Accordingly, the public interest factor in avoiding congesting California courts with out-of-state plaintiffs' claims favors dismissal.

3. The Sacramento local community has no interest in adjudicating claims relating to Oregon property damage by an Oregon defendant.

The third public interest factor calls on the Court to "protect[] the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern[.]" (*Stangvik*, 54 Cal. 3d at 751.) When California is "home to none of the parties," California courts have held that it is "unduly burdensome for California residents to be expected to serve as jurors on what promises to be a long and complicated case[.]" (*Guimei*, *supra*, 172 Cal. App. 4th at 703 (affirming grant of forum non conveniens motion).) The same is true here. While Sacramento jurors have some interest in hearing California Plaintiffs' claims, local jurors do not have the same interest in Oregon Plaintiffs' claims. (*See Stangvik*, 54 Cal. 3d at 751.)

In sum, the public interest factors strongly favor dismissal. Hearing Oregon Plaintiffs' claims here would require California courts to "adjudicat[e] the disparate claims under sister state laws

against non-California defendants." (*Baltimore Football Club*, *supra*, 171 Cal. App. 3d at 364–65.) "California has no interest" in such claims, and accordingly "it would be an abuse of discretion" not to order dismissal. (*Id*.)

C. The Private Interest Factors Favor Oregon Because the Relevant Properties—and thus Relevant Witnesses—Are Located in Oregon

Finally, the private interests of Oregon Plaintiffs and PacifiCorp favor trial in Oregon. "The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." (*Stangvik*, *supra*, 54 Cal. 3d at 751.) Each factor weighs in favor of dismissing Oregon Plaintiffs' claims to be refiled in Oregon.

Because both Oregon Plaintiffs and PacifiCorp reside in Oregon, the "residence of the parties" indicates that trial would be more convenient in Oregon. (*Stangvik*, *supra*, 54 Cal. 3d at 754.) When, as here, a "corporation is the defendant, the state of its incorporation and the place where its principle place of business is located"—in this case, Oregon—"is presumptively a convenient forum." (*Id*. at 755.) And, while California courts recognize a "strong presumption in favor of the correctness of plaintiff's choice of forum" in cases "involving *California resident* plaintiffs," that presumption does not apply to "resident[s] of one of our sister states." (*Nat'l Football League*, *supra*, 216 Cal. App. 4th at 924, 929 (emphasis in original); *see also Campbell*, *supra*, 69 Cal. App. 4th at 1541 ("when the plaintiff is not a resident, his or her choice of forum 'is not a substantial factor in favor of retaining jurisdiction here'" (quoting *Stangvik*, *supra*, 54 Cal. 3d at 755)).)

The "ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses" also favor Oregon as the more convenient forum. (*Stangvik*, *supra*, 54 Cal. 3d at 751.) In short, this factor looks to where the witnesses and evidence are. While some evidence related to PacifiCorp's alleged conduct relating to the Slater Fire may be located in California, more evidence and witnesses are located in Oregon. (*See, e.g., id.* at 756–57 (affirming grant of forum non conveniens motion even though "evidence

relating to defendants' allegedly culpable conduct . . . is in California" in part because damages information, including "witnesses and documents relating to the decedents' medical care and treatment" was in Scandinavia); Compl. ¶¶ 12 (alleging that Plaintiffs reside in California and Oregon), 14 (alleging that PacifiCorp is headquartered in Portland, Oregon), 24 (alleging that Oregon Plaintiffs reside in Oregon); Plessman Decl. ¶ 2 (at least 11 Plaintiffs are Oregon residents).)

In particular, three major categories of witnesses and evidence are located in Oregon rather than California. *First*, Oregon Plaintiffs themselves are Oregon residents. (*See Morris*, 144 Cal. App. 4th at 1466 (affirming grant of forum non conveniens motion when "Plaintiffs, who will no doubt also be witnesses, are Texas residents"); Compl. ¶ 12 (alleging that Oregon Plaintiffs are "owners of real property located within . . . [Josephine] County in Oregon"); Plessman Decl. ¶ 2 (at least 11 Plaintiffs are Oregon residents).) *Second*, witnesses regarding PacifiCorp's allegedly negligent or deliberate decisionmaking reside at PacifiCorp's Portland, Oregon headquarters. (*See* Compl. ¶¶ 14 (alleging that PacifiCorp is headquartered in Portland), 44 (alleging that PacifiCorp "deliberately prioritized profits over safety").) *Third*, witnesses and evidence relating to Oregon Plaintiffs' asserted damages for personal injury and real property injuries are either necessarily located in Oregon (for real and personal property damages) or more likely to be found in Oregon (for personal injuries). (*See Hansen*, 51 Cal. App. 4th at 757 (affirming grant of forum non conveniens motion when Plaintiffs suffered damages in Montana, and "[m]ost of the potential witnesses," including "treating doctors," were located there); Compl. ¶ 91 (seeking damages to "real property" and "[d]amages for personal injury," among other things).) To the extent the parties need to subpoena third parties for documents or testimony on these topics, including eyewitnesses to the fire in Oregon, Oregon is also a preferable forum. (*See Stangvik*, *supra*, 54 Cal. 3d at 751 (citing the "availability of compulsory process for attendance of unwilling witnesses" as a factor in favor of a forum); Or. R. Civ. Proc. 4 F(2) ("A resident of this state who is not a party to the action may be required by subpoena" to attend a deposition or product documents "only in the county where the person resides, is employed, or transacts business in person, or at any other convenient place").)

V. CONCLUSION

For the reasons explained above, the Oregon Plaintiffs' claims should be dismissed on inconvenient forum grounds. Because "California has no interest in adjudicating the disparate claims of non-residents under sister state laws against non-California defendants," then, "it would be an abuse of discretion . . . to do anything other than dismiss the action." (*Baltimore Football Club*, 171 Cal. App. 3d at 364–65.) Even if the Court denies PacifiCorp's motion to sever, the Court should nevertheless grant this motion to dismiss. (*See* Cal. Code Civ. Proc. § 410.30(a) (allowing the Court to "stay or dismiss the action in whole or in part").) If the Court determines that it cannot sever this action or cannot dismiss Oregon Plaintiffs' claims in part, it should dismiss the entire action. (*See David*, *supra*, 237 Cal. App. 4th at 740 (describing the Court's "two options" when a forum is inconvenient as to some parties, but not others: to "dismiss the entire action for inconvenient forum" or "sever" the California parties from the out-of-state parties).)

DATED: September 29, 2022.

HUESTON HENNIGAN LLP

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660

On September 29, 2022 I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S NOTICE OF MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the interested parties in this action as stated:

Douglas Boxer
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Attorneys for Plaintiffs

[X] (BY MAIL) By placing true copies of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 29, 2022, at Newport Beach, California.

Sarah Jones

ELECTRONIC PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On September 29, 2022, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S NOTICE OF MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 29, 2022, at Newport Beach, California.

Sarah Jones

PAC_256.07.176

FILED
Superior Court Of California,
Sacramento
11/03/2022
tbaldwin
By _____, Deputy
Case Number:
34-2020-00290833

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BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYLA HITCHCOCK; et al.,

Plaintiffs,

vs.

PACIFICORP, et al.,

Defendants.

Case No. 34-2020-00290833-CU-MT-GDS

Related Case Nos.: 34-2021-00293621; 34-2021-00299634; 34-2022-00324678; 34-2022-00324570; 34-2022-00324807; 34-2022-00325941; 34-2022-00326049; 34-2022-00326300; 34-2022-00326358; 34-2022-00325617; 34-2022-00326096

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Relates to: Nixon et al. v. PacifiCorp et al., No. 34-2022-00326049

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 3, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On November 3, 2022, I served the foregoing document(s) described as: **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT (relates to Nixon, et al. v. PacifiCorp, et al. 34-2022-00326049)** on the interested parties in this action by submitting an electronic version of the document via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 3, 2022 at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.177

FILED
Superior Court Of California,
Sacramento
11/03/2022
lbaldwin1
By ..... , Deputy
Case Number:
34-2020-00290833

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYLA HITCHCOCK; et al., Plaintiffs, vs. PACIFICORP, et al., Defendants.	Case No. 34-2020-00290833-CU-MT-GDS Related Case Nos.: 34-2021-00293621; 34-2021-00299634; 34-2022-00324678; 34-2022-00324570; 34-2022-00324807; 34-2022-00325941; 34-2022-00326049; 34-2022-00326300; 34-2022-00326358; 34-2022-00325617; 34-2022-00326096 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT** *Relates to: Sanchez et al. v. PacifiCorp et al.*, No. 34-2022-00326358

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 3, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On November 3, 2022, I served the foregoing document(s) described as: **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT (relates to Sanchez, et al. v. PacifiCorp, et al. 34-2022-00326358)** on the interested parties in this action by submitting an electronic version of the document via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 3, 2022 at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.178

BY FAX

FILED
Superior Court Of California,
Sacramento
11/07/2022
tbaldwin
By _____, Deputy
Case Number:
34-2020-00290833

HUESTON HENNIGAN LLP
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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYLA HITCHCOCK; et al., Plaintiffs, vs. PACIFICORP, et al., Defendants.	Case No. 34-2020-00290833-CU-MT-GDS Related Case Nos.: 34-2021-00293621; 34-2021-00299634; 34-2022-00324678; 34-2022-00324570; 34-2022-00324807; 34-2022-00325941; 34-2022-00326049; 34-2022-00326300; 34-2022-00326358; 34-2022-00325617; 34-2022-00326096 **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT** *Relates to: Bleeg et al. v. PacifiCorp et al.*, No. 34-2022-00326096

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 7, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On November 7, 2022, I served the foregoing document(s) described as: **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT (relates to Bleeg, et al. v. PacifiCorp, et al. 34-2022-00326096)** on the interested parties in this action by submitting an electronic version of the document via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 7, 2022 at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.179

BY FAX

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
ddixon@hueston.com
William M. Larsen, State Bar No. 314091
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Attorneys for Defendant PacifiCorp

FILED/ENDORSED
NOV 2 3 2022
By: I. Romo
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

ERIC P. DUVAL, et al.,

Plaintiffs,

vs.

PACIFICORP and DOES 1-200, inclusive,

Defendants.

Case No. 34-2022-00327498-CU-MT-GDS

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 23, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On November 23, 2022, served the foregoing document(s) described as:

DEFENDANT PAFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action as below:

Gerald Singleton
gsingleton@singletonschreiber.com
Susan Dussault
sdussault@singletonschreiber.com
SINGLETON SCHREIBER, LLP
591 Camino de la Reina, Suite 1025
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Christopher R. Rodriguez
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abluth@singletonschreiber.com
Trent Nelson
tnelson@singletonschreiber.com
SINGLETON SCHREIBER, LLP
1414 K Street, Suite 470
Sacramento, CA 95814

☒ (BY E-MAIL) By transmitting true copies of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 23, 2022, at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.180

BY FAX

HUESTON HENNIGAN LLP
Alison L. Plessman, State Bar No. 250631
aplessman@hueston.com
Douglas J. Dixon, State Bar No. 275389
ddixon@hueston.com
William M. Larsen, State Bar No. 314091
wlarsen@hueston.com
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340
Facsimile: (888) 775-0898

Attorneys for Defendant PacifiCorp

FILED/ENDORSED
NOV 2 8 2022
By: I. Romo
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

LYLA HITCHCOCK; et al.,

Plaintiffs,

vs.

PACIFICORP, et al.,

Defendants.

Case No. 34-2020-00290833-CU-MT-GDS

Related Case Nos.: 34-2021-00293621; 34-2021-00299634; 34-2022-00324678; 34-2022-00324570; 34-2022-00324807; 34-2022-00325941; 34-2022-00326049; 34-2022-00326300; 34-2022-00326358; 34-2022-00325617; 34-2022-00326096

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Relates to: Lemon v. PacifiCorp et al., No. 34-2022-00326300

Pursuant to the provisions of Code of Civil Procedure 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers the Complaint ("Complaint") and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in any sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Plaintiffs and Plaintiffs' agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. Had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, such loss, damage, or injury would have been reduced or avoided altogether.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect Plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and that such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damage awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and/or the California Public Utilities Commission.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County of Siskiyou, the State of California, the California Public Utilities Commission, the United States of America, and/or the United States Forest Service, including the aforementioned authorities' agencies, and pursuant to law.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire, it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire, including those related to the assessment, management, and maintenance of vegetation.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, pursuant to California Civil Code § 1431.2, the liability of each of the persons, entities, and/or parties are several and not joint with respect to non-economic damages, and each party is liable only for the amount of non-economic damages alleged to that party in direct proportion of that party's percentage of fault. Non-economic damage has been defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society, companionship and consortium, injury to reputation and humiliation." Therefore, if liability is found as to PacifiCorp, then Plaintiffs are not entitled to recover from PacifiCorp any non-economic damages that are allocable to others.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that allege that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorneys' fees may be awarded.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that the claim in the Complaint for inverse condemnation is barred, in whole or in part, because it violates state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to the inverse condemnation cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack compensable interest in the properties or property rights allegedly taken.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays for judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. That judgment be entered in favor of PacifiCorp herein;

3. That PacifiCorp be awarded its costs of suit incurred herein; and

4. That PacifiCorp be awarded such other and further relief as the Court may deem just and equitable.

Dated: November 28, 2022

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen
Attorneys for Defendant PacifiCorp

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On November 28, 2022, I served the foregoing document(s) described as: **DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT (relates to Thomas Lemon, et la. v. PacifiCorp, et al. 34-2022-00326300)** on the interested parties in this action by submitting an electronic version of the document via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 28, 2022 at Los Angeles, California.

Debi Del Grande
(Type or print name)

Debi Del Grande
(Signature)

PAC_256.07.181

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

EDMUND DENNY, JR.; DANIEL RENTON; EDR MINING LLC; JARET MEIVES; BRIAN MOORE; TRACIE MOORE; and MICHAEL H. TOMLINSON, JR., Plaintiffs, v. PACIFICORP, an Oregon Corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp, Defendants.	No. 22CV29647 DEFENDANT PACIFICORP'S PARTIAL MOTION TO DISMISS COMPLAINT Oral Argument Requested Amount Claimed: Over $10,000,000 Filing Fee per ORS 21.160(1)(e): $1,178

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UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for this motion under UTCR 5.010 because it seeks dismissal for failure to state a claim. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 60 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Pursuant to ORCP 21 A(1)(h), PacifiCorp moves to dismiss the following claims for relief for failure to state ultimate facts sufficient to state a claim: First Claim for Relief (Inverse Condemnation Under the California Constitution); Fifth Claim for Relief (Inverse Condemnation Under the Oregon Constitution); Eighth Claim for Relief (Negligence Per Se);

and "Ninth" Claim for Relief (Public Nuisance, ORS 477.064).[1] PacifiCorp also moves to dismiss all of Plaintiffs' California-based claims (First through Fourth Claims for Relief) because application of the California laws would violate long-standing principles against the extraterritorial application of state law.

This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Per A. Ramfjord ("Ramfjord Decl."), and the pleadings and papers on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the 2020 Labor Day weekend, an unprecedented windstorm hit Northern California and Southern Oregon, igniting dozens of wildfires across the region. Plaintiffs—who allegedly were "homeowners, renters, business owners, residents, and occupants located in Jackson County and/or Josephine County, and/or who had property located therein"—filed a Complaint asserting 12 different claims for relief under Oregon and California state law. (Compl. ¶ 6.) Plaintiffs allege that PacifiCorp caused the Slater Fire, which as alleged by Plaintiffs, ignited in Northern California near Happy Camp and then spread across the state border and into Southern Oregon. (Compl. ¶¶ 1, 4, 5.) Government authorities and PacifiCorp itself are still actively investigating these wildfires, and their causes and origins have not been fully determined.

PacifiCorp seeks an order dismissing several of Plaintiffs' claims for relief, as summarized below.

Plaintiffs' California Law Claims. Plaintiffs assert four claims brought pursuant to California law—the First, Second, Third, and Fourth Claims for Relief. The Court should

[1] The Complaint includes three claims titled "Ninth Claim for Relief," including claims for trespass (¶¶ 115-24), public nuisance (ORS 477.064) (¶¶ 125-33), and public nuisance (Oregon common law) (¶¶ 134-42).

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dismiss all of those claims because none of the cited California statutes should be applied to Oregon residents whose injuries were sustained in Oregon.

Inverse Condemnation Claims. Plaintiffs' inverse condemnation claims brought pursuant to the California and Oregon Constitutions (First and Fifth Claims for Relief) also should be dismissed.

Even if a plaintiff could, theoretically, state an inverse condemnation claim under Article I, Section 19 of the California Constitution for an alleged taking of property in Oregon (they cannot), Plaintiffs' First Claim for Relief nonetheless fails to state a claim. To avoid dismissal, Plaintiffs must allege that (1) a "public entity" (2) "substantially caused," (3) through an "inherent risk of a public improvement as deliberately designed, constructed or maintained," (4) an injury to private property for public use. *City of Oroville v. Superior Court*, 446 P3d 304, 312, 314 (Cal 2019). Plaintiffs do not and cannot make any of those required showings because: (1) PacifiCorp is not a "public entity;" (2) Plaintiffs allege only a minimal "causal connection" between PacifiCorp's infrastructure and the alleged damage to their properties in Oregon, which the California Supreme Court has held is "insufficient to sustain a finding of inverse condemnation liability," *id*. at 315; and (3) Plaintiffs cannot allege that the alleged injury to their private property resulting from a wildfire was for a "public use." *Id*..

Plaintiffs' Fifth Claim for Relief for inverse condemnation under Article I, Section 18 and Article XI, Section 4 of the Oregon Constitution also fails. To begin with, Plaintiffs fail to allege facts sufficient to meet the stringent intent standard for such claims, which requires showing that PacifiCorp "intentionally undertook its actions" such that "the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property * * *." *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P2d 1261 (2014). As Judge Johnson of the Douglas County Circuit Court recognized, in the context of a wildfire inverse condemnation claim, *Dunn* requires alleging both that "1. The intentional act by Defendants

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was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. E at 4.) Because Plaintiffs fail to allege "substantial certainty" at either step, their inverse condemnation claims necessarily fail. *Dunn*, 355 Or at 358.

In addition, Plaintiffs have not alleged—and cannot allege—that PacifiCorp is a "governmental defendant" or that it took Plaintiffs' property "for a public use" as required to state an inverse condemnation claim under Article I, Section 18. *Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 56 P3d 396 (2002) (internal quotation marks and citation omitted). As already noted, there is no dispute that PacifiCorp is a private entity and Plaintiffs cannot allege that the damage to their property served any public purpose.

Finally, Plaintiffs' inverse condemnation claim under Article XI, Section 4 fails for similar reasons because Plaintiffs cannot allege that PacifiCorp acted "under authority of law." Oregon case law requires a direct connection between a corporation's legal "authority" and the alleged conduct, such as when railroads take property pursuant to municipal ordinances. *See, e.g.*, *Willamette Iron Works v. Or. Ry. & Nav. Co.*, 26 Or 224, 225, 37 P 1016 (1894) (railroad's "right to construct and maintain a bridge" was based upon an ordinance). Indeed, the United States Supreme Court has rejected the argument that simply holding "eminent domain" power renders a corporation a state actor for constitutional purposes; a corporation must "*exercise*" state authority to be liable. *Jackson v. Metro. Edison Co.*, 419 US 345, 353, 95 S Ct 449, 42 L Ed 2d 477 (1974) (emphasis added).

Additionally, Plaintiffs' inverse condemnation claims under California and Oregon law should be dismissed because Plaintiffs have not alleged ultimate facts regarding the properties that Plaintiffs allege were "taken" by PacifiCorp or the nature of Plaintiffs' rights or interests in such properties. Nor have Plaintiffs alleged any ultimate facts concerning the extent of any alleged damage to their properties. Without these basic factual allegations, Plaintiffs cannot state an inverse condemnation claim.

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Negligence *Per Se* Claim. The Court also should dismiss Plaintiffs' Eighth Claim for Relief for negligence *per se*. Only statutes and regulations that "fix[] the legal standard of conduct," such that "there is no question of due care left for a factfinder to determine," can support negligence per se. *Shahtout By & Through Shahtout v. Emco Garbage Co.*, 298 Or 598, 601, 695 P2d 897 (1985). The statutes and regulations cited by Plaintiffs do not do so, or do not otherwise meet the requirements for a negligence *per se* claim, and thus such a claim cannot be stated.

Public Nuisance Claim. Finally, the Court should dismiss Plaintiffs' "Ninth" Claim for Relief for public nuisance pursuant to ORS 477.064 because that statute does not create a private right of action. Because that statute does not refer to civil liability and the Court need not provide a remedy when Plaintiffs already have the ability to claim one by suing for negligence, the Court should dismiss the claim.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers in Oregon, Washington, and Northern California. As Plaintiffs concede, PacifiCorp is a privately owned and operated Oregon corporation with its principal place of business in Portland. (Compl. ¶ 9.)

In California, PacifiCorp serves around 45,000 customers in Siskiyou, Del Norte, Modoc, and Shasta counties. Its California operations are regulated by the California Public Utilities Commission ("CPUC"), and PacifiCorp may raise rates only by obtaining the CPUC's approval. *See, e.g.*, Cal Pub Util Code § 454(a). In Oregon, PacifiCorp serves around 596,000 customers under the Pacific Power brand. Its Oregon operations are regulated by the Oregon Public Utilities Commission ("OPUC"), and PacifiCorp may only raise rates by proving to the OPUC that a proposed rate increase is "fair, just and reasonable." *See* ORS 757.205, 757.210.

This case arises out of the Slater Fire, which Plaintiffs allege started in Northern California near Happy Camp and spread north to Southern Oregon. (*See* Compl. ¶¶ 1, 4, 5.)

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Plaintiffs contend that PacifiCorp's equipment in California started the Slater Fire. (*Id*. ¶40.) Plaintiffs do not specifically allege where their properties are in relation to the ignition site, but generally allege that they are located and/or had property in Jackson and/or Josephine counties. (*Id*. ¶ 6.) According to Plaintiffs, the fire started on September 8, 2020, when "high winds, with gusts reaching up to 50 miles per hour, came as predicted," and "vegetation contacted [PacifiCorp's] powerlines which predictably led to the starting of a fire." (*Id*. ¶ 39.) While they offer the further conclusory assertion that "[t]he inevitable consequence of that fire, including the wind, the topography, and the predictable way in which wildfires spread, was the fire's spread to Plaintiffs' properties," they do not allege any supporting facts. (*Id*.) Plaintiffs also generally allege that the fire occurred because PacifiCorp: "(a) failed to deenergize their powerlines on September 7th; (b) intended, designed and constructed their utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas; (c) failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure; and (c) [sic] failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (*Id*. ¶ 41.)

Government investigatORS have not released an official determination of what caused the Slater Fire. Plaintiffs allege that they have suffered "substantial harm" because of the fire and seek damages and other forms of relief. (*See, e.g.*, *id*. ¶ 46 and Prayer for Relief.) Plaintiffs filed their Complaint on August 31, 2022. The Complaint asserts 12 different claims for relief under Oregon and California law. Because a number of Plaintiffs' claims fail as a matter of law, PacifiCorp has filed this motion to dismiss.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state ultimate facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations, legal conclusions, or mere recitations of a claim's elements are insufficient to state a claim.

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See, *e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997) (citation omitted). When a claim as pleaded remains legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. The Court Should Dismiss Each of Plaintiffs' Claims Based on the Application of California Law.

Plaintiffs allege four claims pursuant to California law, asserting that the claims are allowed based on Oregon choice of law principles, namely ORS 15.440(2)(a) and (3). (Compl. ¶¶ 47-48.) Plaintiffs' reliance on ORS 15.440 is misplaced because, as discussed further below, Oregon law is more appropriately applied in this case pursuant to ORS 15.445. But even if California law were to be applied, the Court nonetheless should dismiss each claim based on California law because Plaintiffs have not—and cannot—rebut the presumption against the extraterritorial application of California law.

1. California Law Does Not Apply Extraterritorially to Plaintiffs' Claims.

California courts have long-recognized a "presumption against extraterritoriality—that is, a presumption that state law is intended to apply only within state borders." *Ward v. United Airlines, Inc.*, 466 P3d 309, 317 (Cal 2020). As the *Ward* court explained, this rule "reflects an assumption that a legislature generally legislates with domestic concerns in mind, [and] serves the incidental purpose of avoiding unintended conflicts with other sovereigns." *Id.* (citation omitted). In considering whether the presumption bars a plaintiff's claim, "each law must be considered on its own terms." *Id.* at 319. First, courts look to see whether there is any indication that the presumption has been rebutted. The presumption is rebutted only where a contrary intent is "clearly expressed or reasonably to be inferred from the language

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of the act or from its purpose, subject-matter, or history." *Sullivan v. Oracle Corp.*, 254 P3d 237, 248 (Cal 2011) (internal quotation marks omitted) (quoting *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P2d 539, 554 (Cal 1999)). If the presumption is not rebutted, then courts will consider whether "plaintiffs' proposed application of the [statute] would cause it to operate, impermissibly, with respect to occurrences outside the state." *Id.*

Applying California statutes to claims brought by Oregon residents, against Oregon residents, for injuries suffered in Oregon would violate this presumption against extraterritoriality. For this reason alone, Plaintiff's First, Second, Third, and Fourth Claims for Relief should be dismissed. *See, e.g., Natkin v. Am. Osteopathic Ass'n*, No. 3:16-cv-01494-SB, 2018 WL 452165 at *19 (D Or Jan. 17, 2018) (applying the California presumption and dismissing Oregon plaintiffs' claims under California's Unfair Competition Law); *In re Toyota Motor Corp.*, 785 F Supp 2d 883, 917-18 (CD Cal 2011) (applying the presumption to dismiss non-California residents' claims under California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Law).

a. Article I, Section 19 of the California Constitution Does Not Apply Extraterritorially to Plaintiff's Claims.

Neither the text, history, nor purpose of Article I, Section 19 of the California Constitution suggests that it is not subject to the presumption against extraterritorial application of California law. To the contrary, the plain language of Article I, § 19 demonstrates that it was intended to apply solely to intrastate conduct. For example, it specifically defines "State" as "the State of California and any of its agencies or departments," and defines "public work" as including "projects identified by a State or local government," making clear that the reach of the provision extends to State and local governments—not out-of-state entities or residents. The presumption against extraterritorial application of the provision therefore should apply in "full force." *Sullivan*, 254 P3d at 248; *see also Sarviss v. Gen. Dynamics Info. Tech., Inc*., 663 F Supp 2d 883, 898 (CD Cal 2009)

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(finding the presumption applies to California's wage and hour laws where there was no "clear expression of extraterritoriality" (internal quotation marks, brackets, and citation omitted)).

Further, application of Article I, Section 19 in an Oregon proceeding to property damaged in Oregon would "cause [the constitutional provision] to operate, impermissibly, with respect to occurrences outside the state." *Sullivan*, 254 P3d at 248. In determining whether extraterritorial application of a statute is appropriate, California courts generally look to the purpose of the statute at issue, among other factors. *See, e.g.*, *Ward*, 466 P3d at 323-24; *In re Toyota Motor Corp.,* 785 F Supp 2d at 917. No California appellate court appears to have addressed the extraterritorial application of a claim for inverse condemnation under California law, but given the nature of Article I, Section 19, a California court likely would find that the location of the property that allegedly was taken is the primary determining factor. In fact, any contrary result would create one of the problems the presumption was intended to avoid: unintended conflicts with other sovereigns. *See Ward*, 466 P3d at 316-17. Plaintiffs themselves amply demonstrate this point by also asserting a cause of action under Oregon's inverse condemnation statute. (Compl. ¶¶ 78-92.)

This conclusion is further bolstered when Article I, Section 19 is considered in context. Subsection (a) also provides that "[th]e Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings * * *." There is no indication that the California legislature intended to allow a condemnor to use eminent domain proceedings to acquire property in another state (*i.e.*, Oregon) for California's public use. PacifiCorp has been unable to find any case applying California's takings clause to property held outside of the state—whether by eminent domain or inverse condemnation—and this Court should not be the first to do so.

Accordingly, given that the property at issue is located in Oregon and Plaintiffs and Defendants also are Oregon residents, the Court should conclude that Plaintiffs' claim for

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inverse condemnation under California law is barred by the presumption against extraterritoriality. *See Tidenberg v. Bidz.com, Inc*., No. CV 08-5553 PSG, 2009 WL 605249 at *4 (CD Cal Mar. 4, 2009) (granting motion to dismiss Texas residents' claims under California's False Advertising law where the relevant unlawful conduct did not occur in California); *In re Toyota Motor Corp.*, 785 F Supp 2d at 918 (applying the presumption dismissing non-resident plaintiffs' claims, where plaintiffs did not allege a "sufficient connection to California" under the relevant statutes).

b. California Public Utilities Code § 2106, California Health & Safety Code § 13007, and California Public Resources Code § 4293 Do Not Apply Extraterritorially to Plaintiffs' Claims.

Plaintiffs' Second, Third, and Fourth Claims for Relief, based on three of California's regulatory codes, fail for similar reasons. Again, nothing in those statutes—including their text, context, or purpose—suggests that they were intended to regulate occurrences outside of California. Therefore, it is presumed that the legislature intended that they apply exclusively within California. *Sullivan*, 254 P3d at 248.

Moreover, an application here would cause the statutes to impermissibly operate extraterritorially. Although none of these provisions has been interpreted with regard to the presumption against extraterritoriality, courts' interpretations of the geographic scope of other California regulatory codes give insight into the appropriate application here. For example, in *North Alaska Salmon Co. v. Pillsbury*, 162 P 93, 94 (1916), the California Supreme Court considered whether a worker injured outside of California could seek compensation under the state's workers' compensation statute. . The statute "define[d] the conditions upon which the right to compensation rest[ed], [and] simply declare[d] that liability for the compensation provided shall exist where the given conditions concur," but it contained nothing about "the place of injury," nor did it contain "any language from which the intention to extend [its] operation * * * beyond the territorial limits of the state [could] be inferred.'" *Id*. "Therefore, the Court held, the statute was limited to injuries that occurred

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within California." *Cotter v. Lyft, Inc.*, 60 F Supp 3d 1059, 1062 (ND Cal 2014) (citing *N. Alaska Salmon Co.*, 162 P at 94).

Since nothing in the regulatory statutes suggests that they were meant to apply to injuries occurring outside of California, suffered by residents of another state,[2] the Second, Third, and Fourth Claims should be dismissed.

2. Under ORS 15.440(4) and ORS 145.445, Oregon Law Is More Appropriate Than California Law.

In addition to the foregoing, Plaintiffs' First, Second, Third, and Fourth Claims for Relief should be dismissed pursuant to ORS 15.445 because Oregon law is more appropriately applied in this action than California law. Plaintiffs rely on ORS 15.440(2)(a) and (3) in support of their contention that they can assert their California law claims in this Oregon state action, but they ignore ORS 15.440(4), which provides that if the law of another state is more appropriate under the principles of ORS 15.445, the law of that other state governs. ORS 15.445 provides that the "rights and liabilities of the parties with regard to disputed issues in a noncontractual claim are governed by the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of the state's law the most appropriate for these issues." The statute further provides:

> "The most appropriate law is determined by:
>
> > "(1) Identifying the states that have a relevant contact with the dispute, such as the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, or the place in which the relationship between the parties was centered;

[2] In some circumstances not present here, the California legislature has provided contrary indications. For example, California's False Advertising Law can provide liability for injuries occurring outside of the California, so long as the "conduct complained of occurred in California," because the statute specifically "prohibits false or misleading statements made 'before the public in this state' and 'from this state before the public in any state.'" *Tidenberg*, 2009 WL 605249 at *4 (emphasis omitted) (quoting Cal Bus & Prof Code § 17500). The fact that the statutes at issue in this case do not contain similar provisions further supports PacifiCorp's position that the statutes do not apply.

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> "(2) Identifying the policies embodied in the laws of these states on the disputed issues; and
>
> "(3) Evaluating the relative strength and pertinence of these policies with due regard to:
>
> "(a) The policies of encouraging responsible conduct, deterring injurious conduct and providing adequate remedies for the conduct; and
>
> "(b) The needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states."

Id.

Here, the first factor weighs in favor of applying Oregon—not California—law. Plaintiffs are alleged to be residents of Oregon, purportedly having property interests in Jackson County and/or Josephine County in Oregon. (Compl. ¶ 6.) Defendants are organized under the laws of the State of Oregon and have their principal places of business in Oregon. (*Id*. ¶¶ 9, 10.) The properties allegedly damaged by the fires also are located in Oregon. (*Id*. ¶¶ 6, 7.) Plaintiffs conclusorily allege that the larger fire started in California, but as discussed more fully below, they do not allege any ultimate facts as to how precisely any of Defendants' conduct in California caused injury to Plaintiffs' properties in Oregon.

The second and third factORS also weigh in favor of applying Oregon law. As discussed above, there is no indication that the California legislature intended Article I, Section 19 of the California Constitution or the California regulatory statutes to apply to out-of-state residents in circumstances such as those present here. Moreover, there are no policies that would require application of these laws as Oregon law already provides other potential adequate remedies. For example, the Oregon Constitution also has a takings clause—Article I, Section 18—and Plaintiffs have asserted an inverse condemnation claim under that law as well.

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Accordingly, all of Plaintiffs' claims based on California law should be dismissed.

B. Plaintiffs' Inverse Condemnation Claims Under California and Oregon Law Should Be Dismissed.

If the Court does not dismiss Plaintiffs' California inverse condemnation claim under the principle of extraterritoriality or under choice of law principles, as described above, it nevertheless should dismiss the claim because Plaintiffs fail to allege ultimate facts to meet the requirements for that claim under California law. And regardless—and independent of any challenge to the California inverse condemnation claim—Plaintiffs cannot state a claim for inverse condemnation under the Oregon Constitution for the reasons described below. In short, both the California and Oregon inverse condemnation claims fail on the merits.

1. Plaintiffs Cannot State—and Have Not Sufficiently Alleged—an Inverse Condemnation Claim Under the California Constitution.

The California Constitution's Takings Clause requires the government to provide "just compensation" when private property is "taken or damaged for a public use." Cal Const, Art I, § 19(a). There are two traditional types of takings actions: a formal eminent domain proceeding "initiated by a public entity to acquire private property for public use," and an "inverse condemnation action" initiated by a private property owner when a governmental act "amounts functionally to a taking" but the government "fails to pay the requisite compensation." *City of Oroville*, 446 P3d at 310.

Inverse condemnation does not authorize holding public entities "strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however, remote, to a public improvement." *Id*. at 307. Nor does inverse condemnation cover damages "caused by the negligent conduct of public employees" or the "negligent operation of the improvement." *Customer Co. v. City of Sacramento*, 895 P2d 900, 908 (Cal 1995) (internal quotation marks, emphasis, and citation omitted). Instead, the purpose of inverse condemnation is limited and specialized: to take losses that stem from the "inherent dangers

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of the public improvement as deliberately designed, constructed, or maintained," *City of Oroville*, 446 P3d at 312, and distribute those losses "throughout the community," *Holtz v. Superior Court*, 475 P2d 441, 445 (Cal 1970) (internal quotation marks and citation omitted).

Under that standard, Plaintiffs' California inverse condemnation claim fails because (1) PacifiCorp is not a public entity entitled to spread inverse losses among the public as a matter of right; (2) the alleged damage was not an "inescapable or unavoidable consequence" (3) of "an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement"; and (4) the alleged damage did not further a public use. Because Plaintiffs do not and cannot plausibly allege ultimate facts sufficient to state an inverse condemnation claim (even if granted leave to replead), the Court should dismiss the First Claim for Relief with prejudice.

a. PacifiCorp Is a Private Corporation, Not a Public Entity.

Under the California Constitution's Takings Clause, a "*public entity* must pay the owner just compensation when it takes or damages private property for public use." *City of Oroville*, 446 P3d at 309 (emphasis added) (citing Cal Const, Art I, § 19); *Paterno v. State of California*, 87 Cal Rptr 2d 754, 767 (App 1999) ("The condemnation clause * * * requires an act of a public body."); *Bach v. County of Butte*, 263 Cal Rptr 565, 572-73 (App 1989) ("[I]t is elementary that an inverse condemnation action—being based upon the taking or damaging of property for public use without just compensation—requires state action and, therefore, cannot be asserted against private parties."). Inverse condemnation is limited to government entities because the underlying purpose of the Takings Clause is to take losses "inflicted upon [an] individual" and "distribute [them] throughout the community." *Holtz*, 475 P2d at 445 (internal quotation marks and citation omitted). The takings clause also gives private property owners remedies they "would not otherwise have against the state" because government entities are immune from liability for most tort claims. *Bauer v. Ventura Cnty.*, 289 P2d 1, 5 (Cal 1955), *abrogated on other grounds as recognized by Belair v. Riverside*

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Cnty. Flood Control Dist., 764 P2d 1070, 1077 (Cal 1988); *see also* Cal Gov Code § 815. Unlike government entities, privately owned utilities like PacifiCorp are not able to socialize their inverse losses and are not otherwise protected from wide-ranging tort liability under California's Tort Claims Act.

The California Supreme Court has instructed courts to interpret California's takings clause consistent with the "history [and] intent of the provision," avoiding "literal (and overly simplistic) interpretation[s]." *Customer Co.*, 895 P2d at 906. For decades, California courts have held that "loss distribution" is the fundamental policy goal "underpinning inverse condemnation." *Gutierrez v. Cnty. of San Bernardino*, 130 Cal Rptr 3d 482, 485 (App 2011); *see also Bacich v. Bd. of Control of Cal.*, 144 P2d 818, 823 (Cal 1943) ("[T]he policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements."). As the California Court of Appeal has explained, the goal of inverse condemnation is "to spread among the benefiting community any burden disproportionately borne by a member of that community." *Barham v. S. Cal. Edison Co.*, 88 Cal Rptr 2d 424, 430 (App 1999). That "fundamental policy" applies only to public entities, which can "socialize[] and distribute[]" inverse condemnation losses "over the taxpayers at large." *Cantu v. Pac. Gas & Elec. Co.*, 234 Cal Rptr 365, 368 (App 1987) (internal quotation marks and citation omitted); *see also Albers v. Los Angeles Cnty.*, 398 P2d 129, 137 (Cal 1965) ("[T]he cost of such damage can be better absorbed, and with infinitely less hardship, by the taxpayers as a whole * * *."). The California Supreme Court has thus never ruled that inverse condemnation liability applies to regulated, privately owned electrical utilities like PacifiCorp.

Given the history and intent of the Takings Clause, there is no basis to subject PacifiCorp—a private corporation—to inverse condemnation liability. Plaintiffs do not allege PacifiCorp is a government entity, nor could they. Instead, they concede that PacifiCorp is a private corporation. (*See* Compl. ¶¶ 9-10.) At most, Plaintiffs allege that

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PacifiCorp is an "electrical corporation" and a "public utility" under California Public Utilities Code Sections 218(a) and 216(a)(1), respectively (*id.* ¶ 51), and that PacifiCorp's "utility infrastructure, including their powerlines, are public improvements for the supplying of electricity to the public for public use." (*Id.* ¶ 53.) Even accepting Plaintiffs' allegations as true, these defined terms include private corporations. In other words, not all "public utilities" or "electrical corporations" are government entities subject to inverse condemnation liability. Section 216(a)(1) defines "public utility" to include an "electrical corporation"; Section 218(a) in turn defines "electrical corporation" as "every corporation * * * owning, controlling, operating, or managing any electric plant," whether publicly or privately owned. *See* Cal Pub Util Code §§ 216(a)(1), 218(a). And Section 217 defines an "electric plant" as "real estate, fixtures and personal property" that "facilitate[s] the production, generation, * * * or furnishing of electricity." Cal Pub Util Code § 217. None of those statutes provides that any such entity is a government entity, nor do they address such an entity's ability to spread its inverse losses to society at large.

As a private corporation, PacifiCorp does not have the right to "socialize[] and distribute[]" its losses to "taxpayers at large." *Cantu*, 234 Cal Rptr at 368. PacifiCorp is not a state entity and cannot levy taxes. And PacifiCorp lacks the ability to set its own rates; that right is reserved to the CPUC. *See* Cal Pub Util Code § 454(a) ("[A] public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."). And, as the CPUC explained in rejecting San Diego Gas & Electric's application to raise rates to spread losses from settling a multi-million-dollar inverse condemnation lawsuit, "[i]nverse [c]ondemnation principles are not relevant" to the CPUC's decision about whether to raise utility's rates. (Ramfjord Decl., Ex. G at 67.) Because PacifiCorp does not have the independent ability to spread losses, holding PacifiCorp liable for inverse condemnation would defeat the "fundamental policy underlying the concept of

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inverse condemnation": "to spread among the benefiting community any burden disproportionately borne by a member of that community." *Barham*, 88 Cal Rptr 2d at 430; *see also Bach*, 263 Cal Rptr at 572-73 ("[I]t is elementary that an inverse condemnation action * * * cannot be asserted against private parties."); *Sierra Palms Homeowners Ass'n v. Metro Gold Line Foothill Extension Constr. Auth.*, 228 Cal Rptr 3d 568, 574 (App 2018) (affirming dismissal of inverse condemnation claim after plaintiff did not even "contend in its brief on appeal" that it could state a cause of action, because defendant was "a private entity").

b. Plaintiffs Do Not and Cannot Allege that Damage to Their Specific Properties Was Inescapable or Unavoidable.

Plaintiffs' California inverse condemnation claim also fails because Plaintiffs cannot allege substantial causation as a matter of law.

The "core of the test" for "substantial causation" requires that damage to private property be the "inescapable or unavoidable consequence" of government action. *City of Oroville*, 446 P3d at 314 (quoting Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings LJ 431, 437 n 32 (1969)); *see also Albers*, 398 P2d at 134 (public entities are only liable for damage caused by the "necessary effect[s]" of a public improvement); *Sheffet v. Cnty. of Los Angeles*, 84 Cal Rptr 11, 20 (App 1970) ("Property is only deemed taken or damaged for a public use if the injury is a necessary consequence of the public project."). As the California Supreme Court has explained, that rule is intentionally difficult to satisfy because courts must "mitigate concerns that 'compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.'" *City of Oroville*, 446 P3d 304, 311 (quoting *Bacich*, 144 P2d at 823).

City of Oroville demonstrates the high standard that Plaintiffs must meet to establish substantial causation. In that case, three dentists brought an inverse condemnation action for

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damage from a city's sewer system, which backed up and flooded their office. *Id*. at 307. The city argued that the dentists failed to show that their damages were substantially caused by the city's deliberate actions because the dentists had "failed to install a legally-required backwater valve" that would have prevented the damage. *Id*. The California Supreme Court reversed a judgment for the plaintiffs, explaining that inverse condemnation does *not* provide for strict liability for "any conceivable damage bearing some kind of connection, however remote, to a public improvement." *Id*. Instead, the "damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement." *Id*. at 312. And while the dentists' damages related to the "design, operation, and maintenance of a sewer system," the backwater valve "would have prevented or substantially diminished the risk of the mishap." *Id*. at 316. Accordingly, the Supreme Court held that there was no substantial causation as a matter of law: the "injury to private property" was not an "inescapable or unavoidable consequence of the public improvement as planned and constructed." *Id*. at 314 (internal quotation marks and citation omitted).

Here, Plaintiffs cannot allege and have not alleged ultimate facts sufficient to establish substantial causation. Rather, they offer only conclusory allegations that any alleged damage was the "inescapable and unavoidable consequence" of PacifiCorp's "design, construction, use and maintenance of their utility infrastructure," that PacifiCorp's "deliberate actions when designing, constructing, using and maintaining their utility infrastructure was a substantial factor in damaging a property interest protected by Article I, § 19 of the California Constitution," and that Plaintiffs' damage "was the necessary and probable result of Defendants' public improvement of supplying electricity." (Compl. ¶¶ 58, 59.) But stripped of legal conclusions, Plaintiffs allege only a simple causal connection: that PacifiCorp's various alleged failures to act "materialized when one of their powerlines in California broke, created arcing, and ignited the Slater Fire, which resulted in a taking of

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Plaintiffs' real and/or personal property in Oregon." (*Id.* ¶ 57.) As the California Supreme Court has explained, a simple "causal connection between the public improvement and the property damage alone is insufficient to sustain a finding of inverse condemnation liability." *City of Oroville*, 446 P3d at 315. Absent any factual allegations that Plaintiffs' damages were the "inescapable or unavoidable" consequence of the inherent risks of deliberate actions taken by PacifiCorp, the Complaint fails to state a cause of action.

And to the extent the Complaint contains factual allegations at all, they confirm Plaintiffs could not allege substantial causation even if granted leave to amend. Plaintiffs' allegations focus on the *risk* of fire, which alone is inconsistent with the notion that damage to Plaintiffs' properties was "inescapable" or "unavoidable." For example, Plaintiffs allege that "[t]he manner in which [PacifiCorp] designed, constructed, used and maintained their utility infrastructure created an inherent risk and danger of creating a fire that would damage Plaintiffs' real property." (Compl. ¶ 54.) But a "risk" is only a "possibility of loss, injury, disadvantage, or destruction," while a "necessary" result is one that is "unavoidable" or "inevitable." *Webster's New Int'l Dictionary* 1510, 1961 (3d ed 1961). Even in legal contexts requiring a lower burden on causation than "substantial cause," alleging a "mere possibility of * * * causation is not enough" to allege "probability." *Saelzer v. Advanced Grp. 400*, 23 P3d 1143, 1151 (Cal 2001) (internal quotation marks and citation omitted); *see also Cary v. United States*, 552 F3d 1373, 1378 (Fed Cir 2009) (rejecting inverse condemnation claim because "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable").

Plaintiffs could not allege substantial causation even if granted leave to amend because simply alleging that *ignition of a fire* was inevitable or a "necessary result" of PacifiCorp's deliberate action would not establish that PacifiCorp substantially caused Plaintiffs' damages. Plaintiffs must allege that the *property damage* was itself an

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"inescapable or unavoidable consequence." *City of Oroville*, 446 P3d at 314 (internal quotation marks and citation omitted). But as courts from sister jurisdictions have recognized, fire damage is inherently uncertain. For example, in rejecting a wildfire inverse condemnation claim at the pleading stage, the Texas Court of Appeals explained that to plead causation, the plaintiffs must have alleged that each step of a seven-step chain of causation was "almost-certain" to occur—beginning with the city's alleged cost-saving measures, proceeding through "high winds" and "arcing," and ending in the damage to a plaintiff's property in particular. *City of Austin v. Liberty Mut. Ins.*, 431 SW 3d 817, 825 (Tex App 2014). Because wildfire plaintiffs generally cannot make that showing, wildfire liability—even for *intentionally set* fires—"has traditionally been determined under tort law," not inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998) (dismissing wildfire inverse condemnation claim at pleading stage). That is even more true here, when the wildfire is alleged to have ignited in *California*—an entirely different state—and spread to cause damage to Plaintiffs' property *in Oregon*. Plaintiffs cannot plausibly allege (and have not so alleged) that property damage to Plaintiffs' property in Oregon was the inescapable and unavoidable consequence of its conduct in California.

Even if Plaintiffs were to amend to allege (for example) that any fire ignition at Happy Camp was "almost-certain" to spread to their properties in Oregon, *City of Austin*, 431 SW3d at 825, that would not be sufficient, either. Plaintiffs allege that there was an "extreme fire risk in Northern California" and that "dangerous weather conditions were expected to strike Northern California and Southern Oregon." (Compl. ¶¶ 2, 37.) In other words, in addition to potentially spreading anywhere, the fire could have ignited anywhere—rendering substantial causation nearly impossible to plead, let alone prove, as to any specific property. *See City of Oroville*, 446 P3d at 307 (to show substantial causation, plaintiffs must establish that the "damage to private property" in particular—and not some other, intermediate event, such as a fire—was "substantially caused" by the inherent risks of the public improvement).

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Unlike a flood from a dam built in a specific, fixed location, which will damage specific nearby properties to a near certainty, scientists "stud[ying] the question in advance" cannot "predict" whether a particular property will suffer fire damage from an alleged utility-caused fire igniting in an unknown location, with unknown spread. *Ridge Line, Inc. v. United States*, 346 F3d 1346, 1357 (Fed Cir 2003).

Dismissing Plaintiffs' California inverse condemnation claim will not prevent Plaintiffs from pursuing their negligence claim against PacifiCorp, and it is consistent with *City of Oroville*'s guidance that inverse condemnation plaintiffs must allege that the damage to their properties was "necessary or probable." 446 P3d at 314 (internal quotation marks, emphasis, and citation omitted).

c. Wildfire Damage Is Not an Inherent Risk of the Deliberate Design, Construction, or Maintenance of PacifiCorp's Equipment.

Even if Plaintiffs could allege substantial causation, not all damage substantially caused by government acts can support an inverse condemnation claim under California law. Plaintiffs must allege that their damages arose from the "inherent dangers of the public improvement as *deliberately* designed, constructed, or maintained." *Id.* at 312 (emphasis added). Allegations that a public entity "negligent[ly] operat[ed]" a public improvement, in contrast, do not create inverse condemnation liability. *Id*. at 311 (quoting *Customer Co.*, 895 P2d at 908). This element is designed to "avoid[] open-ended liability by protecting public entities from liability for private property damage that is arguably connected to a public improvement but is not the result of the improvement's inherent risks." *Id*. at 313. For the independent reason that Plaintiffs do not and cannot allege facts showing that any of PacifiCorp's "deliberate" actions resulted in damage to their property, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

The California Supreme Court has set a clear line: deficient plans and policies can create liability, but deficient implementation of plans or policies—including negligence—

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cannot. Inverse condemnation liability attaches if, for example, a public entity makes a "policy choice" to "forgo regular monitoring and repair." *City of Oroville*, 446 P3d at 313-14. In contrast, "inverse condemnation does not involve ordinary acts of carelessness in carrying out of the public entity's program." *Sheffet*, 84 Cal Rptr at 19 (citing *Miller v. City of Palo Alto*, 280 P 108 (Cal 1929)); *see also Customer Co.*, 895 P2d at 908 (*Miller*'s holding "that damage caused by the negligent conduct of * * * a public entity does not fall within the aegis of [the takings clause] has been followed repeatedly and uniformly in the more than 60 years that have elapsed"); *Bauer*, 289 P2d at 7 (citing *Miller*); *McNeil v. City of Montague*, 268 P2d 497, 498 (App 1954) (same, in fire case); *W. Assur. Co. of Toronto v. Sacramento & San Joaquin Drainage Dist.*, 237 P 59, 62 (App 1925) (same, in fire case).

Here, Plaintiffs allege only negligence—not a cognizable "deliberate" plan or policy choice to support inverse condemnation liability. Plaintiffs conclusorily allege that Defendants' actions were "deliberate" but fail to plead any ultimate facts as to such conduct. Stripped of conclusory language, Plaintiffs' Complaint fails to allege that the damage to Plaintiffs' properties resulted from the "inherent dangers of the public improvement as *deliberately* designed, constructed, or maintained." *City of Oroville*, 446 P3d at 312 (emphasis added).

Plaintiffs first allege that PacifiCorp's electrical infrastructure was "intended, designed, and constructed to pass electricity through exposed powerlines in dry, vegetated areas." (Compl. ¶ 3; *see also id.* ¶¶ 38, 41.) Even accepted as true, Plaintiffs do not allege any facts to show that merely constructing "exposed" powerlines in dry, vegetated areas creates an "inherent risk" of wildfire. Under Plaintiffs' theory, *any* construction of electrical facilities in "dry, vegetated" regions would create inverse condemnation liability, no matter what safety measures a utility takes. Allowing that level of generality to pass the pleading stage would eviscerate the requirement that Plaintiffs plead ultimate facts that their damages resulted from an "inherent risk" of a "deliberate" act; any plaintiff could pass the pleading

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stage simply by alleging that a public entity intentionally built a public improvement and describing some aspect of its surroundings. But the California Supreme Court has instructed that the requirement that plaintiffs plead that their damages resulted from the "inherent risk" of any "deliberate" act operates as a "preventative measure to ensure that not all private property damage bearing some causal relationship to a public improvement results in liability." *City of Oroville*, 446 P3d at 312-13. *City of Oroville* requires more than just alleging that an inverse defendant deliberately built an improvement, which is all Plaintiffs' first theory alleges. *Id*. (no liability even though municipality "deliberately" built sewers).

Plaintiffs alternatively allege that the Slater Fire resulted from the "inherent danger" that resulted when PacifiCorp allegedly "failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure" and "failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (Compl. ¶ 41). But Plaintiffs do not allege that these purported failures resulted from an inherent risk of a deliberate "plan" or policy choice. *McMahan's of Santa Monica v. City of Santa Monica*, 194 Cal Rptr 582, 590-91 (App 1983), *disapproved of on other grounds by Bunch v. Coachella Valley Water Dist*., 935 P2d 796, 808 (App 1997); *City of Oroville*, 446 P3d at 311 (inverse condemnation liability arises only if the "injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement" (quoting *Customer Co.*, 895 P2d at 908)). Plaintiffs' allegations mirror those expressly rejected in *City of Oroville*. *City of Oroville*, 446 P3d at 314 (rejecting argument that the "inherent risk of a sewer system is blockage caused by roots or foreign objects").

Plaintiffs' allegations also generally fail because negligence is insufficient to support an inverse condemnation claim under the California Constitution. *Compare McMahan's*, 194 Cal Rptr at 589, 591 (city's "plan of replacement" of water mains, which would "take at least 88 years" to complete, supported inverse condemnation liability), *with Tilton v.*

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Reclamation Dist. No. 800, 48 Cal Rptr 3d 366, 368 (App 2006) (failure of levee "due to improper maintenance" was mere negligence in the "routine operation" of the public improvement and failed to state a claim for inverse condemnation). The California Supreme Court has long distinguished between "dangers inherent in the construction of the public improvement," which can create inverse liability, and "dangers arising from the negligent operation of the improvement," which cannot. *City of Oroville*, 446 P3d at 311 (quoting *Customer Co.*, 895 P2d at 908); *see also Paterno*, 87 Cal Rptr 2d at 767 ("Poor execution of a maintenance plan does not result in a taking.").

d. Accidental Wildfire Does Not Serve a Public Use.

California's Takings Clause is unambiguous: only damage "for public use" creates a compensable taking. Cal Const, Art I, § 19; *see also Customer Co.*, 895 P2d at 908 (only when "[t]he destruction or damaging of property is sufficiently connected with 'public use'" does inverse condemnation liability attach (internal quotation marks and citation omitted)); *Arreola v. Cnty. of Monterey*, 122 Cal Rptr 2d 38, 53 (App 2002) ("To be subject to liability in inverse condemnation, the governmental action at issue must relate to the 'public use' element of article I, Section 19."). Plaintiffs cannot satisfy that requirement as a matter of law, nor does their Complaint attempt to do so.

Plaintiffs allege only that PacifiCorp's "utility infrastructure, including their powerlines, are public improvements for the supplying of electricity to the public for public use." (Compl. ¶ 53.) In other words, Plaintiffs allege that because PacifiCorp operated electrical equipment for the public's benefit, any damage from that equipment served a public use, and so is a compensable taking.

The California Supreme Court has squarely rejected the argument that all damage from public improvements is damage that serves a public use. In *Customer Co.*, the California Supreme Court held that tear gas damage to a store and its inventory was not damage "for public use" even though officials had deliberately fired tear gas canisters for a

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public purpose: apprehending an escaping criminal. 895 P2d at 913. As the Court explained, the destruction of the plaintiff's property did not convey a benefit for public use, even though it arose from the underlying public benefit of capturing the felon. *See id.* at 907-08, 913. The relevant question is thus not whether a court can find some public benefit somewhere up the chain of causation, but instead whether the "destruction or damage of property" *itself* is "sufficiently connected with 'public use.'" *Id*. at 908 (quoting *House v. Los Angeles Cnty. Flood Control Dist*., 153 P2d 950, 956 (Cal 1994) (Traynor, J., concurring)); *see also W. Assur. Co.*, 237 P at 75 (holding that, to be "damage for public use," the damage must be an "act necessary to the doing of the work" that "promote[s] the ends of a public use"; allegations that a public entity negligently started a fire failed to meet that standard); *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 370 P3d 319, 328 (Colo App 2015) ("The public purpose of an intended act (the prescribed burn) that ultimately results in an unintentional 'taking' (the wildfire) does not transfer to and supply the 'public purpose' for that taking.").

The California Supreme Court also has rejected claims like Plaintiffs' allegations here on public use grounds. For example, *Miller* involved an inverse condemnation claim against a city garbage department that took "burning garbage" from an incinerator and "deposited [it] on vacant property" a quarter mile from the plaintiffs' real property; the burning garbage started a wildfire that destroyed the plaintiffs' property. 280 P at 108. The California Supreme Court held that there was "no merit" to the plaintiffs' inverse condemnation claim, explaining that the plaintiffs failed to plead a "public use," defined as a "use which concerns the whole community," even though the "collection and disposal of garbage" served "governmental functions." *Id*. at 109.

For the foregoing reasons, the Court should dismiss Plaintiffs' First Claim for Relief for inverse condemnation under Article I, Section 19 of the California Constitution.

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2. Plaintiffs' Cannot State an Inverse Condemnation Claim Under the Oregon Constitution.

For similar reasons, Plaintiffs also cannot state a claim for inverse condemnation under Article I, Section 18 or Article XI, Section 4 of the Oregon Constitution. Thus, the Court should dismiss Plaintiffs' Fifth Claim for Relief as well.

The Oregon Constitution has two takings clauses. Article I, Section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, Section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

Although the typical taking begins with a formal eminent domain proceeding, governments and corporations acting under authority of law also may "take[] property interests through [their] actions without first initiating condemnation proceedings." *Id*. In those cases, a property owner may recover under the doctrine of inverse condemnation.

Here, Plaintiffs cannot satisfy the elements of either Article I, Section 18 or Article XI, Section 4 as a matter of law. *First*, Plaintiffs cannot meet the intent requirement applicable to a takings claim under either clause, namely that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiffs' property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. *Second*, Plaintiffs cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public purpose" as required by Article I, Section 18. *Third*, Plaintiffs cannot show that PacifiCorp acted "under authority of law" as required by Article XI, Section 18 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

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a. Plaintiffs Fail to Allege That PacifiCorp Intentionally Undertook to Act in a Manner That Necessarily Caused Plaintiffs' Injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation claim under Article I, Section 18 or Article XI, Section 4 of the Oregon Constitution only by proving that the government "intentionally undertook actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas Cnty*., 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If "plaintiff's best evidence" shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun*, 335 Or at 27 ("[A] takings claim cannot be based on * * * negligent government conduct." (internal quotation marks and citation omitted)).

Dunn illustrates the high standard Plaintiffs must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "natural and ordinary consequence[]" of that improvement, and so was liable for inverse condemnation. *Id*. at 345-46.

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The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id*. at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiffs must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id*.

Similarly, in *Worman v. Columbia County*, 223 Or App 223, 236, 195 P3d 414 (2008), the plaintiffs sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiffs failed to state an inverse condemnation claim because the plaintiffs had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to plaintiffs' property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id*. (emphasis omitted). The court rejected the plaintiffs' inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, plaintiffs' property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiffs' property as a natural and ordinary consequence of the project. *Id*.

As Judge Johnson of the Douglas County Circuit Court recognized in rejecting inverse condemnation claims identical to those Plaintiffs assert here, *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege ultimate facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by

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Plaintiffs." (Ramfjord Decl., Ex. E at 4.) Under *Dunn*, it is not enough to allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiffs' properties. Instead, Plaintiffs must allege facts that the invasion "into plaintiff's [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiffs' damages must have been "substantially certain" to occur. *Dunn*, 355 Or at 361.

Judge Conover of Lane County also recently dismissed nearly identical inverse condemnation claims in the *Anderson* case against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the plaintiffs' properties." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims as well. (Ramfjord Decl., Ex. B.)

Finally, Judge Johnson of Douglas County also recently dismissed another inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case. (Ramfjord Decl., Ex. A.) In doing so, Judge Johnson suggested that the plaintiffs there had failed to "allege ultimate facts that would support a claim that ***damage to defendants' property*** was an inevitable or natural result of the Plaintiffs' intentional act that was not dependent on other intervening factors." (*Id*. (emphasis added).) Plaintiffs in the *Roseburg Resources* case have repleaded, and PacifiCorp's renewed motion to dismiss has been argued and is pending decision.

Here, too, Plaintiffs cannot allege that any of the necessary causal steps to damage their specific property were "substantially certain" to occur. Start with the alleged ignition. Plaintiffs allege that the Slater Fire occurred because PacifiCorp "failed to deenergize their powerlines on September 7"; "intended, designed and constructed [its] utility infrastructure

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to pass electricity through exposed powerlines in dry, vegetated areas"; "failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure"; and "failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (Compl. ¶ 41.) Plaintiffs then conclusorily allege that the "predictable and inevitable consequences" of PacifiCorp's conduct was "damage" to Plaintiffs' property, and that the "taking was a necessary, substantially certain, and/or inevitable consequence of [PacifiCorp's] actions and inactions in designing, constructing, using and maintaining their utility infrastructure." (*Id.* ¶¶ 83, 85-89.) Plaintiffs then generally allege that "[w]ildfires move in a direction and at a speed that is predictable and inevitable given known wind patterns, heat, and humidity at the time of ignition." (*Id*.) These generalized allegations are not tied to any specific geographic location and do not allege ultimate facts sufficient to support a claim that the inevitable or natural result of a fire that ignited in *California* was damage to Plaintiffs' property in *Oregon*; rather, they are merely "conclusion[] of law" that does not suffice to state "ultimate facts" entitling Plaintiffs to relief. *Huang*, 147 Or App at 332. Allowing an inverse condemnation claim to stand on such threadbare allegations would unleash a flood of such claims following every wildfire arguably caused by vegetation contacting a powerline.

Nor have Plaintiffs alleged any other specific facts supporting a finding of "substantial certainty." Indeed, the fact that Plaintiffs' factual allegations center on fire "risk" confirm that Plaintiffs cannot do so. The Complaint refers to "risk" or "fire risk" numerous times, alleging, for example, that there was a "risk of arcing" and a "fire potential" that was "well-above normal," among other things. (Compl. ¶¶ 19, 31, 36, 37, 42, 85, 90.) The reason Plaintiffs focus on "risk" is that it is the best they can do; it is implausible (at best) to suggest that actions like failing to inspect vegetation or designing and constructing "utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas"

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are *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, etc.) are necessary for an ignition to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), the plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id*. at 1377. The court rejected the plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "direct, natural, or probable" result of government conduct to state a claim. *Id*. at 1378. As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id*. For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53; *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiffs could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiffs make no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of *the plaintiff's property* that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59 (emphasis added). Indeed, Plaintiffs do not even allege specifically where their properties were located, much less why the fire was substantially certain to consume their properties once it started. Read in the most generous possible light, the most Plaintiffs allege that PacifiCorp's actions were substantially certain to cause ignitions that

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were the but-for cause of a larger fire that was the but-for cause of Plaintiffs' damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiffs' property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id*. at 361 (emphasis in original and added). Such allegations, however, fall far short of the applicable standard.

That problem is especially striking with respect to the claims at issue in this case. The Complaint contains very few details about the specific property interests held by Plaintiffs. The only allegations about those property interests are that they are "located in Jackson County and/or Josephine County." (Compl. ¶ 6.) Plaintiffs state no facts at all—let alone ultimate facts—concerning the nature of Plaintiffs' properties, the size of the properties, the use of the properties (*i.e.*, commercial, residential, etc.), or specific details regarding the extent of the alleged damage to Plaintiffs' specific properties. Without any ultimate facts alleged as to the specific properties that Plaintiffs allege were taken by PacifiCorp's actions, Plaintiffs cannot state a claim for inverse condemnation.

Moreover, as pled in the Complaint, Plaintiffs are residents in potentially two different Oregon counties seeking damages for property injuries that Plaintiffs allege occurred as a result of a fire that ignited in another state (California). (*Id.* ¶¶ 4, 6.) Even if Plaintiffs could allege that some set of actions were "substantially certain" to ignite the fire in California (and they have not done so), they cannot conceivably allege that PacifiCorp's conduct was further "substantially certain" to damage Plaintiffs' properties in another state. Whether or not an inverse condemnation claim can properly be asserted against a private electrical utility relating to a wildfire under *any* facts, this case is an especially egregious example of geographically disparate claims that cannot meet the *Dunn* standard under any set of allegations.

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Additionally, Plaintiffs' allegations in paragraph 87 that "[c]omputer algorithms permit utility companies to have substantial advance notice of weather patterns and the predictable outcome of a resulting fire" do not save their inverse condemnation claim from dismissal. Plaintiffs do not allege that those algorithms would have predicted a fire would ignite at any particular point, let alone the particular points of ignition alleged in the Complaint. Nor do Plaintiffs allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in sufficient proximity to Plaintiffs such that an algorithm would have predicted the fire would invade Plaintiffs' land. *Dunn*, 355 Or at 355.

Finally, Plaintiffs have not met their burden by alleging that PacifiCorp has created "Public Safety Power Shut-off" plans for "proactive de-energization" of powerlines "when weather conditions call for it." (*See* Compl. ¶ 24.) That fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factORS is not a problem Plaintiffs can fix with amendment. It is how fires work. *See City of Austin v. Liberty Mut. Ins*., 431 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost-certain" to occur, foreclosing takings claim). As a result, even with "intentionally set fires" that "escape[] because of intervening winds" or other causes, liability "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiffs do not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiffs in particular "for purposes of a takings claim," they fail to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

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b. Plaintiffs Cannot State an Inverse Condemnation Claim Under Article I, Section 18 of the Oregon Constitution Because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use.

(i) PacifiCorp is not a public entity.

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, Section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." *Vokoun*, 335 Or at 27-28 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiffs' invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, Judge Alexander in Multnomah County recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, Section 18 against a private entity like PacifiCorp. (Ramfjord Decl., Ex. F at 17.) Similarly, Judge Conover in Lane County, in dismissing the inverse condemnation claims against Lane Electric, specifically found that "Lane Electric is not a government actor." (Ramfjord Decl., Ex. C at 30 (transcript pages 70-71); *see also* Ex. D at 1.)

PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the OPUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). Nor would PacifiCorp qualify as a "government body" under Oregon's tort claim statute. *See* ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies"); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by

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statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiffs' Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiffs' Article I, Section 18 claim. *Vokoun*, 335 Or at 28.

(ii) Plaintiffs do not allege that PacifiCorp took property for "public use."

Plaintiffs' Article I, Section 18 inverse condemnation claim also fails for the independent reason that Plaintiffs cannot demonstrate that their property was taken "for a public use," as they must. *Vokoun*, 335 Or at 19; *see also Worman*, 223 Or App at 236 (plaintiffs could not state inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). Plaintiffs allege only that PacifiCorp's "utility infrastructure, including [its] powerlines, are public improvements for the supplying of electricity to the public for public use." (Compl. ¶ 82.) Plaintiffs confuse public "use" with public "benefit." As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Or.*, 240 Or App 490, 500-01, 247 P3d 331 (2011) (internal quotation marks and citation omitted). In other words, Plaintiffs must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. They have not and cannot do so.

Again, Judge Conover of Lane County recently dismissed nearly identical inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * further, there was no intent to put the

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plaintiffs' property to public use." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.)

The same is true here. Plaintiffs must meet the test for public use set forth in *Mossberg*: they must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiffs cannot make that showing, they make no effort to do so, and thus fail to state an inverse condemnation claim under Article I, Section 18 of the Oregon Constitution.

c. Plaintiffs Cannot State an Inverse Condemnation Claim Under Article XI, Section 4 of the Oregon Constitution Because Plaintiffs Do Not Allege That PacifiCorp Acted Under Authority of Law.

Plaintiffs' Article XI, Section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiffs contend damaged them. By its own terms, the takings clause in Article XI, Section 4 only applies to a "corporation under authority of law." Plaintiffs may attempt to meet that showing by arguing that PacifiCorp has the general power of condemnation or that it operates as a public utility. Here, Plaintiffs merely allege that PacifiCorp is an entity "with the power of condemnation pursuant to ORS Chapter 35 and the Oregon Constitution" (Compl. ¶ 81), but they fail to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because they cannot do so, their inverse condemnation claim under Article XI, Section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiffs cannot state an Article XI, Section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, Section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs' property." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.)

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Nor can Plaintiffs cite any authority to the contrary. Article XI, Section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*, 185 Or App 425, 60 P3d 557 (2002)—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiffs allege).[3] 185 Or App at 443 n.5 (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, [S]ection 4").

Nevertheless, the only Oregon cases permitting Article XI, Section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, Section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city counsel of Oregon City"); *Kurtz v. S. Pac. Co*., 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East

[3] A handful of other modern cases have addressed Article XI, Section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, Section 18 or Article XI, Section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006) (rejecting Article XI, Section 4 claim in passing, and collecting cases doing the same thing).

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Portland"). In contrast, PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" within the meaning of Article XI, Section 4 whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

It makes sense that the phrase "under authority of law" requires a direct connection between a corporation's legal authority and the alleged taking, because unlike Article I, Section 18's takings clause, Article XI, Section 4 contains no textual "public use" requirement. The "under authority of law" requirement thus fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiffs' complaint were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "would be absurd to attribute to the framers" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. Or. Hwy. Comm'n*, 196 Or 120, 147, 248 P2d 703 (1952)).[4]

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. 419 US at 350, 368 n 1

[4] If the Court interprets Article XI, Section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, Section 4—and Plaintiffs' claim would then fail for the same reason that their Article I, Section 18 claim fails, as described above. *See, e.g., Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980) (Article XI, Section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I Section 18" (citing *MacVeagh v. Multnomah Cnty*, 126 Or 417, 270 P 502 (1927)).

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(Marshall, J., dissenting). The United States Supreme Court nevertheless found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id*. at 353 (emphasis added). And although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm.*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States * * *."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

Properly construed, Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fire at issue here, nor do Plaintiffs attempt to do so. Plaintiffs do not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires; they allege that PacifiCorp *violated* those regulations. Plaintiffs similarly do not allege that PacifiCorp used the power of eminent domain to take their property, nor to take any relevant land at issue in this case. The most Plaintiffs allege is that PacifiCorp generally has the "power of condemnation"—not that PacifiCorp used that power in any relevant way to their takings claim. (Compl. ¶ 81.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other early Oregon cases—and Plaintiffs do not allege any connection, let alone a direct one—Plaintiffs' Article XI, Section 4 claim fails as a matter of law.

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3. The Complaint Contains No Allegations—Let Alone "Ultimate Facts"—Concerning the Property Interests Allegedly Taken by PacifiCorp or the Extent of the Alleged Damage to Plaintiffs' Properties.

Finally, the First and Fifth Claims for Relief should be dismissed for an additional reason: they fail to allege any facts—let alone ultimate facts—concerning the specific property interests that Plaintiffs allege were taken by PacifiCorp's actions or the extent to which Plaintiffs' properties were damaged.

To maintain an inverse condemnation claim, a plaintiff must show that the property or property interest alleged to have been taken belonged to that person in the first place. *Kinross Copper Corp. v. State*, 160 Or App 513, 519, 981 P2d 833 (1999) ("[A] settled principle of takings law is that, even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it did not ever have."); *Regency Outdoor Advert., Inc. v. City of Los Angeles*, 139 P3d 119, 123 (2006) (as modified Oct. 11, 2006) ("As part of this threshold showing, the plaintiff must demonstrate that the government has 'taken or damaged' a cognizable property right."); *Cty. of San Diego v. Miller*, 532 P2d 139, 141 (1975) ("To be constitutionally entitled to compensation, the claimant customarily must show he owned a property interest taken by the state."). It is axiomatic that a plaintiff must allege facts that establish what "property" is alleged to have been taken and facts concerning the plaintiff's interest or right to that property to state a claim for inverse condemnation.

Plaintiffs have not done so here. Plaintiffs broadly allege that they "were the owners of, or otherwise held an interest in, property in Jackson County and/or Josephine County" (Compl. ¶¶ 50, 80; *see also id*. ¶ 6), but other than these generalized allegations, the Complaint contains no facts about the properties at issue. For example, there are no allegations about the precise locations of the properties (such as the property addresses or legal descriptions), the nature of the properties (residential, commercial, industrial, etc.), or

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Plaintiffs' purported interests in the land (whether Plaintiffs are fee owners, tenants, easement holders, etc.). Without such basic factual allegations, Plaintiffs have not stated a claim for inverse condemnation.

Moreover, Plaintiffs do not allege ultimate facts concerning the extent to which their properties were damaged. Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Id*. (*citing Lincoln Loan Co.*, 274 Or at 57); *Lombardy v. Peter Kiewit Sons' Co.*, 72 Cal. Rptr. 240 (Cal Ct App 1968), *overruled on other grounds by S. Cal. Edison Co. v. Bourgerie*, 507 P2d 964 (1973) (emphasis added) ("No recovery in inverse condemnation may be had unless damage in a substantial amount to the property itself has been sustained."). Here, Plaintiffs conclusorily allege that they suffered "substantial harm" to their properties and that PacifiCorp's conduct "substantially and unreasonably interfered with Plaintiffs' use and enjoyment of their real and personal property" (Compl. ¶ 46; *see also id*. ¶¶ 58, 88), but Plaintiffs do not allege any *facts* describing that purported interference. Again, without any factual allegations describing the way in which Plaintiffs' specific properties were damaged (or interfered with because of PacifiCorp's actions), Plaintiffs have not stated a claim for inverse condemnation.

For all of the foregoing reasons, the First and Fifth Claims for Relief should be dismissed.

C. Plaintiffs' Negligence *Per Se* Claim Fails as a Matter of Law.

Plaintiffs' Eighth Claim for Relief for negligence *per se* alleges numerous distinct sources of potential liability (*see id.* ¶¶ 107-14), taking a "spaghetti approach" to Oregon's electrical utility statutes and regulations: that is to say, "heav[ing] the entire contents * * * against the wall in hopes that something would stick." *Indep. Towers of Wash. v. Washington*, 350 F3d 925, 929 (9th Cir 2003). Neither the Court nor the jury should have to

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"sort through the noodles in search of [Plaintiffs'] claim." *Id.* PacifiCorp requests that the Court dismiss two types of negligence *per se* specifications that fail as a matter of law: (1) those based on general statutes that do not fix the legal standard of care, and (2) those based on regulations whose (purported) violation could not have caused Plaintiffs' damages as a matter of law.

1. Statutes That Only Set Forth General Guidance to "Operate Safely" Do Not Fix the Standard of Care Sufficient to Support Negligence *Per Se*.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout*, 298 Or at 601. Plaintiffs rely on two statutes—ORS 757.020 and 757.035(1)—that fail that test, offering only general guidance that PacifiCorp must operate "safely." As a matter of law, those statutes do not support a negligence *per se* claim under Oregon law.

The Oregon Supreme Court's decision in *Kim v. Multnomah County ex rel. Multnomah County Community Department of Corrections*, 328 Or 140, 153, 970 P2d 631 (1998), is instructive. In *Kim*, the plaintiffs sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Court of Appeals affirmed, the Supreme Court noted that even if Plaintiffs had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id*. at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id*. And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for plaintiffs' negligence *per se* claim" as a matter of law. *Id*.

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The same problem exists here: Plaintiffs rely on ORS 757.020 and ORS 757.035, but neither statute fixes the standard of care in any meaningful way. (Compl. ¶ 108.) ORS 757.020 requires public utilities to "furnish adequate and safe service, equipment and facilities." And ORS 757.035 authorizes the OPUC to "require by general or special orders" that a "person or municipality * * * construct, maintain and operate every line, plant, system, equipment or apparatus in such manner as to protect and safeguard the health and safety of all employees, customers and the public." ORS 757.035(1). Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, ORS 757.035's authorization that the OPUC may adopt "orders" requiring persons to "protect and safeguard the health and safety of all employees" provides no guidance to a factfinder, ORS 757.035(1). Indeed, that statute provides for the scope of the OPUC's regulatory authority—the statute does not establish *any* standard of care for private parties. Equally vague is ORS 757.020: a direction to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601.

For these reasons, the Court should dismiss the portions of Plaintiffs' Eighth Claim for Relief for negligence *per se* to the extent it is based on ORS 757.020 and 757.035(1).

2. Plaintiffs Cannot Show That They Were Meant to Be Protected by ORS 477.720 or That Their Private Property Damage Is the Type of Injury That the Statute Was Enacted to Prevent.

To allege a negligence *per se* claim, a plaintiff must allege, *inter alia*, "that plaintiff was a member of the class of persons meant to be protected by the statute" *and* "that the injury plaintiff suffered is of the type that the statute was enacted to prevent." *McAlpine v. Multnomah Cnty.*, 131 Or App 136, 144, 883 P2d 869 (1994). Plaintiffs cannot meet that burden with respect to ORS 477.720. (*See* Compl. ¶ 108.)

ORS 477.720 provides that certain conduct of failing to extinguish a fire or allowing a fire to spread through carelessness or neglect is "unlawful." ORS 477.993(1), in turn,

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provides that a violation of ORS 477.720 "is a violation punishable" as a Class A, C, or D violation per the terms outlined in the statute. And ORS 477.980, in turn, provides that "[t]he State Board of Forestry, by rule, shall establish the enforcement policy for violations prescribed in ORS 477.993." The Board of Forestry has adopted administrative rules setting forth that enforcement policy. *See* OAR 629-047-0040 (basic enforcement process); OAR 629-047-0270 (providing that the enforcement process in OAR 629-047-0040 shall apply to violations of ORS 477.720).

Thus, the context makes clear that the purpose of the statute is to ensure that the Board of Forestry has enforcement authority over fires that violate ORS 477.720, not to create a civil cause of action for any member of the public. "Nothing on the face of" ORS 477.720 or "in the surrounding provisions" or ORS 477.980-.993 suggests that it was meant to protect the general public from property damage occurring on private property. *McAlpine*, 131 Or App at 145. Rather, the concern of the statute is the failure to extinguish fire set on or near forestland, or the spread of the fire to or through forestland. *See also* ORS 477.005(1) (policy of state of Oregon is "prevention and suppression of forest fires"). Further, like in *McAlpine*, this statute is part of a broader statutory scheme that delegates to a particular agency—here, the Board of Forestry—the authority to take enforcement action. Such statutes do not support a negligence *per se* claim for civil liability by a private party. *McAlpine*, 131 Or App at 144-46 (statute delegating to Board of Parole and Post-Prison Supervision discretion to order the arrest and detention of certain parolees not intended to specifically protect the public, but rather "gives the Board the means to enforce compliance with the conditions of parole").

For these reasons, the Court should dismiss the portions of Plaintiffs' negligence claim premised on a negligence *per se* theory based on ORS 477.720.

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3. The Administrative Regulations Cited by Plaintiffs Cannot Support Negligence *Per Se* Because Plaintiffs Cannot Show That (a) Any Purported Violations Injured Them, and (b) the Legislature Contemplated Imposition of Private Liability for Violations of Those Regulations.

Once a statute "fixes the legal standard of conduct, *Shahtout*, 298 Or at 601," to recover for negligence *per se*, Plaintiffs still must show that "(1) [D]efendants violated a statute; (2) that [P]laintiff[s] w[ere] injured as a result of that violation; (3) that [P]laintiff[s] w[ere] * * * member[s] of the class of persons meant to be protected by the statute; and (4) that the injury [P]laintiff[s] suffered is of a type that the statute was enacted to prevent." *McAlpine*, 131 Or App at 144 (emphasis omitted). Although negligence *per se* may be based on application of a regulation, two conditions must be satisfied: "First, the regulation must, in fact, support a private right of action under the four-part test prescribed in [*McAlpine*]. Second, even if the regulation meets the *McAlpine* factors, its terms permitting the imposition of private liability must not be *ultra vires*." *Ettinger v. Denny Chancler Equip. Co.*, 139 Or App 103, 107, 910 P2d 420 (1996).

Plaintiffs' claims based on various regulations' recordkeeping requirements—specifically OAR 860-024-0011(1)(a)-(b), OAR 860-024-0011(1)(d), and OAR 860-024-0016(2)—cannot support negligence *per se* because Plaintiffs cannot show that any purported failure to keep "adequate written records" caused Plaintiffs' alleged harm. (*See* Compl. ¶¶ 109(b), 109(c), 110.) The Complaint alleges several such failures, including to "[m]aintain adequate written records of policies, plans, and schedules to show inspections and corrections are being carried out" (*id.* ¶ 109(c) (citing OAR 860-024-0011(1)(d)); to "file reports with the [OPUC]" regarding PacifiCorp's "detailed inspections of * * * overhead facilities" (*id.* ¶ 109(b) (citing OAR 860-024-0011(1)(b)); and to "keep appropriate records" of PacifiCorp's "vegetation management program" (*id.* ¶ 110 (citing OAR 860-024-0016(2))). As a matter of law, that alleged conduct could not have caused Plaintiffs' injuries. Because none of these alleged recordkeeping failures could have "caused" Plaintiffs' alleged

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injuries, Plaintiffs' negligence claim—to the extent it is based on a negligence *per se* theory based on these regulations (OAR 860-024-0011(1)(a)-(b), (d); and OAR 860-024-0016(2)) fails as a matter of law.

Nor can Plaintiffs show that application of any of the cited regulations—including the remaining regulations cited in their Complaint, OAR 860-024-0010, OAR 860-024-0011(2), OAR 860-024-0016(5)—would be anything other than *ultra vires*. Each of those regulations implements ORS 757.035. That statute delegates to the OPUC the power, *inter alia*, to adopt and prescribe rules for owners and operatORS of power lines and power systems "for the protection of the health or safety of all employees, customers or the public." ORS 757.035. The legislature also delegated to the OPUC the ability to fine or impose civil penalties on any person who fails to comply with any statutes, rules, regulations, or orders of the OPUC. *See* ORS 757.990, 757.991. Certainly, the OPUC's authority is broad. However, "[t]here is no suggestion in those statutes * * * that they contemplate private, as opposed to governmental, rights of action" for violations of OPUC statutes or rules adopted pursuant thereto. *Ettinger*, 139 Or App at 109.

For these reasons, Plaintiffs cannot maintain a negligence *per se* claim based on any of the statutes or regulations cited in the Complaint and so the Eighth Claim for Relief should be dismissed.

D. Plaintiffs' "Ninth" Claim for Relief for Public Nuisance Pursuant to ORS 477.064 Fails as a Matter of Law.

Plaintiffs' purport to allege a claim for "public nuisance" pursuant to ORS 477.064. That claim fails as a matter of law and should be dismissed because that statute does not create a private right of action.

"When a party asserts a right of action to enforce a duty created by a statute, the first question is whether the statute expressly or impliedly indicates that the legislature intended to create or to deny such a right of action." *Doyle v. City of Medford*, 356 Or 336, 363, 337 P3d

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797 (2014). In answering this question, the court examines "the text, context, and legislative history * * * to determine if there is an indication that the legislature" intended to create a private right of action. *Cruz v. Multnomah Cnty.*, 279 Or App 1, 21, 381 P3d 856 (2016). In examining the text, context, and legislative history, the court focuses on two factors: (1) "whether the statute refers to civil liability in some way," and (2) "whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore, there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle*, 356 Or at 345-46.

ORS 477.064 states as follows:

> "Any fire on any forestland in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life, forest resources or property. The spread of fire in forestland across an ownership boundary is prima facie evidence of fire burning uncontrolled."

Nothing in the plain text of the statute suggests that private parties, such as Plaintiffs, can base a civil action on an alleged violation of the law. First, ORS 477.064 does not refer—explicitly or implicitly—to civil liability. At most, that statute declares certain conduct to be a tort and provides an evidentiary standard for assessing that tort; there is no indication from the text of the statute that the Oregon legislature intended to create a private right of action. Second, the statute's context also suggests that it does not create a private cause of action. ORS 477.064 is contained in the same chapter as ORS 477.089, which specifically states (in part): "This section *does not create a new cause of action* or alter any existing cause of action." ORS 477.089(5) (emphasis added).

Further, under *Doyle*, a court may not imply a cause of action from an Oregon statute when a plaintiff has an "existing claim for relief and associated remedies." *Doyle*, 356 Or at 371. Here, Plaintiffs have brought common law public nuisance and negligence claims. Thus, they have existing common law remedies, and the Court should decline to infer that

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they are entitled to bring a separate statutory cause of action pursuant to ORS 477.064. Indeed, that is precisely the conclusion reached by Judge Johnson in the Douglas County Circuit Court, who expressly found that "ORS 477.064 does not create a private statutory cause of action" but rather "only defines a certain circumstance to be a nuisance" and dismissed the plaintiffs' claim based upon ORS Chapter 477. (*See* Ramfjord Decl., Ex. H.)

For the foregoing reasons, because ORS 477.064 does not give rise to a private right of action, Plaintiffs' "public nuisance" claim premised on that statute fails as a matter of law and should be dismissed.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiffs' First, Second, Third, Fourth, and Fifth Claims for Relief; Eighth Claim for Relief for Negligence Per Se; and "Ninth" Claim for Relief for Public Nuisance pursuant to ORS 477.064.

DATED: December 16, 2022

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s/ Per A. Ramfjord
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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANT PACIFICORP'S PARTIAL MOTION TO DISMISS COMPLAINT** on the following named person(s) on the date indicated below by

☐ mailing with postage prepaid.	☒ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to ORCP 9 G agreement among parties/counsel dated _____.
☐ overnight delivery.	☒ eService via Odyssey File & Serve. (*if registered*)

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

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PAC_256.07.182

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

GLENN SPARKS; GAYLA SPARKS; KYLIE SPARKS; LANSON SPARKS; and ELAINE LIBERTY, Plaintiffs, v. PACIFICORP, an Oregon Corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp, Defendants.	No. 22CV30310 DEFENDANT PACIFICORP'S PARTIAL MOTION TO DISMISS COMPLAINT Oral Argument Requested Amount Claimed: Over $10,000,000 Filing Fee per ORS 21.160(1)(e): $1,178

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UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for this motion under UTCR 5.010 because it seeks dismissal for failure to state a claim. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 60 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Pursuant to ORCP 21 A(1)(h), PacifiCorp moves to dismiss the following claims for relief for failure to state ultimate facts sufficient to state a claim: First Claim for Relief (Inverse Condemnation Under the California Constitution); Fifth Claim for Relief (Inverse Condemnation Under the Oregon Constitution); Eighth Claim for Relief (Negligence Per Se);

and "Ninth" Claim for Relief (Public Nuisance, ORS 477.064).[1] PacifiCorp also moves to dismiss all of Plaintiffs' California-based claims (First through Fourth Claims for Relief) because application of the California laws would violate long-standing principles against the extraterritorial application of state law.

This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Per A. Ramfjord ("Ramfjord Decl."), and the pleadings and papers on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the 2020 Labor Day weekend, an unprecedented windstorm hit Northern California and Southern Oregon, igniting dozens of wildfires across the region. Plaintiffs—apparently five individuals located in Jackson and Josephine Counties[2]—filed a Complaint asserting 12 different claims for relief under Oregon and California state law. Plaintiffs allege that PacifiCorp caused the Slater Fire, which as alleged by Plaintiffs, ignited in Northern California near Happy Camp and then spread across the state border and into Southern Oregon. (Compl. ¶¶ 1, 4, 5.) Government authorities and PacifiCorp itself are still actively investigating these wildfires, and their causes and origins have not been fully determined.

PacifiCorp seeks an order dismissing several of Plaintiffs' claims for relief, as summarized below.

[1] The Complaint includes three claims titled "Ninth Claim for Relief," including claims for trespass (¶¶ 115-24), public nuisance (ORS 477.064) (¶¶ 125-33), and public nuisance (Oregon common law) (¶¶ 134-42).

[2] Paragraph 6 of the Complaint vaguely alleges that "Plaintiffs are individuals, representatives, and legal entities who, at all times relevant to this action, were homeowners, renters, business owners, residents and occupants located in Jackson County and/or Josephine County, and/or who had property located therein." Based on the names of the plaintiffs, however, each plaintiff appears to be an individual.

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Plaintiffs' California Law Claims. Plaintiffs assert four claims brought pursuant to California law—the First, Second, Third, and Fourth Claims for Relief. The Court should dismiss all of those claims because none of the cited California statutes should be applied to Oregon residents whose injuries were sustained in Oregon.

Inverse Condemnation Claims. Plaintiffs' inverse condemnation claims brought pursuant to the California and Oregon Constitutions (First and Fifth Claims for Relief) also should be dismissed.

Even if a plaintiff could, theoretically, state an inverse condemnation claim under Article I, Section 19 of the California Constitution for an alleged taking of property in Oregon (they cannot), Plaintiffs' First Claim for Relief nonetheless fails to state a claim. To avoid dismissal, Plaintiffs must allege that (1) a "public entity" (2) "substantially caused," (3) through an "inherent risk of a public improvement as deliberately designed, constructed or maintained," (4) an injury to private property for public use. *City of Oroville v. Superior Court*, 446 P3d 304, 312, 314 (Cal 2019). Plaintiffs do not and cannot make any of those required showings because: (1) it is undisputed that PacifiCorp is not a "public entity;" (2) Plaintiffs allege only a minimal "causal connection" between PacifiCorp's infrastructure and the alleged damage to their properties in Oregon, which the California Supreme Court has held is "insufficient to sustain a finding of inverse condemnation liability," *id*. at 315; and (3) Plaintiffs cannot allege that the alleged injury to their private property resulting from a wildfire was for a "public use." *Id*.

Plaintiffs' Fifth Claim for Relief for inverse condemnation under Article I, Section 18 and Article XI, Section 4 of the Oregon Constitution also fails. To begin with, Plaintiffs fail to allege facts sufficient to meet the stringent intent standard for such claims, which requires showing that PacifiCorp "intentionally undertook its actions" such that "the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property * * *." *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P2d 1261 (2014). As Judge

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Johnson of the Douglas County Circuit Court recognized, in the context of a wildfire inverse condemnation claim, *Dunn* requires alleging both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. E at 4.) Because Plaintiffs fail to allege "substantial certainty" at either step, their inverse condemnation claims necessarily fail. *Dunn*, 355 Or at 358.

In addition, Plaintiffs have not alleged—and cannot allege—that PacifiCorp is a "governmental defendant" or that it took Plaintiffs' property "for a public use" as required to state an inverse condemnation claim under Article I, Section 18. *Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 56 P3d 396 (2002) (internal quotation marks and citation omitted). As already noted, there is no dispute that PacifiCorp is a private entity and Plaintiffs cannot allege that the damage to their property served any public purpose.

Finally, Plaintiffs' inverse condemnation claim under Article XI, Section 4 fails for similar reasons because Plaintiffs cannot allege that PacifiCorp acted "under authority of law." Oregon case law requires a direct connection between a corporation's legal "authority" and the alleged conduct, such as when railroads take property pursuant to municipal ordinances. *See, e.g.*, *Willamette Iron Works v. Or. Ry. & Nav. Co.*, 26 Or 224, 225, 37 P 1016 (1894) (railroad's "right to construct and maintain a bridge" was based upon an ordinance). Indeed, the United States Supreme Court has rejected the argument that simply holding "eminent domain" power renders a corporation a state actor for constitutional purposes; a corporation must "*exercise*" state authority to be liable. *Jackson v. Metro. Edison Co.*, 419 US 345, 353, 95 S Ct 449, 42 L Ed 2d 477 (1974) (emphasis added).

Additionally, Plaintiffs' inverse condemnation claims under California and Oregon law should be dismissed because Plaintiffs have not alleged ultimate facts regarding the properties that Plaintiffs allege were "taken" by PacifiCorp or the nature of Plaintiffs' rights or interests in such properties. Nor have Plaintiffs alleged any ultimate facts concerning the

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extent of any alleged damage to their properties. Without these basic factual allegations, Plaintiffs cannot state an inverse condemnation claim.

Negligence *Per Se* Claim. The Court also should dismiss Plaintiffs' Eighth Claim for Relief for negligence *per se*. Only statutes and regulations that "fix[] the legal standard of conduct," such that "there is no question of due care left for a factfinder to determine," can support negligence per se. *Shahtout By & Through Shahtout v. Emco Garbage Co*., 298 Or 598, 601, 695 P2d 897 (1985). The statutes and regulations cited by Plaintiffs do not do so, or do not otherwise meet the requirements for a negligence *per se* claim, and thus such a claim cannot be stated.

Public Nuisance Claim. Finally, the Court should dismiss Plaintiffs' "Ninth" Claim for Relief for public nuisance pursuant to ORS 477.064 because that statute does not create a private right of action. Because that statute does not refer to civil liability and the Court need not provide a remedy when Plaintiffs already have the ability to claim one by suing for negligence, the Court should dismiss the claim.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers in Oregon, Washington, and Northern California. As Plaintiffs concede, PacifiCorp is a privately owned and operated Oregon corporation with its principal place of business in Portland. (Compl. ¶ 9.)

In California, PacifiCorp serves around 45,000 customers in Siskiyou, Del Norte, Modoc, and Shasta counties. Its California operations are regulated by the California Public Utilities Commission ("CPUC"), and PacifiCorp may raise rates only by obtaining the CPUC's approval. *See, e.g.*, Cal Pub Util Code § 454(a). In Oregon, PacifiCorp serves around 596,000 customers under the Pacific Power brand. Its Oregon operations are regulated by the Oregon Public Utilities Commission ("OPUC"), and PacifiCorp may only raise rates by proving to the OPUC that a proposed rate increase is "fair, just and reasonable." *See* ORS 757.205, 757.210.

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This case arises out of the Slater Fire, which Plaintiffs allege started in Northern California near Happy Camp and spread north to Southern Oregon. (*See* Compl. ¶¶ 1, 4, 5.) Plaintiffs contend that PacifiCorp's equipment in California started the Slater Fire. (*Id*. ¶ 40.) Plaintiffs do not specifically allege where their properties are in relation to the ignition site, but generally allege that they are located and/or had property in Jackson and/or Josephine Counties. (*Id*. ¶ 6.) According to Plaintiffs, the fire started on September 8, 2020, when "high winds, with gusts reaching up to 50 miles per hour, came as predicted," and "vegetation contacted [PacifiCorp's] powerlines which predictably led to the starting of a fire." (*Id*. ¶ 39.) While they offer the further conclusory assertion that "[t]he inevitable consequence of that fire, including the wind, the topography, and the predictable way in which wildfires spread, was the fire's spread to Plaintiffs' properties," they do not allege any supporting facts. (*Id*.) Plaintiffs also generally allege that the fire occurred because PacifiCorp: "(a) failed to deenergize their powerlines on September 7th; (b) intended, designed and constructed their utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas; (c) failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure; and (c) [sic] failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (*Id*. ¶ 41.)

Government investigators have not released an official determination of what caused the Slater Fire. Plaintiffs allege that they have suffered "substantial harm" because of the fire and seek damages and other forms of relief. (*See, e.g.*, *id*. ¶ 46 and Prayer for Relief.) Plaintiffs filed their Complaint on September 7, 2022. The Complaint asserts 12 different claims for relief under Oregon and California law. Because a number of Plaintiffs' claims fail as a matter of law, PacifiCorp has filed this motion to dismiss.

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III. LEGAL STANDARD

To avoid dismissal, a complaint must state ultimate facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations, legal conclusions, or mere recitations of a claim's elements are insufficient to state a claim. *See*, *e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997) (citation omitted). When a claim as pleaded remains legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. The Court Should Dismiss Each of Plaintiffs' Claims Based on the Application of California Law.

Plaintiffs allege four claims pursuant to California law, asserting that the claims are allowed based on Oregon choice of law principles, namely ORS 15.440(2)(a) and (3). (Compl. ¶¶ 47-48.) Plaintiffs' reliance on ORS 15.440 is misplaced because, as discussed further below, Oregon law is more appropriately applied in this case pursuant to ORS 15.445. But even if California law were to be applied, the Court nonetheless should dismiss each claim based on California law because Plaintiffs have not—and cannot—rebut the presumption against the extraterritorial application of California law.

1. California Law Does Not Apply Extraterritorially to Plaintiffs' Claims.

California courts have long-recognized a "presumption against extraterritoriality—that is, a presumption that state law is intended to apply only within state borders." *Ward v. United Airlines, Inc.*, 466 P3d 309, 317 (Cal 2020). As the *Ward* court explained, this rule "reflects an assumption that a legislature generally legislates with domestic concerns in mind, [and] serves the incidental purpose of avoiding unintended conflicts with other sovereigns."

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Id. (citation omitted). In considering whether the presumption bars a plaintiff's claim, "each law must be considered on its own terms." *Id.* at 319. First, courts look to see whether there is any indication that the presumption has been rebutted. The presumption is rebutted only where a contrary intent is "clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter, or history." *Sullivan v. Oracle Corp.*, 254 P3d 237, 248 (Cal 2011) (internal quotation marks omitted) (quoting *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P2d 539, 554 (Cal 1999)). If the presumption is not rebutted, then courts will consider whether "plaintiffs' proposed application of the [statute] would cause it to operate, impermissibly, with respect to occurrences outside the state." *Id.*

Applying California statutes to claims brought by Oregon residents, against Oregon residents, for injuries suffered in Oregon would violate this presumption against extraterritoriality. For this reason alone, Plaintiff's First, Second, Third, and Fourth Claims for Relief should be dismissed. *See, e.g., Natkin v. Am. Osteopathic Ass'n*, No. 3:16-cv-01494-SB, 2018 WL 452165 at *19 (D Or Jan. 17, 2018) (applying the California presumption and dismissing Oregon plaintiffs' claims under California's Unfair Competition Law); *In re Toyota Motor Corp.*, 785 F Supp 2d 883, 917-18 (CD Cal 2011) (applying the presumption to dismiss non-California residents' claims under California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Law).

a. Article I, Section 19 of the California Constitution Does Not Apply Extraterritorially to Plaintiff's Claims.

Neither the text, history, nor purpose of Article I, Section 19 of the California Constitution suggests that it is not subject to the presumption against extraterritorial application of California law does not apply. To the contrary, the plain language of Article I, § 19 demonstrates that it was intended to apply solely to intrastate conduct. For example, it specifically defines "State" as "the State of California and any of its agencies or departments," and defines "public work" as including "projects identified by a State or local

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government," making clear that the reach of the provision extends to State and local governments—not out-of-state entities or residents. The presumption against extraterritorial application of the provision therefore should apply in "full force." *Sullivan*, 254 P3d at 248; *see also Sarviss v. Gen. Dynamics Info. Tech., Inc*., 663 F Supp 2d 883, 898 (CD Cal 2009) (finding the presumption applies to California's wage and hour laws where there was no "clear expression of extraterritoriality" (internal quotation marks, brackets, and citation omitted)).

Further, application of Article I, Section 19 in an Oregon proceeding to property damaged in Oregon would "cause [the constitutional provision] to operate, impermissibly, with respect to occurrences outside the state." *Sullivan*, 254 P3d at 248. In determining whether extraterritorial application of a statute is appropriate, California courts generally look to the purpose of the statute at issue, among other factors. *See, e.g.*, *Ward*, 466 P3d at 323-24; *In re Toyota Motor Corp.*, 785 F Supp 2d at 917. No California appellate court appears to have addressed the extraterritorial application of a claim for inverse condemnation under California law, but given the nature of Article I, Section 19, a California court likely would find that the location of the property that allegedly was taken is the primary determining factor. In fact, any contrary result would create one of the problems the presumption was intended to avoid: unintended conflicts with other sovereigns. *See Ward*, 466 P3d at 316-17. Plaintiffs themselves amply demonstrate this point by also asserting a cause of action under Oregon's inverse condemnation statute. (Compl. ¶¶ 78-92.)

This conclusion is further bolstered when Article I, Section 19 is considered in context. Subsection (a) also provides that "[th]e Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings * * *." There is no indication that the California legislature intended to allow a condemnor to use eminent domain proceedings to acquire property in another state (*i.e.*, Oregon) for California's public use. PacifiCorp has been unable to find any case applying California's takings clause to

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property held outside of the state—whether by eminent domain or inverse condemnation—and this Court should not be the first to do so.

Accordingly, given that the property at issue is located in Oregon and Plaintiffs and Defendants also are Oregon residents, the Court should conclude that Plaintiffs' claim for inverse condemnation under California law is barred by the presumption against extraterritoriality. *See Tidenberg v. Bidz.com, Inc*., No. CV 08-5553 PSG, 2009 WL 605249 at *4 (CD Cal Mar. 4, 2009) (granting motion to dismiss Texas residents' claims under California's False Advertising law where the relevant unlawful conduct did not occur in California); *In re Toyota Motor Corp.*, 785 F Supp 2d at 918 (applying the presumption dismissing non-resident plaintiffs' claims, where plaintiffs did not allege a "sufficient connection to California" under the relevant statutes).

b. California Public Utilities Code § 2106, California Health & Safety Code § 13007, and California Public Resources Code § 4293 Do Not Apply Extraterritorially to Plaintiffs' Claims.

Plaintiffs' Second, Third, and Fourth Claims for Relief, based on three of California's regulatory codes, fail for similar reasons. Again, nothing in those statutes—including their text, context, or purpose—suggests that they were intended to regulate occurrences outside of California. Therefore, it is presumed that the legislature intended that they apply exclusively within California. *Sullivan*, 254 P3d at 248.

Moreover, an application here would cause the statutes to impermissibly operate extraterritorially. Although none of these provisions has been interpreted with regard to the presumption against extraterritoriality, courts' interpretations of the geographic scope of other California regulatory codes give insight into the appropriate application here. For example, in *North Alaska Salmon Co. v. Pillsbury*, 162 P 93, 94 (Cal 1916), the California Supreme Court considered whether a worker injured outside of California could seek compensation under the state's workers' compensation statute. The statute "define[d] the conditions upon which the right to compensation rest[ed], [and] simply declare[d] that

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liability for the compensation provided shall exist where the given conditions concur," but it contained nothing about "the place of injury," nor did it contain "any language from which the intention to extend [its] operation * * * beyond the territorial limits of the state [could] be inferred.'" *Id*. "Therefore, the Court held, the statute was limited to injuries that occurred within California." *Cotter v. Lyft, Inc.*, 60 F Supp 3d 1059, 1062 (ND Cal 2014) (citing *N. Alaska Salmon Co.*, 162 P at 94).

Since nothing in the regulatory statutes suggests that they were meant to apply to injuries occurring outside of California, suffered by residents of another state,[3] the Second, Third, and Fourth Claims should be dismissed.

2. Under ORS 15.440(4) and ORS 145.445, Oregon Law Is More Appropriate Than California Law.

In addition to the foregoing, Plaintiffs' First, Second, Third, and Fourth Claims for Relief should be dismissed pursuant to ORS 15.445 because Oregon law is more appropriately applied in this action than California law. Plaintiffs rely on ORS 15.440(2)(a) and (3) in support of their contention that they can assert their California law claims in this Oregon state action, but they ignore ORS 15.440(4), which provides that if the law of another state is more appropriate under the principles of ORS 15.445, the law of that other state governs. ORS 15.445 provides that the "rights and liabilities of the parties with regard to disputed issues in a noncontractual claim are governed by the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of the state's law the most appropriate for these issues." The statute further provides:

[3] In some circumstances not present here, the California legislature has provided contrary indications. For example, California's False Advertising Law can provide liability for injuries occurring outside of the California, so long as the "conduct complained of occurred in California," because the statute specifically "prohibits false or misleading statements made 'before the public in this state' and 'from this state before the public in any state.'" *Tidenberg*, 2009 WL 605249 at *4 (emphasis omitted) (quoting Cal Bus & Prof Code § 17500). The fact that the statutes at issue in this case do not contain similar provisions further supports PacifiCorp's position that the statutes do not apply.

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> "The most appropriate law is determined by:
>
> "(1) Identifying the states that have a relevant contact with the dispute, such as the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, or the place in which the relationship between the parties was centered;
>
> "(2) Identifying the policies embodied in the laws of these states on the disputed issues; and
>
> "(3) Evaluating the relative strength and pertinence of these policies with due regard to:
>
> "(a) The policies of encouraging responsible conduct, deterring injurious conduct and providing adequate remedies for the conduct; and
>
> "(b) The needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states."

Id.

Here, the first factor weighs in favor of applying Oregon—not California—law. Plaintiffs are alleged to be residents of Oregon, purportedly having property interests in Jackson County and/or Josephine County in Oregon. (Compl. ¶ 6.) Defendants are organized under the laws of the State of Oregon and have their principal places of business in Oregon. (*Id*. ¶¶ 9, 10.) The properties allegedly damaged by the fires also are located in Oregon. (*Id*. ¶¶ 6, 7.) Plaintiffs conclusorily allege that the larger fire started in California, but as discussed more fully below, they do not allege any ultimate facts as to how precisely any of Defendants' conduct in California caused injury to Plaintiffs' properties in Oregon.

The second and third factors also weigh in favor of applying Oregon law. As discussed above, there is no indication that the California legislature intended Article I, Section 19 of the California Constitution or the California regulatory statutes to apply to out-of-state residents in circumstances such as those present here. Moreover, there are no policies that would require application of these laws as Oregon law already provides other potential adequate remedies. For example, the Oregon Constitution also has a takings

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clause—Article I, Section 18—and Plaintiffs have asserted an inverse condemnation claim under that law as well.

Accordingly, all of Plaintiffs' claims based on California law should be dismissed.

B. Plaintiffs' Inverse Condemnation Claims Under California and Oregon Law Should Be Dismissed.

If the Court does not dismiss Plaintiffs' California inverse condemnation claim under the principle of extraterritoriality or under choice of law principles, as described above, it nevertheless should dismiss the claim because Plaintiffs fail to allege ultimate facts to meet the requirements for that claim under California law. And regardless—and independent of any challenge to the California inverse condemnation claim—Plaintiffs cannot state a claim for inverse condemnation under the Oregon Constitution for the reasons described below. In short, both the California and Oregon inverse condemnation claims fail on the merits.

1. Plaintiffs Cannot State—and Have Not Sufficiently Alleged—an Inverse Condemnation Claim Under the California Constitution.

The California Constitution's Takings Clause requires the government to provide "just compensation" when private property is "taken or damaged for a public use." Cal Const, Art I, § 19(a). There are two traditional types of takings actions: a formal eminent domain proceeding "initiated by a public entity to acquire private property for public use," and an "inverse condemnation action" initiated by a private property owner when a governmental act "amounts functionally to a taking" but the government "fails to pay the requisite compensation." *City of Oroville*, 446 P3d at 310.

Inverse condemnation does not authorize holding public entities "strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however, remote, to a public improvement." *Id*. at 307. Nor does inverse condemnation cover damages "caused by the negligent conduct of public employees" or the "negligent operation of the improvement." *Customer Co. v. City of Sacramento*, 895 P2d 900, 908 (Cal 1995)

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(internal quotation marks, emphasis, and citation omitted). Instead, the purpose of inverse condemnation is limited and specialized: to take losses that stem from the "inherent dangers of the public improvement as deliberately designed, constructed, or maintained," *City of Oroville*, 446 P3d at 312, and distribute those losses "throughout the community," *Holtz v. Superior Court*, 475 P2d 441, 445 (Cal 1970) (internal quotation marks and citation omitted).

Under that standard, Plaintiffs' California inverse condemnation claim fails because (1) PacifiCorp is not a public entity entitled to spread inverse losses among the public as a matter of right; (2) the alleged damage was not an "inescapable or unavoidable consequence" (3) of "an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement"; and (4) the alleged damage did not further a public use. Because Plaintiffs do not and cannot plausibly allege ultimate facts sufficient to state an inverse condemnation claim (even if granted leave to replead), the Court should dismiss the First Claim for Relief with prejudice.

a. PacifiCorp Is a Private Corporation, Not a Public Entity.

Under the California Constitution's takings clause, a "*public entity* must pay the owner just compensation when it takes or damages private property for public use." *City of Oroville*, 446 P3d at 309 (emphasis added) (citing Cal Const, Art I, § 19); *Paterno v. State of California*, 87 Cal Rptr 2d 754, 767 (App 1999) ("The condemnation clause * * * requires an act of a public body."); *Bach v. County of Butte*, 263 Cal Rptr 565, 572-73 (App 1989) ("[I]t is elementary that an inverse condemnation action—being based upon the taking or damaging of property for public use without just compensation—requires state action and, therefore, cannot be asserted against private parties."). Inverse condemnation is limited to government entities because the underlying purpose of the takings clause is to take losses "inflicted upon [an] individual" and "distribute [them] throughout the community." *Holtz*, 475 P2d at 445 (internal quotation marks and citation omitted). The Takings Clause also gives private property owners remedies they "would not otherwise have against the state"

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because government entities are immune from liability for most tort claims. *Bauer v. Ventura Cnty.*, 289 P2d 1, 5 (Cal 1955), *abrogated on other grounds as recognized by Belair v. Riverside Cnty. Flood Control Dist.*, 764 P2d 1070, 1077 (Cal 1988); *see also* Cal Gov Code § 815. Unlike government entities, privately owned utilities like PacifiCorp are not able to socialize their inverse losses and are not otherwise protected from wide-ranging tort liability under California's Tort Claims Act.

The California Supreme Court has instructed courts to interpret California's takings clause consistent with the "history [and] intent of the provision," avoiding "literal (and overly simplistic) interpretation[s]." *Customer Co.*, 895 P2d at 906. For decades, California courts have held that "loss distribution" is the fundamental policy goal "underpinning inverse condemnation." *Gutierrez v. Cnty. of San Bernardino*, 130 Cal Rptr 3d 482, 485 (App 2011); *see also Bacich v. Bd. of Control of Cal.*, 144 P2d 818, 823 (Cal 1943) ("[T]he policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements."). As the California Court of Appeal has explained, the goal of inverse condemnation is "to spread among the benefiting community any burden disproportionately borne by a member of that community." *Barham v. S. Cal. Edison Co.*, 88 Cal Rptr 2d 424, 430 (App 1999). That "fundamental policy" applies only to public entities, which can "socialize[] and distribute[]" inverse condemnation losses "over the taxpayers at large." *Cantu v. Pac. Gas & Elec. Co.*, 234 Cal Rptr 365, 368 (App 1987) (internal quotation marks and citation omitted); *see also Albers v. Los Angeles Cnty.*, 398 P2d 129, 137 (Cal 1965) ("[T]he cost of such damage can be better absorbed, and with infinitely less hardship, by the taxpayers as a whole * * *."). The California Supreme Court has thus never ruled that inverse condemnation liability applies to regulated, privately owned electrical utilities like PacifiCorp.

Given the history and intent of the takings clause, there is no basis to subject PacifiCorp—a private corporation—to inverse condemnation liability. Plaintiffs do not

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allege PacifiCorp is a government entity, nor could they. Instead, they concede that PacifiCorp is a private corporation. (*See* Compl. ¶¶ 9-10.) At most, Plaintiffs allege that PacifiCorp is an "electrical corporation" and a "public utility" under California Public Utilities Code Sections 218(a) and 216(a)(1), respectively (*id.* ¶ 51), and that PacifiCorp's "utility infrastructure, including their powerlines, are public improvements for the supplying of electricity to the public for public use." (*Id.* ¶ 53.) Even accepting Plaintiffs' allegations as true, these defined terms include private corporations. In other words, not all "public utilities" or "electrical corporations" are government entities subject to inverse condemnation liability. Section 216(a)(1) defines "public utility" to include an "electrical corporation"; Section 218(a) in turn defines "electrical corporation" as "every corporation * * * owning, controlling, operating, or managing any electric plant," whether publicly or privately owned. *See* Cal Pub Util Code §§ 216(a)(1), 218(a). And Section 217 defines an "electric plant" as "real estate, fixtures and personal property" that "facilitate[s] the production, generation, * * * or furnishing of electricity." Cal Pub Util Code § 217. None of those statutes provides that any such entity is a government entity, nor do they address such an entity's ability to spread its inverse losses to society at large.

As a private corporation, PacifiCorp does not have the right to "socialize[] and distribute[]" its losses to "taxpayers at large." *Cantu*, 234 Cal Rptr at 368. PacifiCorp is not a state entity and cannot levy taxes. And PacifiCorp lacks the ability to set its own rates; that right is reserved to the CPUC. *See* Cal Pub Util Code § 454(a) ("[A] public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."). And, as the CPUC explained in rejecting San Diego Gas & Electric's application to raise rates to spread losses from settling a multi-million-dollar inverse condemnation lawsuit, "[i]nverse [c]ondemnation principles are not relevant" to the CPUC's decision about whether to raise utility's rates. (Ramfjord Decl., Ex. G at 67.) Because

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PacifiCorp does not have the independent ability to spread losses, holding PacifiCorp liable for inverse condemnation would defeat the "fundamental policy underlying the concept of inverse condemnation": "to spread among the benefiting community any burden disproportionately borne by a member of that community." *Barham*, 88 Cal Rptr 2d at 430; *see also Bach*, 263 Cal Rptr at 572-73 ("[I]t is elementary that an inverse condemnation action * * * cannot be asserted against private parties."); *Sierra Palms Homeowners Ass'n v. Metro Gold Line Foothill Extension Constr. Auth.*, 228 Cal Rptr 3d 568, 574 (App 2018) (affirming dismissal of inverse condemnation claim after plaintiff did not even "contend in its brief on appeal" that it could state a cause of action, because defendant was "a private entity").

b. Plaintiffs Do Not and Cannot Allege that Damage to Their Specific Properties Was Inescapable or Unavoidable.

Plaintiffs' California inverse condemnation claim also fails because Plaintiffs cannot allege substantial causation as a matter of law.

The "core of the test" for "substantial causation" requires that damage to private property be the "inescapable or unavoidable consequence" of government action. *City of Oroville*, 446 P3d at 314 (quoting Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings LJ 431, 437 n 32 (1969)); *see also Albers*, 398 P2d at 134 (public entities are only liable for damage caused by the "necessary effect[s]" of a public improvement); *Sheffet v. Cnty. of Los Angeles*, 84 Cal Rptr 11, 20 (App 1970) ("Property is only deemed taken or damaged for a public use if the injury is a necessary consequence of the public project."). As the California Supreme Court has explained, that rule is intentionally difficult to satisfy because courts must "mitigate concerns that 'compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.'" *City of Oroville*, 446 P3d 304, 311 (quoting *Bacich*, 144 P2d at 823).

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City of Oroville demonstrates the high standard that Plaintiffs must meet to establish substantial causation. In that case, three dentists brought an inverse condemnation action for damage from a city's sewer system, which backed up and flooded their office. *Id*. at 307. The city argued that the dentists failed to show that their damages were substantially caused by the city's deliberate actions because the dentists had "failed to install a legally-required backwater valve" that would have prevented the damage. *Id*. The California Supreme Court reversed a judgment for the plaintiffs, explaining that inverse condemnation does *not* provide for strict liability for "any conceivable damage bearing some kind of connection, however remote, to a public improvement." *Id*. Instead, the "damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement." *Id*. at 312. And while the dentists' damages related to the "design, operation, and maintenance of a sewer system," the backwater valve "would have prevented or substantially diminished the risk of the mishap." *Id*. at 316. Accordingly, the Supreme Court held that there was no substantial causation as a matter of law: the "injury to private property" was not an "inescapable or unavoidable consequence of the public improvement as planned and constructed." *Id*. at 314 (internal quotation marks and citation omitted).

Here, Plaintiffs cannot allege and have not alleged ultimate facts sufficient to establish substantial causation. Rather, they offer only conclusory allegations that any alleged damage was the "inescapable and unavoidable consequence" of PacifiCorp's "design, construction, use and maintenance of their utility infrastructure," that PacifiCorp's "deliberate actions when designing, constructing, using and maintaining their utility infrastructure was a substantial factor in damaging a property interest protected by Article I, § 19 of the California Constitution," and that Plaintiffs' damage "was the necessary and probable result of Defendants' public improvement of supplying electricity." (Compl. ¶¶ 58, 59.) But stripped of legal conclusions, Plaintiffs allege only a simple causal connection: that

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PacifiCorp's various alleged failures to act "materialized when one of their powerlines in California broke, created arcing, and ignited the Slater Fire, which resulted in a taking of Plaintiffs' real and/or personal property in Oregon." (*Id.* ¶ 57.) As the California Supreme Court has explained, a simple "causal connection between the public improvement and the property damage alone is insufficient to sustain a finding of inverse condemnation liability." *City of Oroville*, 446 P3d at 315. Absent any factual allegations that Plaintiffs' damages were the "inescapable or unavoidable" consequence of the inherent risks of deliberate actions taken by PacifiCorp, the Complaint fails to state a cause of action.

And to the extent the Complaint contains factual allegations at all, they confirm Plaintiffs could not allege substantial causation even if granted leave to amend. Plaintiffs' allegations focus on the *risk* of fire, which alone is inconsistent with the notion that damage to Plaintiffs' properties was "inescapable" or "unavoidable." For example, Plaintiffs allege that "[t]he manner in which [PacifiCorp] designed, constructed, used and maintained their utility infrastructure created an inherent risk and danger of creating a fire that would damage Plaintiffs' real property." (Compl. ¶ 54.) But a "risk" is only a "possibility of loss, injury, disadvantage, or destruction," while a "necessary" result is one that is "unavoidable" or "inevitable." *Webster's New Int'l Dictionary* 1510, 1961 (3d ed 1961). Even in legal contexts requiring a lower burden on causation than "substantial cause," alleging a "mere possibility of * * * causation is not enough" to allege "probability." *Saelzer v. Advanced Grp. 400*, 23 P3d 1143, 1151 (Cal 2001) (internal quotation marks and citation omitted); *see also Cary v. United States*, 552 F3d 1373, 1378 (Fed Cir 2009) (rejecting inverse condemnation claim because "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable").

Plaintiffs could not allege substantial causation even if granted leave to amend because simply alleging that *ignition of a fire* was inevitable or a "necessary result" of

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PacifiCorp's deliberate action would not establish that PacifiCorp substantially caused Plaintiffs' damages. Plaintiffs must allege that the *property damage* was itself an "inescapable or unavoidable consequence." *City of Oroville*, 446 P3d at 314 (internal quotation marks and citation omitted). But as courts from sister jurisdictions have recognized, fire damage is inherently uncertain. For example, in rejecting a wildfire inverse condemnation claim at the pleading stage, the Texas Court of Appeals explained that to plead causation, the plaintiffs must have alleged that each step of a seven-step chain of causation was "almost-certain" to occur—beginning with the city's alleged cost-saving measures, proceeding through "high winds" and "arcing," and ending in the damage to a plaintiff's property in particular. *City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825 (Tex App 2014). Because wildfire plaintiffs generally cannot make that showing, wildfire liability—even for *intentionally set* fires—"has traditionally been determined under tort law," not inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998) (dismissing wildfire inverse condemnation claim at pleading stage). That is even more true here, when the wildfire is alleged to have ignited in *California*—an entirely different state—and spread to cause damage to Plaintiffs' property *in Oregon*. Plaintiffs cannot plausibly allege (and have not so alleged) that property damage to Plaintiffs' property in Oregon was the inescapable and unavoidable consequence of its conduct in California.

Even if Plaintiffs were to amend to allege (for example) that any fire ignition at Happy Camp was "almost-certain" to spread to their properties in Oregon, *City of Austin*, 431 SW3d at 825, that would not be sufficient, either. Plaintiffs allege that there was an "extreme fire risk in Northern California" and that "dangerous weather conditions were expected to strike Northern California and Southern Oregon." (Compl. ¶¶ 2, 37.) In other words, in addition to potentially spreading anywhere, the fire could have ignited anywhere—rendering substantial causation nearly impossible to plead, let alone prove, as to any specific property. *See City of Oroville*, 446 P3d at 307 (to show substantial causation, plaintiffs must establish

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that the "damage to private property" in particular—and not some other, intermediate event, such as a fire—was "substantially caused" by the inherent risks of the public improvement). Unlike a flood from a dam built in a specific, fixed location, which will damage specific nearby properties to a near certainty, scientists "stud[ying] the question in advance" cannot "predict" whether a particular property will suffer fire damage from an alleged utility-caused fire igniting in an unknown location, with unknown spread. *Ridge Line, Inc. v. United States*, 346 F3d 1346, 1357 (Fed Cir 2003).

Dismissing Plaintiffs' California inverse condemnation claim will not prevent Plaintiffs from pursuing their negligence claim against PacifiCorp, and it is consistent with *City of Oroville*'s guidance that inverse condemnation plaintiffs must allege that the damage to their properties was "necessary or probable." 446 P3d at 314 (internal quotation marks, emphasis, and citation omitted).

c. Wildfire Damage Is Not an Inherent Risk of the Deliberate Design, Construction, or Maintenance of PacifiCorp's Equipment.

Even if Plaintiffs could allege substantial causation, not all damage substantially caused by government acts can support an inverse condemnation claim under California law. Plaintiffs must allege that their damages arose from the "inherent dangers of the public improvement as *deliberately* designed, constructed, or maintained." *Id.* at 312 (emphasis added). Allegations that a public entity "negligent[ly] operat[ed]" a public improvement, in contrast, do not create inverse condemnation liability. *Id*. at 311 (quoting *Customer Co.*, 895 P2d at 908). This element is designed to "avoid[] open-ended liability by protecting public entities from liability for private property damage that is arguably connected to a public improvement but is not the result of the improvement's inherent risks." *Id*. at 313. For the independent reason that Plaintiffs do not and cannot allege facts showing that any of PacifiCorp's "deliberate" actions resulted in damage to their property, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

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The California Supreme Court has set a clear line: deficient plans and policies can create liability, but deficient implementation of plans or policies—including negligence—cannot. Inverse condemnation liability attaches if, for example, a public entity makes a "policy choice" to "forgo regular monitoring and repair." *City of Oroville*, 446 P3d at 313-14. In contrast, "inverse condemnation does not involve ordinary acts of carelessness in carrying out of the public entity's program." *Sheffet*, 84 Cal Rptr at 19 (citing *Miller v. City of Palo Alto*, 280 P 108 (Cal 1929)); *see also Customer Co.*, 895 P2d at 908 (*Miller*'s holding "that damage caused by the negligent conduct of * * * a public entity does not fall within the aegis of [the takings clause] has been followed repeatedly and uniformly in the more than 60 years that have elapsed"); *Bauer*, 289 P2d at 7 (citing *Miller*); *McNeil v. City of Montague*, 268 P2d 497, 498 (App 1954) (same, in fire case); *W. Assur. Co. of Toronto v. Sacramento & San Joaquin Drainage Dist.*, 237 P 59, 62 (App 1925) (same, in fire case).

Here, Plaintiffs allege only negligence—not a cognizable "deliberate" plan or policy choice to support inverse condemnation liability. Plaintiffs conclusorily allege that Defendants' actions were "deliberate" but fail to plead any ultimate facts as to such conduct. Stripped of conclusory language, Plaintiffs' Complaint fails to allege that the damage to Plaintiffs' properties resulted from the "inherent dangers of the public improvement as *deliberately* designed, constructed, or maintained." *City of Oroville*, 446 P3d at 312 (emphasis added).

Plaintiffs first allege that PacifiCorp's electrical infrastructure was "intended, designed, and constructed to pass electricity through exposed powerlines in dry, vegetated areas." (Compl. ¶ 3; *see also id.* ¶¶ 38, 41.) Even accepted as true, Plaintiffs do not allege any facts to show that merely constructing "exposed" powerlines in dry, vegetated areas creates an "inherent risk" of wildfire. Under Plaintiffs' theory, *any* construction of electrical facilities in "dry, vegetated" regions would create inverse condemnation liability, no matter what safety measures a utility takes. Allowing that level of generality to pass the pleading

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stage would eviscerate the requirement that Plaintiffs plead ultimate facts that their damages resulted from an "inherent risk" of a "deliberate" act; any plaintiff could pass the pleading stage simply by alleging that a public entity intentionally built a public improvement and describing some aspect of its surroundings. But the California Supreme Court has instructed that the requirement that plaintiffs plead that their damages resulted from the "inherent risk" of any "deliberate" act operates as a "preventative measure to ensure that not all private property damage bearing some causal relationship to a public improvement results in liability." *City of Oroville*, 446 P3d at 312-13. *City of Oroville* requires more than just alleging that an inverse defendant deliberately built an improvement, which is all Plaintiffs' first theory alleges. *Id*. (no liability even though municipality "deliberately" built sewers).

Plaintiffs alternatively allege that the Slater Fire resulted from the "inherent danger" that resulted when PacifiCorp allegedly "failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure" and "failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (Compl. ¶ 41.) But Plaintiffs do not allege that these purported failures resulted from an inherent risk of a deliberate "plan" or policy choice. *McMahan's of Santa Monica v. City of Santa Monica*, 194 Cal Rptr 582, 590-91 (App 1983), *disapproved of on other grounds by Bunch v. Coachella Valley Water Dist*., 935 P2d 796, 808 (App 1997); *City of Oroville*, 446 P3d at 311 (inverse condemnation liability arises only if the "injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement" (quoting *Customer Co.*, 895 P2d at 908)). Plaintiffs' allegations mirror those expressly rejected in *City of Oroville*. *City of Oroville*, 446 P3d at 314 (rejecting argument that the "inherent risk of a sewer system is blockage caused by roots or foreign objects").

Plaintiffs' allegations also generally fail because negligence is insufficient to support an inverse condemnation claim under the California Constitution. *Compare McMahan's*,

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194 Cal Rptr at 589, 591 (city's "plan of replacement" of water mains, which would "take at least 88 years" to complete, supported inverse condemnation liability), *with Tilton v. Reclamation Dist. No. 800*, 48 Cal Rptr 3d 366, 368 (App 2006) (failure of levee "due to improper maintenance" was mere negligence in the "routine operation" of the public improvement and failed to state a claim for inverse condemnation). The California Supreme Court has long distinguished between "dangers inherent in the construction of the public improvement," which can create inverse liability, and "dangers arising from the negligent operation of the improvement," which cannot. *City of Oroville*, 446 P3d at 311 (quoting *Customer Co.*, 895 P2d at 908); *see also Paterno*, 87 Cal Rptr 2d at 767 ("Poor execution of a maintenance plan does not result in a taking.").

d. Accidental Wildfire Does Not Serve a Public Use.

California's takings clause is unambiguous: only damage "for public use" creates a compensable taking. Cal Const, Art I, § 19; *see also Customer Co.*, 895 P2d at 908 (only when "[t]he destruction or damaging of property is sufficiently connected with 'public use'" does inverse condemnation liability attach (internal quotation marks and citation omitted)); *Arreola v. Cnty. of Monterey*, 122 Cal Rptr 2d 38, 53 (App 2002) ("To be subject to liability in inverse condemnation, the governmental action at issue must relate to the 'public use' element of article I, Section 19."). Plaintiffs cannot satisfy that requirement as a matter of law, nor does their Complaint attempt to do so.

Plaintiffs allege only that PacifiCorp's "utility infrastructure, including their powerlines, are public improvements for the supplying of electricity to the public for public use." (Compl. ¶ 53.) In other words, Plaintiffs allege that because PacifiCorp operated electrical equipment for the public's benefit, any damage from that equipment served a public use, and so is a compensable taking.

The California Supreme Court has squarely rejected the argument that all damage from public improvements is damage that serves a public use. In *Customer Co.*, the

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California Supreme Court held that tear gas damage to a store and its inventory was not damage "for public use" even though officials had deliberately fired tear gas canisters for a public purpose: apprehending an escaping criminal. 895 P2d at 913. As the Court explained, the destruction of the plaintiff's property did not convey a benefit for public use, even though it arose from the underlying public benefit of capturing the felon. *See id.* at 907-08, 913. The relevant question is thus not whether a court can find some public benefit somewhere up the chain of causation, but instead whether the "destruction or damage of property" *itself* is "sufficiently connected with 'public use.'" *Id*. at 908 (quoting *House v. Los Angeles Cnty. Flood Control Dist*., 153 P2d 950, 956 (Cal 1994) (Traynor, J., concurring)); *see also W. Assur. Co.*, 237 P at 75 (holding that, to be "damage for public use," the damage must be an "act necessary to the doing of the work" that "promote[s] the ends of a public use"; allegations that a public entity negligently started a fire failed to meet that standard); *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 370 P3d 319, 328 (Colo App 2015) ("The public purpose of an intended act (the prescribed burn) that ultimately results in an unintentional 'taking' (the wildfire) does not transfer to and supply the 'public purpose' for that taking.").

The California Supreme Court also has rejected claims like Plaintiffs' allegations here on public use grounds. For example, *Miller* involved an inverse condemnation claim against a city garbage department that took "burning garbage" from an incinerator and "deposited [it] on vacant property" a quarter mile from the plaintiffs' real property; the burning garbage started a wildfire that destroyed the plaintiffs' property. 280 P at 108. The California Supreme Court held that there was "no merit" to the plaintiffs' inverse condemnation claim, explaining that the plaintiffs failed to plead a "public use," defined as a "use which concerns the whole community," even though the "collection and disposal of garbage" served "governmental functions." *Id*. at 109.

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For the foregoing reasons, the Court should dismiss Plaintiffs' First Claim for Relief for inverse condemnation under Article I, Section 19 of the California Constitution.

2. Plaintiffs' Cannot State an Inverse Condemnation Claim Under the Oregon Constitution.

For similar reasons, Plaintiffs also cannot state a claim for inverse condemnation under Article I, Section 18 or Article XI, Section 4 of the Oregon Constitution. Thus, the Court should dismiss Plaintiffs' Fifth Claim for Relief as well.

The Oregon Constitution has two takings clauses. Article I, Section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, Section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

Although the typical taking begins with a formal eminent domain proceeding, governments and corporations acting under authority of law also may "take[] property interests through [their] actions without first initiating condemnation proceedings." *Id*. In those cases, a property owner may recover under the doctrine of inverse condemnation.

Here, Plaintiffs cannot satisfy the elements of either Article I, Section 18 or Article XI, Section 4 as a matter of law. *First*, Plaintiffs cannot meet the intent requirement applicable to a takings claim under either clause, namely that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiffs' property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. *Second*, Plaintiffs cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public purpose" as required by Article I, Section 18. *Third*, Plaintiffs cannot show that PacifiCorp acted "under authority of law" as required by Article XI, Section 18 in any relevant respect to their

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claims here. Because none of these problems can be fixed by amendment, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

a. Plaintiffs Fail to Allege That PacifiCorp Intentionally Undertook to Act in a Manner That Necessarily Caused Plaintiffs' Injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation claim under Article I, Section 18 or Article XI, Section 4 of the Oregon Constitution only by proving that the government "intentionally undertook actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas Cnty*., 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If "plaintiff's best evidence" shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun*, 335 Or at 27 ("[A] takings claim cannot be based on * * * negligent government conduct." (internal quotation marks and citation omitted)).

Dunn illustrates the high standard Plaintiffs must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "natural

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and ordinary consequence[]" of that improvement, and so was liable for inverse condemnation. *Id*. at 345-46.

The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id*. at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiffs must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id*.

Similarly, in *Worman v. Columbia County*, 223 Or App 223, 236, 195 P3d 414 (2008), the plaintiffs sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiffs failed to state an inverse condemnation claim because the plaintiffs had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to plaintiffs' property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id*. (emphasis omitted). The court rejected the plaintiffs' inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, plaintiffs' property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiffs' property as a natural and ordinary consequence of the project. *Id*.

As Judge Johnson of the Douglas County Circuit Court recognized in rejecting inverse condemnation claims identical to those Plaintiffs assert here, *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege ultimate facts

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sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Ramfjord Decl., Ex. E at 4.) Under *Dunn*, it is not enough to allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiffs' properties. Instead, Plaintiffs must allege facts that the invasion "into plaintiff's [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiffs' damages must have been "substantially certain" to occur. *Dunn*, 355 Or at 361.

Judge Conover of Lane County also recently dismissed nearly identical inverse condemnation claims in the *Anderson* case against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the plaintiffs' properties." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims as well. (Ramfjord Decl., Ex. B.)

Finally, Judge Johnson of Douglas County also recently dismissed another inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case. (Ramfjord Decl., Ex. A.) In doing so, Judge Johnson suggested that the plaintiffs there had failed to "allege ultimate facts that would support a claim that ***damage to defendants' property*** was an inevitable or natural result of the Plaintiffs' intentional act that was not dependent on other intervening factors." (*Id*. (emphasis added).) Plaintiffs in the *Roseburg Resources* case have repleaded, and PacifiCorp's renewed motion to dismiss has been argued and is pending decision.

Here, too, Plaintiffs cannot allege that any of the necessary causal steps to damage their specific property were "substantially certain" to occur. Start with the alleged ignition.

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Plaintiffs allege that the Slater Fire occurred because PacifiCorp "failed to deenergize their powerlines on September 7"; "intended, designed and constructed [its] utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas"; "failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure"; and "failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (Compl. ¶ 41.) Plaintiffs then conclusorily allege that the "predictable and inevitable consequences" of PacifiCorp's conduct was "damage" to Plaintiffs' property, and that the "taking was a necessary, substantially certain, and/or inevitable consequence of [PacifiCorp's] actions and inactions in designing, constructing, using and maintaining their utility infrastructure." (*Id.* ¶¶ 83, 85-89.) Plaintiffs then generally allege that "[w]ildfires move in a direction and at a speed that is predictable and inevitable given known wind patterns, heat, and humidity at the time of ignition." (*Id*.) These generalized allegations are not tied to any specific geographic location and do not allege ultimate facts sufficient to support a claim that the inevitable or natural result of a fire that ignited in *California* was damage to Plaintiffs' property in *Oregon*; rather, they are merely "conclusion[] of law" that does not suffice to state "ultimate facts" entitling Plaintiffs to relief. *Huang*, 147 Or App at 332. Allowing an inverse condemnation claim to stand on such threadbare allegations would unleash a flood of such claims following every wildfire arguably caused by vegetation contacting a powerline.

Nor have Plaintiffs alleged any other specific facts supporting a finding of "substantial certainty." Indeed, the fact that Plaintiffs' factual allegations center on fire "risk" confirm that Plaintiffs cannot do so. The Complaint refers to "risk" or "fire risk" numerous times, alleging, for example, that there was a "risk of arcing" and a "fire potential" that was "well-above normal," among other things. (Compl. ¶¶ 19, 31, 36, 37, 42, 85, 90.) The reason Plaintiffs focus on "risk" is that it is the best they can do; it is implausible (at best) to suggest that actions like failing to inspect vegetation or designing and constructing

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"utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas" are *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, etc.) are necessary for an ignition to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), the plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id*. at 1377. The court rejected the plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "direct, natural, or probable" result of government conduct to state a claim. *Id*. at 1378. As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id*. For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53; *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiffs could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiffs make no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of *the plaintiff's property* that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59 (emphasis added). Indeed, Plaintiffs do not even allege specifically where their properties were located, much less why the fire was substantially certain to consume their properties once it started. Read in the most generous possible light, the most

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Plaintiffs allege that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of a larger fire that was the but-for cause of Plaintiffs' damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiffs' property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id*. at 361 (emphasis in original and added). Such allegations, however, fall far short of the applicable standard.

That problem is especially striking with respect to the claims at issue in this case. The Complaint contains very few details about the specific property interests held by Plaintiffs. The only allegations about those property interests are that they are "located in Jackson County and/or Josephine County." (Compl. ¶ 6.) Plaintiffs state no facts at all—let alone ultimate facts—concerning the nature of Plaintiffs' properties, the size of the properties, the use of the properties (*i.e.*, commercial, residential, etc.), or specific details regarding the extent of the alleged damage to Plaintiffs' specific properties. Moreover, the Complaint generally alleges that "Plaintiffs are individuals, representatives, and *legal entities*" who are "homeowners, renters, business owners, residents and occupants" in Jackson and Josephine Counties. (*Id.* (emphasis added).) The named Plaintiffs, however, appear to all be individuals—Glenn Sparks, Gayla Sparks, Kylie Sparks, Lanson Sparks, and Elaine Liberty; there are no facts suggesting that any of these plaintiffs is a legal entity. Without any ultimate facts alleged as to the specific properties that Plaintiffs allege were taken by PacifiCorp's actions, Plaintiffs cannot state a claim for inverse condemnation.

Moreover, as pled in the Complaint, Plaintiffs are residents in potentially two different Oregon counties seeking damages for property injuries that Plaintiffs allege occurred as a result of a fire that ignited in another state (California). (*Id.* ¶¶ 4, 6.) Even if Plaintiffs could allege that some set of actions were "substantially certain" to ignite the fire in California (and they have not done so), they cannot conceivably allege that PacifiCorp's

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conduct was further "substantially certain" to damage Plaintiffs' properties in another state. Whether or not an inverse condemnation claim can properly be asserted against a private electrical utility relating to a wildfire under *any* facts, this case is an especially egregious example of geographically disparate claims that cannot meet the *Dunn* standard under any set of allegations.

Additionally, Plaintiffs' allegations in paragraph 87 that "[c]omputer algorithms permit utility companies to have substantial advance notice of weather patterns and the predictable outcome of a resulting fire" do not save their inverse condemnation claim from dismissal. Plaintiffs do not allege that those algorithms would have predicted a fire would ignite at any particular point, let alone the particular points of ignition alleged in the Complaint. Nor do Plaintiffs allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in sufficient proximity to Plaintiffs such that an algorithm would have predicted the fire would invade Plaintiffs' land. *Dunn*, 355 Or at 355.

Finally, Plaintiffs have not met their burden by alleging that PacifiCorp has created "Public Safety Power Shut-off" plans for "proactive de-energization" of powerlines "when weather conditions call for it." (*See* Compl. ¶ 24.) That fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors is not a problem Plaintiffs can fix with amendment. It is how fires work. *See City of Austin v. Liberty Mut. Ins*., 431 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost-certain" to occur, foreclosing takings claim). As a result, even with "intentionally set fires" that "escape[] because of intervening winds" or other causes, liability "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiffs do not and cannot allege that any alleged fire caused "certain and

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inevitable" damage to Plaintiffs in particular "for purposes of a takings claim," they fail to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

b. Plaintiffs Cannot State an Inverse Condemnation Claim Under Article I, Section 18 of the Oregon Constitution Because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use.

(i) PacifiCorp is not a public entity.

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, Section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." *Vokoun*, 335 Or at 27-28 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiffs' invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, Judge Alexander in Multnomah County recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, Section 18 against a private entity like PacifiCorp. (Ramfjord Decl., Ex. F at 17.) Similarly, Judge Conover in Lane County, in dismissing the inverse condemnation claims against Lane Electric, specifically found that "Lane Electric is not a government actor." (Ramfjord Decl., Ex. C at 30 (transcript pages 70-71); *see also* Ex. D at 1.)

PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the OPUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). Nor would PacifiCorp qualify as a "government body" under Oregon's tort claim statute. *See* ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies,

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local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiffs' Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiffs' Article I, Section 18 claim. *Vokoun*, 335 Or at 28.

(ii) Plaintiffs do not allege that PacifiCorp took property for "public use."

Plaintiffs' Article I, Section 18 inverse condemnation claim also fails for the independent reason that Plaintiffs cannot demonstrate that their property was taken "for a public use," as they must. *Vokoun*, 335 Or at 19; *see also Worman*, 223 Or App at 236 (plaintiffs could not state inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). Plaintiffs allege only that PacifiCorp's "utility infrastructure, including [its] powerlines, are public improvements for the supplying of electricity to the public for public use." (Compl. ¶ 82.) Plaintiffs confuse public "use" with public "benefit." As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Or.*, 240 Or App 490, 500-01, 247 P3d 331 (2011) (internal quotation marks and citation omitted). In other words, Plaintiffs must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. They have not and cannot do so.

Again, Judge Conover of Lane County recently dismissed nearly identical inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by

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wild fire was for a public use or public purpose. * * * [F]urther, there was no intent to put the plaintiffs' property to public use." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.)

The same is true here. Plaintiffs must meet the test for public use set forth in *Mossberg*: they must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiffs cannot make that showing, they make no effort to do so, and thus fail to state an inverse condemnation claim under Article I, Section 18 of the Oregon Constitution.

c. Plaintiffs Cannot State an Inverse Condemnation Claim Under Article XI, Section 4 of the Oregon Constitution Because Plaintiffs Do Not Allege That PacifiCorp Acted Under Authority of Law.

Plaintiffs' Article XI, Section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiffs contend damaged them. By its own terms, the takings clause in Article XI, Section 4 only applies to a "corporation under authority of law." Plaintiffs may attempt to meet that showing by arguing that PacifiCorp has the general power of condemnation or that it operates as a public utility. Here, Plaintiffs merely allege that PacifiCorp is an entity "with the power of condemnation pursuant to ORS Chapter 35 and the Oregon Constitution" (Compl. ¶ 81), but they fail to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because they cannot do so, their inverse condemnation claim under Article XI, Section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiffs cannot state an Article XI, Section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, Section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs' property." (Ramfjord Decl., Ex. C at 30 (page 71 of the transcript); *see also* Ex. D at 1.)

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Nor can Plaintiffs cite any authority to the contrary. Article XI, Section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*, 185 Or App 425, 60 P3d 557 (2002)—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiffs allege).[4] 185 Or App at 443 n.5 (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, [S]ection 4").

Nevertheless, the only Oregon cases permitting Article XI, Section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, Section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city counsel of Oregon City"); *Kurtz v. S. Pac. Co*., 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East

[4] A handful of other modern cases have addressed Article XI, Section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, Section 18 or Article XI, Section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006) (rejecting Article XI, Section 4 claim in passing, and collecting cases doing the same thing).

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Portland"). In contrast, PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" within the meaning of Article XI, Section 4 whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

It makes sense that the phrase "under authority of law" requires a direct connection between a corporation's legal authority and the alleged taking, because unlike Article I, Section 18's takings clause, Article XI, Section 4 contains no textual "public use" requirement. The "under authority of law" requirement thus fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiffs' Complaint were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "would be absurd to attribute to the framers" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. Or. Hwy. Comm'n*, 196 Or 120, 147, 248 P2d 703 (1952)).[5]

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. 419 US at 350, 368 n 1

[5] If the Court interprets Article XI, Section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, Section 4—and Plaintiffs' claim would then fail for the same reason that their Article I, Section 18 claim fails, as described above. *See, e.g., Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980) (Article XI, Section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I Section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1927)).

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(Marshall, J., dissenting). The United States Supreme Court nevertheless found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id*. at 353 (emphasis added). And although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm.*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States * * *."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

Properly construed, Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fire at issue here, nor do Plaintiffs attempt to do so. Plaintiffs do not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires; they allege that PacifiCorp *violated* those regulations. Plaintiffs similarly do not allege that PacifiCorp used the power of eminent domain to take their property, nor to take any relevant land at issue in this case. The most Plaintiffs allege is that PacifiCorp generally has the "power of condemnation"—not that PacifiCorp used that power in any relevant way to their takings claim. (Compl. ¶ 81.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other early Oregon cases—and Plaintiffs do not allege any connection, let alone a direct one—Plaintiffs' Article XI, Section 4 claim fails as a matter of law.

3. The Complaint Contains No Allegations—Let Alone "Ultimate Facts"—Concerning the Property Interests Allegedly Taken by PacifiCorp or the Extent of the Alleged Damage to Plaintiffs' Properties.

Finally, the First and Fifth Claims for Relief should be dismissed for an additional reason: they fail to allege any facts—let alone ultimate facts—concerning the specific

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property interests that Plaintiffs allege were taken by PacifiCorp's actions or the extent to which Plaintiffs' properties were damaged.

To maintain an inverse condemnation claim, a plaintiff must show that the property or property interest alleged to have been taken belonged to that person in the first place. *Kinross Copper Corp. v. State*, 160 Or App 513, 519, 981 P2d 833 (1999) ("[A] settled principle of takings law is that, even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it did not ever have."); *Regency Outdoor Advert., Inc. v. City of Los Angeles*, 139 P3d 119, 123 (2006) (as modified Oct. 11, 2006) ("As part of this threshold showing, the plaintiff must demonstrate that the government has 'taken or damaged' a cognizable property right."); *Cty. of San Diego v. Miller*, 532 P2d 139, 141 (1975) ("To be constitutionally entitled to compensation, the claimant customarily must show he owned a property interest taken by the state."). It is axiomatic that a plaintiff must allege facts that establish what "property" is alleged to have been taken and facts concerning the plaintiff's interest or right to that property to state a claim for inverse condemnation.

Plaintiffs have not done so here. Plaintiffs broadly allege that they "were the owners of, or otherwise held an interest in, property in Jackson County and/or Josephine County" (Compl. ¶¶ 50, 80; *see also id*. ¶ 6), but other than these generalized allegations, the Complaint contains no facts about the properties at issue. For example, there are no allegations about the precise locations of the properties (such as the property addresses or legal descriptions), the nature of the properties (residential, commercial, industrial, etc.), or Plaintiffs' purported interests in the land (whether Plaintiffs are fee owners, tenants, easement holders, etc.). And as noted above, the Complaint generally describes Plaintiffs as "individuals, representatives, and legal entities" without any other facts concerning who the Plaintiffs are, and it is unclear how any of the named plaintiffs are *legal entities* (as they all

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appear to be individuals). Without such basic factual allegations, Plaintiffs have not stated a claim for inverse condemnation.

Moreover, Plaintiffs do not allege ultimate facts concerning the extent to which their properties were damaged. Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Id*. (*citing Lincoln Loan Co.*, 274 Or at 57); *Lombardy v. Peter Kiewit Sons' Co.*, 72 Cal. Rptr. 240 (Cal Ct App 1968), *overruled on other grounds by S. Cal. Edison Co. v. Bourgerie*, 507 P2d 964 (1973) (emphasis added) ("No recovery in inverse condemnation may be had unless damage in a substantial amount to the property itself has been sustained."). Here, Plaintiffs conclusorily allege that they suffered "substantial harm" to their properties and that PacifiCorp's conduct "substantially and unreasonably interfered with Plaintiffs' use and enjoyment of their real and personal property" (Compl. ¶ 46; *see also id*. ¶¶ 58, 88), but Plaintiffs do not allege any *facts* describing that purported interference. Again, without any factual allegations describing the way in which Plaintiffs' specific properties were damaged (or interfered with because of PacifiCorp's actions), Plaintiffs have not stated a claim for inverse condemnation.

For all of the foregoing reasons, the First and Fifth Claims for Relief should be dismissed.

C. Plaintiffs' Negligence *Per Se* Claim Fails as a Matter of Law.

Plaintiffs' Eighth Claim for Relief for negligence *per se* alleges numerous distinct sources of potential liability (*see id.* ¶¶ 107-14), taking a "spaghetti approach" to Oregon's electrical utility statutes and regulations: that is to say, "heav[ing] the entire contents * * * against the wall in hopes that something would stick." *Indep. Towers of Wash. v. Washington*, 350 F3d 925, 929 (9th Cir 2003). Neither the Court nor the jury should have to "sort through the noodles in search of [Plaintiffs'] claim." *Id.* PacifiCorp requests that the

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Court dismiss two types of negligence *per se* specifications that fail as a matter of law: (1) those based on general statutes that do not fix the legal standard of care, and (2) those based on regulations whose (purported) violation could not have caused Plaintiffs' damages as a matter of law.

1. Statutes That Only Set Forth General Guidance to "Operate Safely" Do Not Fix the Standard of Care Sufficient to Support Negligence *Per Se*.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout*, 298 Or at 601. Plaintiffs rely on two statutes—ORS 757.020 and 757.035(1)—that fail that test, offering only general guidance that PacifiCorp must operate "safely." As a matter of law, those statutes do not support a negligence *per se* claim under Oregon law.

The Oregon Supreme Court's decision in *Kim v. Multnomah County ex rel. Multnomah County Community Department of Corrections*, 328 Or 140, 153, 970 P2d 631 (1998), is instructive. In *Kim*, the plaintiffs sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Court of Appeals affirmed, the Supreme Court noted that even if Plaintiffs had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id*. at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id*. And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for plaintiffs' negligence *per se* claim" as a matter of law. *Id*.

The same problem exists here: Plaintiffs rely on ORS 757.020 and ORS 757.035, but neither statute fixes the standard of care in any meaningful way. (Compl. ¶ 108.) ORS

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757.020 requires public utilities to "furnish adequate and safe service, equipment and facilities." And ORS 757.035 authorizes the OPUC to "require by general or special orders" that a "person or municipality * * * construct, maintain and operate every line, plant, system, equipment or apparatus in such manner as to protect and safeguard the health and safety of all employees, customers and the public." ORS 757.035(1). Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, ORS 757.035's authorization that the OPUC may adopt "orders" requiring persons to "protect and safeguard the health and safety of all employees" provides no guidance to a factfinder, ORS 757.035(1). Indeed, that statute provides for the scope of the OPUC's regulatory authority—the statute does not establish *any* standard of care for private parties. Equally vague is ORS 757.020: a direction to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601.

For these reasons, the Court should dismiss the portions of Plaintiffs' Eighth Claim for Relief for negligence *per se* to the extent it is based on ORS 757.020 and 757.035(1).

2. Plaintiffs Cannot Show That They Were Meant to Be Protected by ORS 477.720 or That Their Private Property Damage Is the Type of Injury That the Statute Was Enacted to Prevent.

To allege a negligence *per se* claim, a plaintiff must allege, *inter alia*, "that plaintiff was a member of the class of persons meant to be protected by the statute" *and* "that the injury plaintiff suffered is of the type that the statute was enacted to prevent." *McAlpine v. Multnomah Cnty.*, 131 Or App 136, 144, 883 P2d 869 (1994). Plaintiffs cannot meet that burden with respect to ORS 477.720. (*See* Compl. ¶ 108.)

ORS 477.720 provides that certain conduct of failing to extinguish a fire or allowing a fire to spread through carelessness or neglect is "unlawful." ORS 477.993(1), in turn, provides that a violation of ORS 477.720 "is a violation punishable" as a Class A, C, or D violation per the terms outlined in the statute. And ORS 477.980, in turn, provides that "[t]he

State Board of Forestry, by rule, shall establish the enforcement policy for violations prescribed in ORS 477.993." The Board of Forestry has adopted administrative rules setting forth that enforcement policy. *See* OAR 629-047-0040 (basic enforcement process); OAR 629-047-0270 (providing that the enforcement process in OAR 629-047-0040 shall apply to violations of ORS 477.720).

Thus, the context makes clear that the purpose of the statute is to ensure that the Board of Forestry has enforcement authority over fires that violate ORS 477.720, not to create a civil cause of action for any member of the public. "Nothing on the face of" ORS 477.720 or "in the surrounding provisions" or ORS 477.980-.993 suggests that it was meant to protect the general public from property damage occurring on private property. *McAlpine*, 131 Or App at 145. Rather, the concern of the statute is the failure to extinguish fire set on or near forestland, or the spread of the fire to or through forestland. *See also* ORS 477.005(1) (policy of state of Oregon is "prevention and suppression of forest fires"). Further, like in *McAlpine*, this statute is part of a broader statutory scheme that delegates to a particular agency—here, the Board of Forestry—the authority to take enforcement action. Such statutes do not support a negligence *per se* claim for civil liability by a private party. *McAlpine*, 131 Or App at 144-46 (statute delegating to Board of Parole and Post-Prison Supervision discretion to order the arrest and detention of certain parolees not intended to specifically protect the public, but rather "gives the Board the means to enforce compliance with the conditions of parole").

For these reasons, the Court should dismiss the portions of Plaintiffs' negligence claim premised on a negligence *per se* theory based on ORS 477.720.

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3. The Administrative Regulations Cited by Plaintiffs Cannot Support Negligence *Per Se* Because Plaintiffs Cannot Show That (a) Any Purported Violations Injured Them, and (b) the Legislature Contemplated Imposition of Private Liability for Violations of Those Regulations.

Once a statute "fixes the legal standard of conduct, *Shahtout*, 298 Or at 601," to recover for negligence *per se*, Plaintiffs still must show that "(1) [D]efendants violated a statute; (2) that [P]laintiff[s] w[ere] injured as a result of that violation; (3) that [P]laintiff[s] w[ere] * * * member[s] of the class of persons meant to be protected by the statute; and (4) that the injury [P]laintiff[s] suffered is of a type that the statute was enacted to prevent." *McAlpine*, 131 Or App at 144 (emphasis omitted). Although negligence *per se* may be based on application of a regulation, two conditions must be satisfied: "First, the regulation must, in fact, support a private right of action under the four-part test prescribed in [*McAlpine*]. Second, even if the regulation meets the *McAlpine* factors, its terms permitting the imposition of private liability must not be *ultra vires*." *Ettinger v. Denny Chancler Equip. Co.*, 139 Or App 103, 107, 910 P2d 420 (1996).

Plaintiffs' claims based on various regulations' recordkeeping requirements—specifically OAR 860-024-0011(1)(a)-(b), OAR 860-024-0011(1)(d), and OAR 860-024-0016(2)—cannot support negligence *per se* because Plaintiffs cannot show that any purported failure to keep "adequate written records" caused Plaintiffs' alleged harm. (*See* Compl. ¶¶ 109(b), 109(c), 110.) The Complaint alleges several such failures, including to "[m]aintain adequate written records of policies, plans, and schedules to show inspections and corrections are being carried out" (*id.* ¶ 109(c) (citing OAR 860-024-0011(1)(d)); to "file reports with the [OPUC]" regarding PacifiCorp's "detailed inspections of * * * overhead facilities" (*id.* ¶ 109(b) (citing OAR 860-024-0011(1)(b)); and to "keep appropriate records" of PacifiCorp's "vegetation management program" (*id.* ¶ 110 (citing OAR 860-024-0016(2))). As a matter of law, that alleged conduct could not have caused Plaintiffs' injuries. Because none of these alleged recordkeeping failures could have "caused" Plaintiffs' alleged

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injuries, Plaintiffs' negligence claim—to the extent it is based on a negligence *per se* theory based on these regulations (OAR 860-024-0011(1)(a)-(b), (d); and OAR 860-024-0016(2)) fails as a matter of law.

Nor can Plaintiffs show that application of any of the cited regulations—including the remaining regulations cited in their Complaint, OAR 860-024-0010, OAR 860-024-0011(2), OAR 860-024-0016(5)—would be anything other than *ultra vires*. Each of those regulations implements ORS 757.035. That statute delegates to the OPUC the power, *inter alia*, to adopt and prescribe rules for owners and operators of power lines and power systems "for the protection of the health or safety of all employees, customers or the public." ORS 757.035. The legislature also delegated to the OPUC the ability to fine or impose civil penalties on any person who fails to comply with any statutes, rules, regulations, or orders of the OPUC. *See* ORS 757.990, 757.991. Certainly, the OPUC's authority is broad. However, "[t]here is no suggestion in those statutes * * * that they contemplate private, as opposed to governmental, rights of action" for violations of OPUC statutes or rules adopted pursuant thereto. *Ettinger*, 139 Or App at 109.

For these reasons, Plaintiffs cannot maintain a negligence *per se* claim based on any of the statutes or regulations cited in the Complaint and so the Eighth Claim for Relief should be dismissed.

D. Plaintiffs' "Ninth" Claim for Relief for Public Nuisance Pursuant to ORS 477.064 Fails as a Matter of Law.

Plaintiffs' purport to allege a claim for "public nuisance" pursuant to ORS 477.064. That claim fails as a matter of law and should be dismissed because that statute does not create a private right of action.

"When a party asserts a right of action to enforce a duty created by a statute, the first question is whether the statute expressly or impliedly indicates that the legislature intended to create or to deny such a right of action." *Doyle v. City of Medford*, 356 Or 336, 363, 337 P3d

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797 (2014). In answering this question, the court examines "the text, context, and legislative history * * * to determine if there is an indication that the legislature" intended to create a private right of action. *Cruz v. Multnomah Cnty.*, 279 Or App 1, 21, 381 P3d 856 (2016). In examining the text, context, and legislative history, the court focuses on two factors: (1) "whether the statute refers to civil liability in some way," and (2) "whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore, there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle*, 356 Or at 345-46.

ORS 477.064 states as follows:

> "Any fire on any forestland in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life, forest resources or property. The spread of fire in forestland across an ownership boundary is prima facie evidence of fire burning uncontrolled."

Nothing in the plain text of the statute suggests that private parties, such as Plaintiffs, can base a civil action on an alleged violation of the law. First, ORS 477.064 does not refer—explicitly or implicitly—to civil liability. At most, that statute declares certain conduct to be a tort and provides an evidentiary standard for assessing that tort; there is no indication from the text of the statute that the Oregon legislature intended to create a private right of action. Second, the statute's context also suggests that it does not create a private cause of action. ORS 477.064 is contained in the same chapter as ORS 477.089, which specifically states (in part): "This section *does not create a new cause of action* or alter any existing cause of action." ORS 477.089(5) (emphasis added).

Further, under *Doyle*, a court may not imply a cause of action from an Oregon statute when a plaintiff has an "existing claim for relief and associated remedies." *Doyle*, 356 Or at 371. Here, Plaintiffs have brought common law public nuisance and negligence claims. Thus, they have existing common law remedies, and the Court should decline to infer that

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they are entitled to bring a separate statutory cause of action pursuant to ORS 477.064. Indeed, that is precisely the conclusion reached by Judge Johnson in the Douglas County Circuit Court, who expressly found that "ORS 477.064 does not create a private statutory cause of action" but rather "only defines a certain circumstance to be a nuisance" and dismissed the plaintiffs' claim based upon ORS Chapter 477. (*See* Ramfjord Decl., Ex. H.)

For the foregoing reasons, because ORS 477.064 does not give rise to a private right of action, Plaintiffs' "public nuisance" claim premised on that statute fails as a matter of law and should be dismissed.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiffs' First, Second, Third, Fourth, and Fifth Claims for Relief; Eighth Claim for Relief for Negligence Per Se; and "Ninth" Claim for Relief for Public Nuisance pursuant to ORS 477.064.

DATED: December 16, 2022

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s/ Per A. Ramfjord

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANT PACIFICORP'S PARTIAL MOTION TO DISMISS COMPLAINT** on the following named person(s) on the date indicated below by

☐ mailing with postage prepaid.	☒ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to ORCP 9 G agreement among parties/counsel dated _____.
☐ overnight delivery.	☒ eService via Odyssey File & Serve. (*if registered*)

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

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DATED: December 16, 2022

s/ Per A. Ramfjord
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E-Served: May 1 2023 2:50PM PDT Via Case Anywhere

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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

IN RE SLATER FIRE LITIGATION

LYLA HITCHCOCK, et al.,

Plaintiffs,

v.

PACIFICORP, et al.,

Defendants.

Case No. 34-2023-00290833

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Relates to: Hodges et al. v. PacifiCorp et al., No. 34-2022-00325617

Pursuant to the provisions of Code of Civil Procedure Section 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiffs' Complaint[1] ("Complaint"), and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

---

[1] Following the Court's January 13, 2023 Order Granting Defendant PacifiCorp's Motions to Sever and Dismiss Oregon-Resident Plaintiffs, the remaining *Hodges* plaintiffs are: George W. Thorward; Ronald D. Sharp; Taft Tinnin; Shari Tinnin; Tracy Ledbetter; Teresa Ledbetter; Alaina Ledbetter; Erik A. Wheaton; Peggy L. Wheaton; Perry Ervin Murphy; Sandra Jean Morgan; David Louis Poeschel; Stormy Springer; Susan Tarpley; Steven White; Cierra Rhodes-Silva; and Karen Haas.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack standing to bring their claims.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the allegations in the Complaint are barred, in whole or in part, for lack of jurisdiction, including but not limited to the limitations of California Public Utilities Code Section 1759.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other beach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damages awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and the California Public Utilities Commission.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County and City of Los Angeles, the County and City of Ventura, the City of Santa Monica, the City of Malibu, the State of California, the California Public Utilities Commission, the United States of America, and any other relevant public entities including their agencies, and pursuant to the law.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, at all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on waiver.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on laches.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on estoppel.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that if responsible for Plaintiffs' injuries, damages, and

expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the action is barred by the statute of limitations including, but not limited to, Code of Civil Procedure §§ 335.1, 338(a)-(c), (j), and 339.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire(s), it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the claims in the Complaint are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense, PacifiCorp alleges that Plaintiffs are not entitled to treble or double damages per Civil Code §§ 3346, 733, and 3294, especially because PacifiCorp's conduct or trespass was not causal, involuntary, willful or malicious; PacifiCorp did not negligently, intentionally, or willfully and maliciously trespass on Plaintiffs' property or damage Plaintiffs' trees; and due to the penal nature of the requested damages, Plaintiffs are not entitled to either double or treble damages if Plaintiffs are awarded punitive damages.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

THIRTIETH AFFIRMATIVE DEFENSE

32. As a thirtieth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

THIRTY-FIRST AFFIRMATIVE DEFENSE

33. As a thirty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the claims in the Complaint for punitive damages are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and any claim for punitive damages is limited by state and federal law,

including but not limited to the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 123 S. Ct. 1513.

THIRTY-SECOND AFFIRMATIVE DEFENSE

34. As a thirty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the allegations in the Complaint fail to state facts sufficient to support an award of exemplary or punitive damages or other statutory fines or penalties against PacifiCorp. No alleged act or omission of PacifiCorp was oppressive, fraudulent, or malicious under California Civil Code section 3294, and therefore, any award of punitive damages is barred. Any claim for punitive damages also is barred under California Civil Code section 3294(b). No alleged act or omission of PacifiCorp was willful under California Public Utilities Code section 2106, and therefore, any award of punitive damages is barred.

THIRTY-THIRD AFFIRMATIVE DEFENSE

35. As a thirty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' claims are preempted, in whole or in part, by federal law.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

36. As a thirty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs, the person(s) insured by Plaintiffs, or the underlying insureds from which Plaintiffs' claims arise, knew about the risk, and voluntarily undertook the risk that led to the accident or injuries complained of in this case.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

37. As a thirty-fifth separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the California Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions. (Pub. Util. Code § 1759.)

THIRTY-SIXTH AFFIRMATIVE DEFENSE

38. As a thirty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

Dated: May 1, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen

Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

SLATER FIRE CASES

Lead Case No. 34-2020-00290833-CU-MT-GDS

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On May 1, 2023, I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 1, 2023, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.184

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

SUSAN IRENE TERRAN; THE SUSAN I. TERRAN TRUST DATED JANUARY 9, 2006; DAVID R. HODGES; MARTHA T. HODGES; DAVID KENDALL; and LYDIA KENDALL,

Plaintiffs,

v.

PACIFICORP, an Oregon corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp,

Defendants.

No. 23CV27759

DEFENDANTS' PARTIAL MOTION TO DISMISS

Amount Claimed: Over $10,000,000
Filing Fee: ORS 21.160(1)(e) - $1,178

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UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request oral argument and estimate that 60 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Pursuant to ORCP 21 A(1)(h), PacifiCorp moves to dismiss the following claims for relief for failure to state ultimate facts sufficient to state a claim: First Claim for Relief (Inverse Condemnation Under the California Constitution); Fifth Claim for Relief (Inverse Condemnation Under the Oregon Constitution); Eighth Claim for Relief (Negligence *Per Se*); and Tenth Claim for Relief (Public Nuisance, ORS 477.064).[1]

PacifiCorp also moves to dismiss all of Plaintiffs' claims to the extent liability is based on PacifiCorp's decision to institute or not institute a Public Safety Power Shutoff ("PSPS") in connection with the Slater Fire because the Oregon Public Utility Commission ("OPUC") and, to the extent applicable, the California Public Utility Commission ("CPUC") have exclusive and primary jurisdiction over such matters.

PacifiCorp appreciates that this motion is lengthy. That length is the result of Plaintiffs' having pleaded 10 claims involving two states' laws. Accordingly, PacifiCorp summarizes the grounds for its motions in the following chart:

Mtn.	Claim	Basis for Motion
1	Multiple	PacifiCorp seeks a determination that Oregon law applies to this case.
2	Inverse Condemnation (California – Claim 1)	Plaintiffs' claim should be dismissed because Plaintiffs cannot satisfy California Supreme Court's requirements to state an inverse condemnation claim.

[1] Plaintiffs plead Claims 5-12 in the alternative to Claims 1-4. (Compl. ¶ 82.) For the reasons stated herein, Oregon law—not California law—applies, and thus Claims 1-4 should be dismissed. But if the Court concludes that California law—not Oregon law—applies, then Claims 5-12 should be dismissed (and in any event, Claims 5, 8, and 10 should be dismissed for the reasons stated herein).

3	Inverse Condemnation (Oregon – Claim 5)	Plaintiffs' claim should be dismissed because Plaintiffs cannot show that any of PacifiCorp's "intentional" acts "inevitably" caused the invasion of Plaintiffs' properties or meet other requirements to state a claim.
4	Negligence *Per Se* Oregon – Claim 8)	Plaintiffs' claim should be dismissed because none of the statutes or regulations that Plaintiffs cite support negligence *per se* as a matter of law.
5	Public Nuisance (Oregon – Claim 10)	Plaintiffs' claim should be dismissed because ORS 477.064 does not create a private right of action.
6	Multiple	PacifiCorp seeks a ruling dismissing the claims arising under whichever state's law the Court determines does not apply in this case.
7	Multiple	PacifiCorp seeks a ruling that the OPUC and CPUC have primary jurisdiction over power shutoffs to the extent Plaintiffs' claims are based on those shutoffs.

This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Reilley D. Keating ("Keating Decl."), and the pleadings and papers on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Over the 2020 Labor Day weekend, an unprecedented windstorm hit Northern California and Southern Oregon, igniting dozens of wildfires across the region. Nearly three years later, Plaintiffs filed a Complaint asserting 12 different claims for relief under Oregon and California state law. Plaintiffs allege that PacifiCorp caused the Slater Fire, which as alleged by Plaintiffs ignited in Northern California near Happy Camp and then spread across the state border and into Southern Oregon. (Compl. ¶¶ 1, 4, 5.) Litigation involving the California-resident Plaintiffs is proceeding in California state court. Plaintiffs here are all Oregon residents of Josephine County. Government authorities and PacifiCorp itself are still actively investigating these wildfires, and the causes and origins of the fires have not been fully determined.

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PacifiCorp seeks an order dismissing Plaintiffs' claims for relief, as summarized below.

Oregon Law Applies. As a preliminary matter, the Court should reject Plaintiffs' request to apply California law to this Oregon action involving Oregon residents whose properties are located exclusively in Oregon. As explained below, Plaintiffs cannot assert in this action an inverse condemnation claim based on Article I, section 19, of the California Constitution. The choice-of-law rules in ORS 15.400, *et seq*. do not apply to that claim. Moreover, Oregon's choice-of-law rules compel the application of Oregon law to Plaintiffs' claims. And even if that were not the case (and it is), Oregon law is substantially more appropriate. Thus, all of Plaintiffs' claims based on California law—the First, Second, Third, and Fourth Claims for Relief—should be dismissed.

Inverse Condemnation Claims. Plaintiffs' inverse condemnation claims under the California and Oregon Constitutions (First and Fifth Claims for Relief) also should be dismissed.

Even if Plaintiffs could assert an inverse condemnation claim under the California Constitution for an alleged taking of property in Oregon (which they cannot do), Plaintiffs' First Claim for Relief nonetheless fails to state a claim. To avoid dismissal, Plaintiffs must allege that (1) a "public entity" (2) "substantially caused," (3) through an "inherent danger[] of the public improvement as deliberately designed, constructed, or maintained," (4) an injury to private property for public use. *City of Oroville v. Superior Ct. of Butte Cnty.*, 446 P3d 304, 312, 314 (Cal 2019). Plaintiffs do not and cannot make any of those required showings because: (1) PacifiCorp is not a "public entity"; (2) Plaintiffs allege only a minimal "causal connection" between PacifiCorp's infrastructure and the alleged damage to their properties in Oregon, which the California Supreme Court has held is "insufficient to sustain a finding of inverse condemnation liability," *id*. at 315; and (3) Plaintiffs cannot allege that

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the alleged injury to their private property resulting from a wildfire was for a "public use," *see id*.

Plaintiffs' Fifth Claim for Relief for inverse condemnation under Article I, section 18, and Article XI, section 4, of the Oregon Constitution also fails. Multiple trial courts in Oregon, including Multnomah County, have dismissed similar inverse condemnation claims in cases arising out of the Labor Day fires on several independent grounds. (*See* Keating Decl., Exs. 1-8, 13-14.)

First, as multiple trial courts have found, Plaintiffs cannot show that PacifiCorp "intentionally undertook its actions" such that "the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P3d 1261 (2014). *Second*, Plaintiffs have not alleged—and cannot allege—that PacifiCorp is a "governmental defendant" or that it took Plaintiffs' property "for a public use" as required to state an inverse condemnation claim under Article I, section 18. *Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 27-28, 56 P3d 396 (2002). *Third*, Plaintiffs' Article XI, section 4, inverse condemnation claim similarly fails because Plaintiffs cannot allege that PacifiCorp took Plaintiffs' property for public use or acted "under authority of law." *Fourth*, and finally, Plaintiffs' inverse condemnation claims under California and Oregon law should be dismissed because Plaintiffs have not alleged ultimate facts regarding the properties that Plaintiffs allege were "taken" by PacifiCorp, the nature of Plaintiffs' rights or interests in such properties, or the extent of any alleged property damage.

Negligence *Per Se* Claim. The Court also should dismiss Plaintiffs' Eighth Claim for Relief for negligence *per se*. Only statutes and regulations that "fix[] the legal standard of conduct," such that "there is no question of due care left for a factfinder to determine," can support negligence *per se*. *Shahtout v. Emco Garbage Co*., 298 Or 598, 601, 695 P2d 897 (1985). The statutes and regulations cited by Plaintiffs do not do so or otherwise meet the requirements for a negligence *per se* claim, and thus such a claim cannot be stated.

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Public Nuisance Claim. The Court should dismiss Plaintiffs' Tenth Claim for Relief for public nuisance pursuant to ORS 477.064 because that statute does not create a private right of action. Because that statute does not refer to civil liability and the Court need not provide a remedy when Plaintiffs already have the ability to assert a claim for negligence, the Court should dismiss the claim.

All Oregon Claims to the Extent the Court Determines California Law Applies. Oregon's choice-of-law rules provide that a plaintiff may not "pick and choose" the favorable parts of one state's law and disregard the others. Thus, to the extent that the Court determines that California law applies (and it should not for the reasons stated herein), Plaintiffs' claims based on Oregon law should be dismissed.

All Claims Based on PacifiCorp's PSPS-Related Decision. The OPUC and CPUC have exclusive and primary jurisdiction with respect to any decisions by PacifiCorp regarding whether to institute (or not institute) a PSPS, and thus Plaintiffs' claims based on such decisions should be dismissed.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers in Oregon, Washington, and Northern California. Plaintiffs allege that Pacific Power is a "for-profit, investor-owned utility company" and that it is an "assumed business name" of PacifiCorp. (Compl. ¶ 10.) Further, PacifiCorp is "an electric-power company and the parent company of Pacific Power," and it is "an Oregon corporation doing business as a public utility." (*Id.* ¶ 11.) The principal places of business for Pacific Power and PacifiCorp are in Multnomah County, Oregon. (*Id.* ¶¶ 10, 11.) Plaintiffs also allege the legal conclusions that Pacific Power and PacifiCorp each "is a public entity for purposes of relevant law" and is "a public entity operating under the protection of the State, with the power of condemnation, and performs functions typically reserved for government agencies." (*Id.*) Moreover, Plaintiffs allege that

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PacifiCorp's "officers and management are intertwined" and that they "operate as a single business enterprise based in the same building in Multnomah County." (*Id*. ¶ 14.)

In California, PacifiCorp serves around 45,000 customers in Siskiyou, Del Norte, Modoc, and Shasta counties. Its California operations are regulated by the CPUC, and PacifiCorp may raise rates only by obtaining the CPUC's approval. *See, e.g.*, Cal Pub Util Code § 454(a). In Oregon, PacifiCorp serves around 596,000 customers under the Pacific Power brand. Its Oregon operations are regulated by the OPUC, and PacifiCorp may only raise rates by proving to the OPUC that a proposed rate increase is "fair, just and reasonable." ORS 757.210(1)(a); *see also* ORS 757.205.

This case arises out of the Slater Fire, which Plaintiffs allege started in Northern California on September 8, 2020, when trees "crash[ed] into" PacifiCorp's powerlines near Happy Camp and spread north to Southern Oregon. (*See* Compl. ¶¶ 1, 5, 6.) Although Plaintiffs contend that PacifiCorp's equipment in California started the Slater Fire (*id.* ¶ 43), government investigators have not released an official determination of what caused the fire. Plaintiffs, however, contend they have suffered significant damages as a result of the Slater Fire and PacifiCorp's actions, including the loss of real and personal property, personal injuries, emotional distress, and evacuation expenses. (*Id*. ¶ 49.)

This case involves only Oregon-resident Plaintiffs. Initially, some of the Plaintiffs in these Slater Fire cases filed suit in California. PacifiCorp moved to dismiss the Oregon-resident Plaintiffs from the California lawsuits under the doctrine of *forum non conveniens*. The California trial court granted PacifiCorp's motion—finding, among other things, that Oregon had a greater interest in having its laws applied to a dispute involving Oregon-resident Plaintiffs, an Oregon-resident defendant, and property damage in Oregon, especially when all of the relevant decisions on which Plaintiffs' liability theories are premised took place in Oregon. (Keating Decl., Ex. 12 at 2.) No Plaintiffs have appealed that ruling.

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Instead, the Oregon-resident Plaintiffs dismissed from California filed suit here, in Oregon—but seek to apply California law despite the California trial court's decision.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state ultimate facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations, legal conclusions, or mere recitations of a claim's elements are insufficient to state a claim. *See*, *e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997) (citation omitted). When a claim as pleaded remains legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. The Court Should Dismiss Each of Plaintiffs' Claims Based on the Application of California Law.

Plaintiffs allege four claims under California law, asserting that the claims are allowed based on Oregon choice-of-law principles, namely ORS 15.440(2)(a) and (3). (Compl. ¶¶ 47-48.) Plaintiffs' choice-of-law analysis is flawed for multiple reasons. *First*, the choice-of-law rules set forth in ORS 15.400, *et seq*. do not apply to inverse condemnation claims, and thus Plaintiffs' First Claim for Relief for inverse condemnation based on Article I, section 19, of the California Constitution should be dismissed. *Second*, because the alleged "injurious conduct" is alleged to have occurred in both Oregon and California and the resulting injury occurred in Oregon, Oregon law applies to all of Plaintiffs' claims under the governing choice-of-law statutes. *Third*, in the event the Court concludes that either California or Oregon law could apply (which PacifiCorp disputes), the application of Oregon

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law is substantially more appropriately pursuant to ORS 15.445, and Plaintiffs cannot rebut the presumption against extraterritorial application of California law in this Oregon case.

1. Oregon Law Applies to an Inverse Condemnation Claim.

ORS 15.400, *et seq.* was enacted to provide "specific rules for determining which state's law will govern most tort and other non-contractual claims arising from situations having contacts with more than one state." (Keating Decl., Ex. 10 at 5.) Although ORS 15.440 sets forth "general rules" that may permit the application of the law of another state to certain tort and noncontractual claims, ORS 15.430 identifies specific claims to which Oregon law applies notwithstanding any other provision of the statute.

One of those exceptions is ORS 15.430(5), which provides that Oregon law governs "[a]ctions against an owner, lessor or *possessor* of land, buildings or other real property situated in Oregon that seek to recover for, or to prevent, injury on that property and arising out of conduct that occurs in Oregon." (Emphasis added.) The term "possessor" is defined as "one that occupies, holds, owns or controls" and "one that holds property without title." *Webster's Third New International Dictionary* 1770 (3d ed 2002).

No Oregon appellate court has addressed the application of ORS 15.400, *et seq*. to inverse condemnation claims. However, by its nature, an inverse condemnation claim asserts that a defendant with the power of eminent domain has unlawfully *taken* the plaintiff's property without just compensation. *See* Or Const, Art I, § 18 ("Private property shall not be *taken* for public use * * * without just compensation * * *." (emphasis added)); Or Const, Art XI, § 4 ("No person's property shall be *taken* by any corporation under authority of law, without compensation being first made * * *." (emphasis added)); *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 429-30, 60 P3d 557 (2002). As explained by the Oregon Supreme Court in *Dunn*, to constitute a taking, "the government's conduct must be 'tantamount to a public appropriation' of property, both in nature and in degree." 355 Or at 348 (citation omitted). Thus, inherent in such a claim is that the defendant has occupied,

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held, or controlled—*i.e.*, possessed—the property to such a degree that the property owner was deprived of its rights in the property. In this case, the subject properties are in Oregon, and Plaintiffs allege that the conduct occurred in Oregon and California.[2] (Compl. ¶¶ 14 (Defendants "officers and management are intertwined, and they operate as a single business enterprise based in the same building in Multnomah County"), 24-27,[3] 28-29 (allegations regarding public statements made in Oregon), 36 (allegations regarding a call on September 7, 2020 with the Oregon Governor's Chief of Staff, Oregon State Fire Chief, PacifiCorp, and others), 39-47 (PacifiCorp's decision-making).) The California Constitution does not and cannot grant PacifiCorp the power to "take" property in Oregon under basic principles of state sovereignty. Thus, the elements of ORS 15.430(5) are met, and Oregon law applies.

Further, ORS 15.430(4) requires the application of Oregon law to noncontractual actions "filed against a public body of the State of Oregon," unless waived.[4] An inverse condemnation claim is "the label for a judicial proceeding brought by a property owner to remedy an alleged 'taking' that results from *governmental* actions other than the exercise of the eminent domain power." *Nelson v. City of Lake Oswego*, 126 Or App 416, 419 n 2, 869 P2d 350 (1994) (emphasis added); *City of Keizer*, 185 Or App at 431; *see also* discussion *infra* Section IV.B.2.b(i). Although PacifiCorp is not a "public body"[5] (for the reasons

[2] A more robust discussion of where the alleged injurious conduct occurred is set forth below in Section IV.A.2.

[3] Paragraphs 24-27 of the Complaint discusses a "2019 California Wildfire Mitigation Plan" released by Defendants and includes a link to that document, reflected in footnote 3. The Court may consider this document in deciding this ORCP 21 A(1)(h) motion because it is specifically incorporated in the Complaints. *See Kutz v. Lee*, 291 Or App 470, 472, 422 P3d 362 (2018) (addressing standard under former ORCP 21 A(8)); *Boardmaster Corp. v. Jackson County*, 224 Or App 533, 535, 198 P3d 454 (2008). The two cover pages of the linked document reflect a signature by Cynthia Hansen Mifsud, an attorney for PacifiCorp in Portland, Oregon. Thus, accepting Plaintiffs' allegations as true for purposes of this motion to dismiss, the document appears to have been executed in Oregon.

[4] The term "public body" is defined in ORS 15.400(7) as a "public body as defined in ORS 174.109, the Oregon Health and Science University, and the Oregon State Bar." ORS 174.109 defines "public body" to mean state government bodies, local government bodies, and special government bodies.

[5] Plaintiffs allege that PacifiCorp "is a public entity for purposes of relevant law." (Compl. ¶ 10.)

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explained below), PacifiCorp also is not aware of any Oregon appellate case in which inverse condemnation has been applied to an entity that is *not* a "public body."[6] The legislature presumably was aware of this fact when it enacted ORS 15.430(4). Thus, a reasonable construction of ORS 15.430(4) is that it was intended to encompass inverse condemnation claims generally and thus requires the application of Oregon law to such claims.[7]

Even if ORS 15.430 does not require the application of Oregon law, an inverse condemnation claim does not fit squarely within the definition of a "noncontractual claim" and thus is not subject to ORS 15.440. A "noncontractual claim" is "a claim, other than a claim for failure to perform a contractual or other consensual obligation, that arises from a tort as defined in ORS 30.260, or any conduct that caused or may cause injury compensable by damages, without regard to whether damages are sought." ORS 15.400(5). The term "injury" is defined as "physical or nonphysical harm to a person or property caused by the conduct of another person." ORS 15.400(3). Whether a claim is a noncontractual claim is determined under Oregon law. ORS 15.410(1). Further, Oregon law determines what constitutes injurious conduct for purposes of the choice-of-law analysis. ORS 15.415(1).

An inverse condemnation claim is not a tort. *See, e.g., Moeller v. Multnomah County*, 218 Or 413, 423, 345 P2d 813 (1959) (distinguishing between tort actions against public bodies and a taking of private property under Article I, section 18, of the Oregon Constitution); *Vokoun v. City of Lake Oswego*, 189 Or App 499, 510-11, 76 P3d 677 (2003) (inverse condemnation claim not subject to the Oregon Tort Claims Act's damages cap); *Cereghino v. State ex rel. State Highway Comm'n*, 230 Or 439, 443, 370 P2d 694 (1962) (inverse condemnation actions "are not tort actions"). No court has addressed whether inverse condemnation arises from "any conduct that caused or may cause injury compensable

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[6] In *Motes v. PacifiCorp*, 230 Or App 701, 217 P3d 1072 (2009), the plaintiff had asserted an inverse condemnation claim against PacifiCorp, but the trial court dismissed it, and on appeal, the Court of Appeals rejected "without discussion" the dismissal of that claim.

[7] Indeed, this further underscores the inappropriateness and flawed application of Plaintiffs' inverse condemnation claim against PacifiCorp here.

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by damages, without regard to whether damages are sought," as that phrase is used in ORS 15.400(5). For the reasons that follow, the Court should determine that the claim does not fall within the scope of that phrase.

Oregon courts have held that government action that results in mere damage to, but not a taking of, private property does not constitute a compensable taking under Oregon law. In *Moeller* the Oregon Supreme Court contrasted Oregon's constitutional takings provision, 218 Or at 423, 425-30 ("'Private property shall not be *taken* for public use, * * * without just compensation * * *[.]'" (ellipses in original; emphasis added; citation omitted)), with the provisions in many other states that require just compensation to be paid when property is "*taken or damaged*." For example, Article I, section 19(a), of the California Constitution requires just compensation when private property is "taken or damaged for a public use." Oregon, however, has not amended its constitution to include "damage," and thus a takings claim cannot be stated for damage—*i.e.*, harm (or injury)—that does not rise to the level of a taking. *Moeller*, 218 Or at 427; *see also Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (a taking can occur only when the government's action constitutes a "substantial interference" that "destroys or materially decreases the value of private property"). Thus, a claim for inverse condemnation is not a claim for "*any* conduct that *caused or may cause injury* compensable by damages." ORS 15.400(5) (emphases added).

Additionally, the phrase "without regard to whether damages are sought" in the definition of "noncontractual claim" makes no sense in the context of an inverse condemnation claim. *See* ORS 15.400(5). The *only* remedy for an inverse condemnation claim is the payment of just compensation as required by the Oregon Constitution. Plainly, the phrase "noncontractual claim" does not logically apply to an inverse condemnation claim.

This conclusion is supported by the context of ORS 15.440. ORS 15.440(2)(a) provides, in part, that the law of the state in which the injurious conduct occurred determines "the standard of care" by which the conduct is judged. *Id*. There is no "standard of care" in

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an inverse condemnation claim. There is a standard of care in a tort claim and many other noncontractual claims, but this provision makes no sense when applied to an inverse condemnation claim.

Moreover, the statute's legislative history does not support the conclusion that the statute applies to an inverse condemnation claim. ORS 15.400, *et seq*. was drafted by the Oregon Law Commission ("OLC") (Keating Decl., Ex. 10), and Oregon courts rely on the OLC's commentary in interpreting the statute. *See, e.g.*, ORS 15.460 (directing the OLC to make its commentary available on its website); *Portfolio Recovery Assocs., LLC v. Sanders*, 366 Or 355, 366, 462 P3d 263 (2020). In discussing the types of claims that the term "noncontractual claim" was intended to encompass, the OLC identified claims such as those arising from "racial discrimination, employment discrimination (beyond claims covered by employment law), unfair trade practices, breach of fiduciary duty, and restitution." (Keating Decl., Ex. 10 at 11.) Nothing in the list suggests or implies that it was intended to apply to inverse condemnation.

Additionally, ORS 15.415 effectively precludes application of another state's law in any meaningful way to an inverse condemnation claim. That statute identifies certain issues that are determined under Oregon law, including "[w]hat conduct caused the injury, and where the conduct occurred." ORS 15.415(1). As explained by the OLC, "Section 4 [ORS 15.415] provides that Oregon law determines what constitutes 'injurious conduct' or 'conduct that caused the injury' and 'where that conduct and the resulting injury occurred.'" (Keating Decl., Ex. 10 at 20.) To determine what constitutes "injurious conduct" in an inverse condemnation claim, a court must apply Oregon law regarding what conduct constitutes a compensable taking. That necessarily requires application of the intent standard set forth in *Dunn* (*see* discussion *infra* Section IV.B.2.a) as well as the other legal principles regarding what is and is not a compensable taking under Oregon law. After that analysis, it is unclear what meaningful application could be made of another state's law to the claim.

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This statute demonstrates once again that an inverse condemnation claim does not fall within the scope (and was not intended to fall within the scope) of ORS 15.400, *et seq*.

Finally, the very nature of an inverse condemnation claim demonstrates that it was not intended to be, and cannot reasonably be, governed by the law of a state other than that in which the property is located. California's Constitution cannot grant rights to take land in Oregon without violating Oregon's sovereignty. As discussed above, the term "inverse condemnation" is the "label" applied to an action where the government has taken private property without first initiating a condemnation action. *See Nelson*, 126 Or App at 419; *City of Keizer*, 185 Or App at 431. Inherent in the claim is the presumption that the property *could have been lawfully acquired* had the government properly exercised its power of eminent domain by filing a condemnation action and paying just compensation. For properties in Oregon, such an action would have to be filed in Oregon. *See* ORS 35.375 (exclusive procedure for condemnation of property under the power of eminent domain); ORS 35.245(1) (action to condemn property may be commenced in the circuit court in the county where the property is located). It would be illogical to apply the law of another state to an action whose very nature is based on the assertion that a judicial proceeding should have been filed in Oregon.

Accordingly, the Court should reject Plaintiffs' request to apply California law to its inverse condemnation claim and dismiss the First Claim for Relief.

2. Oregon's Choice-of-Law Rules Compel the Application of Oregon Law to Plaintiffs' Action.

Even for claims subject to ORS 15.440, Oregon law applies. Before applying ORS 15.440, the Court first must make several preliminary determinations, including what conduct caused the injury, where the conduct occurred, and where the injury occurred. ORS 15.415(1), (3).[8] Those determinations are made under Oregon law. *Id*. ORS 15.415(1)

[8] "Conduct" is defined as "an act or omission that has occurred or that may occur in the future," and "injury" is defined as "physical or nonphysical harm to a person or property

provides that, if "injurious conduct occurs in more than one state, the state where the conduct occurred that is *primarily responsible* for the injury is the state where the injurious conduct occurred." (Emphasis added.) And under ORS 15.415(3), if the "same conduct causes injury in more than one state, the place of injury is in the *state in which most of the injurious effects occurred*." (Emphasis added.)

There is no dispute that Plaintiffs' alleged injuries occurred solely in Oregon. Plaintiffs reside in Oregon and their properties are located there. (*See* Compl. ¶¶ 7, 48-49.) There are no allegations that Plaintiffs suffered injuries in California.

The question then is what conduct allegedly caused the injury and where that conduct occurred. Viewed in their totality, Plaintiffs' Complaint alleges that the conduct that caused Plaintiffs' injuries is PacifiCorp's decision-making, and those decisions were made in Oregon. Plaintiffs allege that they were injured by PacifiCorp's decisions about the design of powerlines located in California, vegetation management, and whether to keep lines energized, regardless of whether those lines were located in California or Oregon. (Compl. ¶¶ 18-22, 26-30, 36-38, 40-42, 46-47.) Plaintiffs also allege that those decisions were made in Oregon: the officers and management of PacifiCorp operate in a building in Multnomah County, Oregon (*id.* ¶ 14), and Plaintiffs concede that PacifiCorp's principal place of business is in Portland, Oregon (*id*. ¶¶ 10, 11, 14). Thus, as alleged by Plaintiffs in their Complaint, the conduct in question—the decisions described in Plaintiffs' Complaint—occurred *in Oregon*.

Attempting to resist that conclusion, Plaintiffs offer conclusory allegations that the injurious conduct occurred wholly in California, but those assertions cannot be squared with the totality of the allegations in the Complaint. And even if some conduct that allegedly caused Plaintiffs' injuries occurred in California, the state where the alleged conduct

caused by the conduct of another person." ORS 15.400(1), (3). Other determinations are the domiciles of the injured person and person whose conduct caused the alleged injury. For purposes of this motion, PacifiCorp does not dispute that Plaintiffs are domiciled in Oregon, and Plaintiffs have elected PacifiCorp's domicile to be California pursuant to ORS 15.420(2).

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occurred that is *primarily responsible* for Plaintiffs' injuries is Oregon. Accordingly, pursuant to ORS 15.415(1), the injurious conduct occurred in Oregon.

To summarize, for purposes of the choice-of-law analysis under ORS 15.440, the preliminary determinations are as follows:

Issue to Be Determined	Applicable State
Plaintiffs' domicile	Oregon
PacifiCorp's domicile	California (as selected by Plaintiffs pursuant to ORS 15.420(2))
Where the injurious conduct occurred	Oregon (pursuant to ORS 15.415(1))
Where the resulting injury occurred	Oregon (pursuant to ORS 15.415(3))

Therefore, under ORS 15.440(2)(a), the Court may *not* apply ORS 15.440(3)(c) because the injury did *not* occur in a state other than the one in which the conduct occurred. Rather, ORS 15.440(3)(a) applies. That provision states: "If both the injurious conduct and the resulting injury occurred in the same state, the law of that state governs if either the injured person or the person whose conduct caused the injury was domiciled in that state." ORS 15.440(3)(a). Here, the injurious conduct and the resulting injury occurred in Oregon. Plaintiffs are domiciled in Oregon. Thus, Oregon law applies.

3. Oregon Law Is Substantially More Appropriate Pursuant to ORS 15.445.

If the Court decides that California law applies pursuant to ORS 15.440(3)(c) (and it should not), the Court nonetheless should apply Oregon law pursuant to ORS 15.440(4) because the law of this state is substantially more appropriate under the principles of ORS 15.445.

ORS 15.445 identifies the factors by which the "most appropriate law is determined": (1) identifying the states that have a relevant contact with the dispute, such as the place of the injurious conduct, place of resulting injury, domicile, habitual residence or pertinent place of business of each person, or the place in which the relationship between the parties was centered; (2) identifying the policies embodied in the laws of these states on the disputed

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issues; and (3) evaluating the relative strength and pertinence of these policies with due regard to (a) the policies of encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies; and (b) the needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states. Each factor is analyzed below.

a. States with Relevant Contacts.

ORS 15.445(1) weighs in favor of Oregon law. Although Oregon and California arguably have relevant contacts to this dispute, Oregon's contacts are more significant. As discussed above, the allegedly injurious conduct occurred in Oregon (or at a minimum, both Oregon and California), but the resulting injury occurred solely in Oregon. Plaintiffs and PacifiCorp are domiciled in Oregon. Although Plaintiffs have voluntarily chosen to assign California as PacifiCorp's domicile based on its business address in California, Plaintiffs concede that PacifiCorp's principal place of business is located in Oregon, and it is an Oregon citizen. (*See* Compl. ¶¶ 10-11, 17.) Finally, to the extent there is any "relationship" between the parties, that could only be centered in Oregon as that is where Plaintiffs' alleged injuries occurred, where Plaintiffs filed this action, and where Plaintiffs allege jurisdiction and venue are appropriate. (*Id.* ¶¶ 15-17.)

Moreover, a California court addressed the precise question of whether California or Oregon has a more substantial interest in claims asserted by Oregon residents against PacifiCorp related to the Slater Fire. In *Hitchcock et al. v. PacifiCorp*, Sacramento County Superior Court Case No. 34-2020-00290833-CU-MT-GDA, the court granted PacifiCorp's motion to sever the Oregon plaintiffs' claims for damages allegedly caused by the Slater Fire from the California plaintiffs' claims and granted PacifiCorp's motion to dismiss the Oregon plaintiffs' claims on *forum non conveniens* grounds. (Keating Decl., Ex. 12 at 2.) The court ruled that the Oregon plaintiffs' claims, "in all fairness, belong in the state of Oregon," and that, in addition to practical considerations, "public interest factors also weigh in favor of the

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Oregon-Plaintiffs' portion of the case being tried in Oregon. The Oregon courts have a much closer connection to Defendant [PacifiCorp] and its alleged actions, as they affected private citizens of Oregon and the damage that was sustained in Oregon as a result of the fire." (*Id*. at 4.)

Thus, facts related to this first factor weigh heavily in favor of Oregon, rather than California.

b. The Policies Embodied in the Laws of Oregon and California on the Disputed Issues and the Relative Strength and Pertinence of Those Policies.

The second factor requires an identification of the substantive rules in each state that appear to be in material conflict and the policies embodied in those rules. Here, with respect to Plaintiffs' inverse condemnation claim, there is a material difference in Oregon's and California's constitutional takings provisions. Article I, section 18, of the Oregon Constitution requires the payment of just compensation when property is "taken" for public use, while Article I, section 19(a), of the California Constitution requires just compensation for property "taken or damaged."[9] *See, e.g.*, *Moeller*, 218 Or at 425-30. Further, the Second through Fourth Claims for Relief are based on specific California statutes (not Oregon laws).

The third factor requires an evaluation of the relative strength of those policies. In some sense, the policies for the takings clauses in both states are similar. Both constitutional provisions codify the government's inherent authority to exercise its power of eminent domain to take property for public use without the owner's consent but with payment of just compensation. And both states allow a property owner to bring an inverse condemnation

[9] As recognized by the Supreme Courts of both Oregon and California, the intent standard applicable to the states' respective takings clauses is similar. *See City of Oroville*, 446 P3d at 314 (to prevail on an inverse condemnation claim, a plaintiff must prove that the "inherent risk" of the government's deliberate action was a "substantial cause" of plaintiff's property damage, meaning that such damage was the "'inescapable or unavoidable consequence'" of the government action (citation omitted)); *Dunn*, 355 Or at 358-59 (to prevail on an inverse condemnation claim, a plaintiff must show that "the government intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim").

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action when the government's exercise of its power of eminent domain is not done through a proper condemnation action.

However, both states' constitutions and their condemnation statutes recognize that condemnation and the exercise of the power of eminent domain is localized and available only to the sovereign (of each state) or other persons authorized (by the state) to acquire property for public use. For example, both states' condemnation procedures acts make clear that a condemner is "the state" (meaning Oregon or California, respectively), other public bodies in that state (*i.e.*, county, city, etc.), or another entity authorized by law (*i.e.*, by the states' respective legislatures) to exercise the power of eminent domain for a particular purpose. *See* ORS 35.215(1) (definition of "condemner"); Cal Civ Pro Code § 1235.190 (definition of "public entity"). Moreover, condemnation proceedings in both states must be commenced in the county in which the property sought to be taken is located. *See* ORS 35.245(1); Cal Civ Pro Code § 1250.020. And condemnation actions in Oregon must be commenced in the Oregon circuit court, ORS 35.245(1), while condemnation actions in California must be commenced in the California superior court, Cal Civ Pro Code § 1250.010.[10]

PacifiCorp is not aware of any case in Oregon or California that suggests that a governmental body *in one state* is authorized to exercise its power of eminent domain to take property *located in another state* for the first state's public use. In fact, the notion that condemnation could apply extraterritorially is fundamentally at odds with the process for condemnation actions under both states' respective laws. Thus, under the relevant policies in *both* states, Oregon law is substantially more appropriate given that the subject properties all are located in Oregon. The inverse condemnation claim based on Article I, section 19, of the California Constitution should be dismissed.

[10] Similarly, ORS 14.040(1) provides that actions "for injuries to real property" must be commenced and tried in the county in which the subject of the action or suit is situated, further demonstrating the inherent localized nature of a claim such as inverse condemnation.

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So too should Plaintiffs' claims based on specific California statutes. California does not have an interest in regulating conduct that occurs in Oregon. Moreover, California has little, if any, interest in regulating conduct that occurs in both California and Oregon when the alleged "taking" and all related damages are incurred by Oregon residents within the state of Oregon. The Superior Court of California recognized this when it ruled on PacifiCorp's motion to dismiss the Oregon plaintiffs' claims on *forum non conveniens* grounds. (Keating Decl., Ex. 12 at 4 (stating: "California has substantial interest in adjudicating damages of its own citizens occasioned within the border of the state; its interest is markedly less (if any) where the damage, even if arising from the same incident, occurred outside the state to non-California residents and was occasioned by a non-California resident.").)

In contrast, Oregon has a substantial interest in the action as demonstrated by Oregon choice-of-law rules that identify Oregon as the applicable law, the fact that real property located in Oregon was allegedly damaged by a wildfire that burned in Oregon, and the fact that both Plaintiffs and PacifiCorp are citizens of Oregon. Also, PacifiCorp is regulated by the OPUC, which has its own policies and regulations applicable to public utilities in Oregon. Oregon has little interest in adjudicating CPUC regulations when Oregon regulations already apply. Finally, Oregon has a substantial interest in ensuring that its residents are not subjected to liability beyond what Oregon law deems reasonable. All of these interests support applying Oregon law.

4. The Presumption Against Extraterritoriality Bars Application of California Law to Plaintiffs' Claims.

Finally, the policy embodied in the long-standing presumption against extraterritoriality bars Plaintiffs' California-law claims. California courts have long recognized a "presumption against extraterritoriality—that is, a presumption that state law is intended to apply only within state borders." *Ward v. United Airlines, Inc.*, 466 P3d 309, 317 (Cal 2020); *Natkin v. Am. Osteopathic Ass'n*, No. 3:16-cv-01494-SB, 2018 WL 452165 at

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*19 (D Or Jan. 17, 2018) (applying the California presumption and dismissing Oregon plaintiffs' claims under California's Unfair Competition Law). As the *Ward* court explained, this rule "reflects an assumption that a legislature generally legislates with domestic concerns in mind, [and] serves the incidental purpose of avoiding unintended conflicts with other sovereigns." 466 P3d at 317 (citation omitted). In considering whether the presumption bars a plaintiff's claim, "each law must be considered on its own terms." *Id.* at 319. First, courts look to see whether there is any indication that the presumption has been rebutted. The presumption is rebutted only where a contrary intent is "clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history." *Sullivan v. Oracle Corp.*, 254 P3d 237, 248 (Cal 2011) (internal quotation marks omitted) (quoting *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P2d 539, 553 (Cal 1999)). If the presumption is not rebutted, then courts will consider whether "plaintiffs' proposed application of the [statute] would cause it to operate, impermissibly, with respect to occurrences outside the state." *Id.*

As discussed above, Article I, section 19, of the California Constitution applies only to intrastate conduct. Not only is that evident from the language of California's condemnation procedures act, but the plain text of the provision includes numerous terms that apply only to California. *See* Cal Const, Art. I, § 19(e)(5), (6) (defining "State" as "the State of California and any of its agencies or departments," and "public work or improvement" as including "projects identified by a State or local government"). Applying the constitutional provision in an Oregon proceeding to property located in Oregon would cause it to operate impermissibly outside of California and could lead to unintended conflicts with other sovereigns. *See Sullivan*, 254 P3d at 248; *Ward*, 466 P3d at 316-17. The presumption against extraterritorial application of the provision should apply in "full force." *Sullivan*, 254 P3d at 248; *see also Sarviss v. Gen. Dynamics Info. Tech., Inc*., 663 F Supp 2d 883, 898 (CD Cal 2009) (finding the presumption applies to California's wage and hour laws

where there was no "clear expression of extraterritorial application" (internal quotation marks, brackets, and citation omitted)); *Tidenberg v. Bidz.com, Inc*., No. CV 08-5553 PSG, 2009 WL 605249 at *4 (CD Cal Mar. 4, 2009) (granting motion to dismiss Texas residents' claims under California's False Advertising law where the relevant unlawful conduct did not occur in California); *In re Toyota Motor Corp.*, 785 F Supp 2d 883, 917-18 (CD Cal 2011) (applying the presumption dismissing non-resident plaintiffs' claims, where plaintiffs did not allege a "sufficient connection to California" under the relevant statutes).

Plaintiffs' Second, Third, and Fourth Claims for Relief, based on three of California's regulatory codes, fail for similar reasons. Again, nothing in those statutes—including their text, context, or purpose—suggests that they were intended to regulate occurrences outside of California. For example, California Public Resources Code section 4293 authorizes the "director or the agency which has primary responsibility for the fire protection" to identify areas with certain clearance requirements between vegetation and conductors carrying electric current and to permit exceptions from such requirements. The statute does not create a private right of action or otherwise indicate that it was intended to be enforceable in a civil lawsuit by residents and citizens of another state.[11] It is presumed that the legislature intended that they apply exclusively within California. *Sullivan*, 254 P3d at 248.

Moreover, an application here would cause the statutes to impermissibly operate extraterritorially. Although none of these provisions has been interpreted with regard to the presumption against extraterritoriality, courts' interpretations of the geographic scope of other California regulatory codes give insight into the appropriate application here. For example, in *North Alaska Salmon Co. v. Pillsbury*, 162 P 93, 94 (Cal 1916), the California Supreme Court considered whether a worker injured outside of California could seek

[11] Another part of that statute—California Public Resources Code section 4291—imposes obligations on property owners and lessors (among others) to maintain a specific defensible space. It cannot reasonably be argued that those statutory provisions could apply to a person's property in Oregon. This further underscores the inapplicability of this statute to Plaintiffs' claims.

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compensation under the state's workers' compensation statute. The statute "define[d] the conditions upon which the right to compensation rest[ed], [and] simply declare[d] that liability for the compensation provided shall exist where the given conditions concur," but it contained nothing about "the place of injury," nor did it contain "any language from which the intention to extend [its] operation * * * beyond the territorial limits of the state [could] be inferred." *Id*. "Therefore, the Court held, the statute was limited to injuries that occurred within California." *Cotter v. Lyft, Inc.*, 60 F Supp 3d 1059, 1062 (ND Cal 2014) (citing *N. Alaska Salmon Co.*, 162 P at 94).

Since nothing in the regulatory statutes suggests that they were meant to apply to injuries occurring outside of California, suffered by residents of another state, the Second, Third, and Fourth Claims should be dismissed.

5. If the Court Concludes That California Law Applies, the Oregon Claims Should Be Dismissed.

As alleged in the Complaint, Plaintiffs' Oregon-law claims (Claims 5-12) are stated in the alternative to Claims 1-4. (Compl. ¶ 82.) For that reason alone, if the Court concludes that California law applies (and it should not), then it should dismiss the Oregon-law claims. Further, such a result would be consistent with the OLC's statement that a plaintiff may not "'pick and choose' the favorable and discard the unfavorable parts of the law of the state of injury." (Keating Decl., Ex. 10 at 25.)

B. Inverse Condemnation Claims Under California and Oregon Law Should Be Dismissed.

As discussed above, the Court should dismiss Plaintiffs' inverse condemnation claim based on Article I, section 19, of the California Constitution because that provision does not apply to an alleged taking of property located in Oregon. But even if the Court determines that the constitutional provision applies, the First Claim for Relief nonetheless should be dismissed because Plaintiffs fail to allege ultimate facts to meet the requirements for that

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claim under California law. Plaintiffs also cannot state a claim for inverse condemnation under the Oregon Constitution for the reasons described below. In short, both the California and Oregon inverse condemnation claims fail as a matter of law.

1. Plaintiffs Cannot State—and Have Not Sufficiently Alleged—an Inverse Condemnation Claim Under the California Constitution.

The California Constitution's takings clause requires the government to provide "just compensation" when private property is "taken or damaged for a public use." Cal Const, Art I, § 19(a). There are two traditional types of takings actions: a formal eminent domain proceeding "instituted by a public entity to acquire private property for public use," and an "inverse condemnation action" initiated by a private property owner when a governmental act "amounts functionally to a taking" but the government "fails to pay the requisite compensation." *City of Oroville*, 446 P3d at 310.

Inverse condemnation does not authorize holding public entities "strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however remote, to a public improvement." *Id*. at 307. Nor does inverse condemnation cover damages "caused by the negligent conduct of public employees" or the "negligent operation of the improvement." *Customer Co. v. City of Sacramento*, 895 P2d 900, 908 (Cal 1995) (internal quotation marks, emphasis, and citation omitted). Instead, the purpose of inverse condemnation is limited and specialized: to take losses that stem from the "inherent dangers of the public improvement as deliberately designed, constructed, or maintained," *City of Oroville*, 446 P3d at 312, and distribute those losses "throughout the community," *Holtz v. Superior Court*, 475 P2d 441, 445 (Cal 1970) (internal quotation marks and citation omitted).

Under that standard, Plaintiffs' California inverse condemnation claim fails because (1) PacifiCorp is not a public entity entitled to spread inverse losses among the public as a matter of right; (2) the alleged damage was not an "inescapable or unavoidable consequence" (3) of "an inherent risk presented by the deliberate design, construction, or maintenance of

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the public improvement"; and (4) the alleged damage did not further a public use. Because Plaintiffs do not and cannot plausibly allege ultimate facts sufficient to state an inverse condemnation claim (even if granted leave to replead), the Court should dismiss the First Claim for Relief with prejudice.

a. PacifiCorp Is a Private Corporation, Not a Public Entity.

Under the California Constitution's takings clause, a "*public entity* must pay the owner just compensation when it takes or damages private property for public use." *City of Oroville*, 446 P3d at 309 (emphasis added) (citing Cal Const, Art I, § 19); *Paterno v. State*, 87 Cal Rptr 2d 754, 767 (App 1999) ("The condemnation clause * * * requires an act of a public body."); *Bach v. County of Butte*, 263 Cal Rptr 565, 572-73 (App 1989) ("[I]t is elementary that an inverse condemnation action—being based upon the taking or damaging of property for public use without just compensation—requires state action and, therefore, cannot be asserted against private parties."). Inverse condemnation is limited to government entities because the underlying purpose of the takings clause is to take losses "inflicted upon [an] individual" and "distribute [them] throughout the community." *Holtz*, 475 P2d at 445 (internal quotation marks and citation omitted). The takings clause also gives private property owners remedies they "would not otherwise have against the state" because government entities are immune from liability for most tort claims. *Bauer v. County of Ventura*, 289 P2d 1, 5 (Cal 1955), *abrogated on other grounds as recognized by Belair v. Riverside Cnty. Flood Control Dist.*, 764 P2d 1070, 1077 (Cal 1988).

The California Supreme Court has instructed courts to interpret California's takings clause consistent with the "history [and] intent of the provision," avoiding "literal (and overly simplistic) interpretation[s]." *Customer Co.*, 895 P2d at 906. For decades, California courts have held that "loss distribution" is the fundamental policy goal "underpinning inverse condemnation." *Gutierrez v. County of San Bernardino*, 130 Cal Rptr 3d 482, 485 (App 2011) (internal quotation marks and citation omitted). As the California Court of Appeal has

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explained, the goal of inverse condemnation is "to spread among the benefiting community any burden disproportionately borne by a member of that community." *Barham v. S. Cal. Edison Co.*, 88 Cal Rptr 2d 424, 430 (App 1999). That "fundamental policy" applies only to public entities, which can "socialize[] and distribute[]" inverse condemnation losses "over the taxpayers at large." *Cantu v. Pac. Gas & Elec. Co.*, 234 Cal Rptr 365, 368 (App 1987) (internal quotation marks and citation omitted). The California Supreme Court has thus never ruled that inverse condemnation liability applies to regulated, privately owned electrical utilities like PacifiCorp.

Given the history and intent of the takings clause, there is no basis to subject PacifiCorp—a private corporation—to inverse condemnation liability. Plaintiffs conclusorily allege that PacifiCorp is "a public entity for purposes of relevant law" (Compl. ¶¶ 10-11), but that is a legal conclusion that the Court is not required to accept. And in fact, Plaintiffs *also* allege that PacifiCorp is a "for profit, investor-owned utility company," or in other words, that it is a private corporation. (*See id*.)

At most, Plaintiffs allege that PacifiCorp is an "electrical corporation" and a "public utility" under California Public Utilities Code sections 218(a) and 216(a)(1), respectively. (*Id.* ¶ 54.) They also allege that PacifiCorp's "utility infrastructure, including their powerlines, are public improvements for the supplying of electricity to the public for public use." (*Id.* ¶ 56.) Even accepting Plaintiffs' allegations as true, these defined terms include private corporations. In other words, not all "public utilities" or "electrical corporations" are government entities subject to inverse condemnation liability. Section 216(a)(1) defines "public utility" to include an "electrical corporation"; section 218(a) in turn defines "electrical corporation" as "every corporation * * * owning, controlling, operating, or managing any electric plant," whether publicly or privately owned. *See* Cal Pub Util Code §§ 216(a)(1), 218(a). And section 217 defines an "electric plant" as "real estate, fixtures and personal property" that "facilitate[s] the production, generation, * * * or furnishing of

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electricity." Cal Pub Util Code § 217. None of those statutes provides that any such entity is a government entity for purposes of inverse condemnation liability, nor do they address such an entity's ability to spread its inverse losses to society at large.

As a private corporation, PacifiCorp does not have the right to "socialize[] and distribute[]" its losses to "taxpayers at large." *Cantu*, 234 Cal Rptr at 368 (internal quotation marks and citation omitted). PacifiCorp is not a state entity and cannot levy taxes. And PacifiCorp lacks the ability to set its own rates; that right is reserved to the CPUC. *See* Cal Pub Util Code § 454(a) ("[A] public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."). And, as the CPUC explained in rejecting San Diego Gas & Electric's application to raise rates to spread losses from settling a multimillion-dollar inverse condemnation lawsuit, "[i]nverse [c]ondemnation principles are not relevant" to the CPUC's decision about whether to raise utility's rates. (Keating Decl., Ex. 11 at 67.) For those reasons, California litigants and courts have long recognized that "inverse condemnation * * * cannot be asserted against private parties." *Bach*, 263 Cal Rptr at 572-73; *see also Sierra Palms Homeowners Ass'n v. Metro Gold Line Foothill Extension Constr. Auth.*, 228 Cal Rptr 3d 568, 574 (App 2018) (affirming dismissal of inverse condemnation claim after plaintiff did not even "contend in its brief on appeal" that it could state a cause of action, because defendant was "a private entity"). The Court should recognize the same principle and dismiss the California inverse condemnation claim with prejudice.

b. Plaintiffs Do Not and Cannot Allege That Damage to Their Specific Properties Was Inescapable or Unavoidable.

Plaintiffs' California inverse condemnation claim also fails because Plaintiffs cannot allege substantial causation as a matter of law.

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Under California law, the "core of the test" for "substantial causation" requires that damage to private property be the "'inescapable or unavoidable consequence'" of government action. *City of Oroville*, 446 P3d at 314 (quoting Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings LJ 431, 437 n 32 (1969)); *see also Albers v. County of Los Angeles*, 398 P2d 129, 134 (Cal 1965) (public entities are only liable for damage caused by the "'necessary effect[s]'" of a public improvement (citation omitted)); *Sheffet v. County of Los Angeles*, 84 Cal Rptr 11, 20 (App 1970) ("Property is only deemed taken or damaged for a public use if the injury is a necessary consequence of the public project."). As the California Supreme Court has explained, that rule is intentionally difficult to satisfy because courts must "mitigate concerns that 'compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost.'" *City of Oroville*, 446 P3d at 311 (quoting *Bacich v. Bd. of Control of Cal.*, 144 P2d 818, 823 (Cal 1944)).

City of Oroville demonstrates the high standard that Plaintiffs must meet to establish substantial causation. In that case, three dentists brought an inverse condemnation action for damage from a city's sewer system, which backed up and flooded their office. *Id*. at 307. The city argued that the dentists failed to show that their damages were substantially caused by the city's deliberate actions because the dentists had "failed to install a legally-required backwater valve" that would have prevented the damage. *Id*. The California Supreme Court reversed a judgment for the plaintiffs, explaining that inverse condemnation does *not* provide for strict liability for "any conceivable damage bearing some kind of connection, however remote, to a public improvement." *Id*. Instead, the "damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement." *Id*. at 312. And while the dentists' damages related to the "design, operation, and maintenance of the sewer system," the backwater valve "would have prevented or substantially diminished the risk of the mishap." *Id*. at 316.

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Accordingly, the Supreme Court held that there was no substantial causation as a matter of law: the "injury to private property" was not an "inescapable or unavoidable consequence of the public improvement as planned and constructed." *Id*. at 314 (internal quotation marks and citation omitted).

Here, Plaintiffs cannot allege and have not alleged ultimate facts sufficient to establish substantial causation. Rather, they offer only conclusory allegations that any alleged damage was the "inescapable consequence" of PacifiCorp's "design, construction, use and/or maintenance of their utility infrastructure"; that PacifiCorp's "deliberate actions when designing, constructing, using and maintaining their utility infrastructure was a substantial factor in damaging a property interest protected by Article I, § 19 of the California Constitution"; and that Plaintiffs' damage "was the natural, ordinary, necessary, probable (and even inevitable) result of [PacifiCorp's] public improvement of supplying electricity." (Compl. ¶¶ 61, 62.) But stripped of legal conclusions, Plaintiffs allege only a simple causal connection: that PacifiCorp's various alleged failures to act "materialized when one of their powerlines in California broke, created arcing, and ignited the Slater Fire, which resulted in a taking of Plaintiffs' real and/or personal property in Oregon." (*Id.* ¶ 60.) As the California Supreme Court has explained, a simple "causal connection between the public improvement and the property damage alone is insufficient to sustain a finding of inverse condemnation liability." *City of Oroville*, 446 P3d at 315. Absent any factual allegations that Plaintiffs' damages were the "inescapable or unavoidable" consequence of the inherent risks of deliberate actions taken by PacifiCorp, the Complaint fails to state a cause of action.

And to the extent the Complaint contains factual allegations at all, they confirm Plaintiffs could not allege substantial causation even if granted leave to amend. Plaintiffs' allegations focus on the *risk* of fire, which alone is inconsistent with the notion that damage to Plaintiffs' properties was "inescapable" or "unavoidable." For example, Plaintiffs allege

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that "[t]he manner in which [PacifiCorp] deliberately designed, constructed, used and maintained their utility infrastructure created an inherent risk, intrinsic danger, and inescapable consequence of fire that would (and predictably did) damage Plaintiffs' real property." (Compl. ¶ 57.) But a "risk" is only a "possibility of loss, injury, disadvantage, or destruction," *Webster's Third New International Dictionary* at 1961, while a "necessary" result is one that is "unavoidable," "inevitable," or "determined and fixed and inevitable," *id.* at 1510. Even in legal contexts requiring a lower burden on causation than "substantial cause," alleging a "mere possibility of * * * causation is not enough" to allege "probability." *Saelzler v. Advanced Grp. 400*, 23 P3d 1143, 1151 (Cal 2001) (internal quotation marks and citation omitted); *see also Cary v. United States*, 552 F3d 1373, 1378 (Fed Cir 2009) (rejecting inverse condemnation claim because "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable").

Plaintiffs could not allege substantial causation even if granted leave to amend because simply alleging that *ignition of a fire* was inevitable or a "necessary result" of PacifiCorp's deliberate action would not establish that the *property damage* was itself an "inescapable or unavoidable consequence." *City of Oroville*, 446 P3d at 314 (internal quotation marks and citation omitted). As courts from sister jurisdictions have recognized, fire damage is inherently uncertain. For example, in rejecting a wildfire inverse condemnation claim at the pleading stage, the Texas Court of Appeals explained that to plead causation, the plaintiffs must have alleged that each step of a seven-step chain of causation was "almost-certain" to occur—beginning with the city's alleged cost-saving measures, proceeding through "high winds" and "arcing," and ending in the damage to a plaintiff's property in particular. *City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825 (Tex App 2014). Because wildfire plaintiffs generally cannot make that showing, wildfire liability—even for *intentionally set* fires—"has traditionally been determined under tort law," not

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inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998) (dismissing wildfire inverse condemnation claim at pleading stage). That is even more true here, when the wildfire is alleged to have ignited in *California*—an entirely different state—and spread to cause damage to Plaintiffs' property *in Oregon*.

Even if Plaintiffs were to amend to allege (for example) that any fire ignition at Happy Camp was "almost-certain" to spread to their properties in Oregon, *City of Austin*, 431 SW3d at 825, that would not be sufficient, either. Plaintiffs allege that there was an "extreme fire risk in Northern California" (Compl. ¶ 40) and that "[h]azardous weather conditions were expected to strike Northern California and Southern Oregon" (*id*. ¶ 3). In other words, in addition to potentially spreading anywhere, the fire could have ignited anywhere—rendering substantial causation nearly impossible to plead, let alone prove, as to any specific property. *See City of Oroville*, 446 P3d at 307 (to show substantial causation, plaintiffs must establish that the "damage to private property" in particular—and not some other, intermediate event, such as a fire—was "substantially caused" by the inherent risks of the public improvement). Unlike a flood from a dam built in a specific, fixed location, which will damage specific nearby properties to a near certainty, scientists "stud[ying] the question in advance" cannot "predict[]" whether a particular property will suffer fire damage from an alleged utility-caused fire igniting in an unknown location, with unknown spread. *Ridge Line, Inc. v. United States*, 346 F3d 1346, 1357 (Fed Cir 2003) (internal quotation marks and citation omitted).

Dismissing Plaintiffs' California inverse condemnation claim will not prevent Plaintiffs from pursuing their negligence claim against PacifiCorp, and it is consistent with *City of Oroville*'s guidance that inverse condemnation plaintiffs must allege that the damage to their properties was "necessary or probable." 446 P3d at 314 (internal quotation marks, emphasis, and citation omitted).

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c. Wildfire Damage Is Not an Inherent Risk of the Deliberate Design, Construction, or Maintenance of PacifiCorp's Equipment.

Even if Plaintiffs could allege substantial causation, not all damage substantially caused by government acts can support an inverse condemnation claim under California law. Plaintiffs must allege that their damages arose from the "inherent dangers of the public improvement as *deliberately* designed, constructed, or maintained." *Id.* at 312 (emphasis added). Allegations that a public entity "negligent[ly] operat[ed]" a public improvement, in contrast, do not create inverse condemnation liability. *Id*. at 311 (internal quotation marks and emphasis omitted) (quoting *Customer Co.*, 895 P2d at 908). This element is designed to "avoid[] open-ended liability by protecting public entities from liability for private property damage that is arguably connected to a public improvement but is not the result of the improvement's inherent risks." *Id*. at 313. For the independent reason that Plaintiffs do not and cannot allege facts showing that any of PacifiCorp's "deliberate" actions resulted in damage to their property, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

The California Supreme Court has set a clear line: deficient plans and policies can create liability, but deficient implementation of plans or policies—including negligence—cannot. Inverse condemnation liability attaches if, for example, a public entity makes a "policy choice" to "forgo regular monitoring and repair." *Id.* at 313-14. In contrast, "inverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program." *Sheffet*, 84 Cal Rptr at 19 (citing *Miller v. City of Palo Alto*, 280 P 108 (Cal 1929)); *see also Customer Co.*, 895 P2d at 908 (*Miller*'s holding "that damage caused by the negligent conduct of * * * a public entity does not fall within the aegis of [the takings clause] has been followed repeatedly and uniformly in the more than 60 years that have elapsed"); *Bauer*, 289 P2d at 7 (citing *Miller*); *McNeil v. City of Montague*, 268 P2d 497, 498

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(App 1954) (same, in fire case); *W. Assur. Co. of Toronto v. Sacramento & San Joaquin Drainage Dist.*, 237 P 59, 62 (App 1925) (same, in fire case).

Here, Plaintiffs allege only negligence—not a cognizable "deliberate" plan or policy choice to support inverse condemnation liability. Plaintiffs conclusorily allege that PacifiCorp's actions were "deliberate" but fail to plead any ultimate facts as to such conduct. Stripped of conclusory language, Plaintiffs' Complaint fails to allege that the damage to Plaintiffs' properties resulted from the "inherent dangers of the public improvement as *deliberately* designed, constructed, or maintained." *City of Oroville*, 446 P3d at 312 (emphasis added).

d. Accidental Wildfire Does Not Serve a Public Use.

California's takings clause is unambiguous: only damage "for public use" creates a compensable taking. Cal Const, Art I, § 19; *see also Customer Co.*, 895 P2d at 908 (only when "the destruction or damaging of property is sufficiently connected with 'public use'" does inverse condemnation liability attach (internal quotation marks, brackets, and citation omitted)); *Arreola v. County of Monterey*, 122 Cal Rptr 2d 38, 53 (App 2002) ("To be subject to liability in inverse condemnation, the governmental action at issue must relate to the 'public use' element of article I, section 19."). Plaintiffs cannot satisfy that requirement as a matter of law, nor does their Complaint attempt to do so.

Plaintiffs allege only that PacifiCorp's "utility infrastructure, including their powerlines, are public improvements for the supplying of electricity to the public for public use." (Compl. ¶ 53.) In other words, Plaintiffs allege that because PacifiCorp operated electrical equipment for the public's benefit, any damage from that equipment served a public use, and so is a compensable taking.

The California Supreme Court has squarely rejected the argument that all damage from public improvements is damage that serves a public use. In *Customer Co.*, the California Supreme Court held that tear gas damage to a store and its inventory was not

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damage "for public use" even though officials had deliberately fired tear gas canisters for a public purpose: apprehending an escaping criminal. 895 P2d at 913. As the Court explained, the destruction of the plaintiff's property did not convey a benefit for public use, even though it arose from the underlying public benefit of capturing the felon. *See id.* at 907-08, 913. The relevant question is thus not whether a court can find some public benefit somewhere up the chain of causation, but instead whether the "'destruction or damaging of property'" *itself* is "'sufficiently connected with "public use."'" *Id*. at 908 (quoting *House v. L.A. Cnty. Flood Control Dist*., 153 P2d 950, 956 (Cal 1944) (Traynor, J., concurring)); *see also W. Assur. Co.*, 237 P at 75 (holding that, to be "'damage[] for public use,'" the damage must be an "act necessary to the doing of the work" that "promote[s] the ends of a public use"; allegations that a public entity negligently started a fire failed to meet that standard (citation omitted)); *Am. Family Mut. Ins. Co. v. Am. Nat'l Prop. & Cas. Co.*, 370 P3d 319, 328 (Colo App 2015) ("The public purpose of an intended act (the prescribed burn) that ultimately results in an unintentional 'taking' (the wildfire) does not transfer to and supply the 'public purpose' for that taking.").

The California Supreme Court also has rejected claims like Plaintiffs' allegations here on public use grounds. For example, *Miller* involved an inverse condemnation claim against a city garbage department that took "burning garbage" from an incinerator and "deposited [it] on vacant property" a quarter mile from the plaintiffs' real property; the burning garbage started a wildfire that destroyed the plaintiffs' property. 280 P at 108. The California Supreme Court held that there was "no merit" to the plaintiffs' inverse condemnation claim, explaining that the plaintiffs failed to plead a "public use," defined as a "use which concerns the whole community," even though the "collection and disposal of garbage" served "governmental functions." *Id*. at 109 (internal quotation marks and citation omitted).

For the foregoing reasons, the Court should dismiss Plaintiffs' First Claim for Relief for inverse condemnation under Article I, section 19, of the California Constitution.

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2. Plaintiffs Cannot State an Inverse Condemnation Claim Under the Oregon Constitution.

For similar reasons, Plaintiffs also cannot state a claim for inverse condemnation under Article I, section 18, or Article XI, section 4, of the Oregon Constitution. Thus, the Court should dismiss Plaintiffs' Fifth Claim for Relief as well.

The Oregon Constitution has two takings clauses. Article I, section 18, prohibits the government from taking "[p]rivate property" for "public use" without "just compensation." Article XI, section 4, states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." In short, when the government or a corporation acting under authority of law "takes property, it must pay for it," whether by formal condemnation or in liability for inverse condemnation. *Dunn*, 355 Or at 347.

Here, Plaintiffs cannot satisfy the elements of either Article I, section 18, or Article XI, section 4, as a matter of law. *First*, Plaintiffs cannot meet the intent requirement applicable to a takings claim under either clause, namely that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Id.* at 358-59. *Second*, Plaintiffs cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public purpose" as required by Article I, section 18. *Third*, Plaintiffs cannot show that PacifiCorp acted "under authority of law" as required by Article XI, section 4, in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

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a. Plaintiffs Fail to Allege That PacifiCorp Intentionally Undertook to Act in a Manner That Necessarily Caused Plaintiffs' Injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation claim under Article I, section 18, or Article XI, section 4, of the Oregon Constitution only by proving that the government "intentionally undertook * * * actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas County*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If "plaintiff's best evidence" shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun*, 335 Or at 27 ("[A] takings claim cannot be based on * * * negligent government conduct." (internal quotation marks and citation omitted)).

Dunn illustrates the high standard Plaintiffs must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "natural and ordinary consequence[]" of that improvement, and so was liable for inverse condemnation. *Id*. at 345-46.

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The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id*. at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiffs must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id*. (emphasis added).

Similarly, in *Worman v. Columbia County*, 223 Or App 223, 236, 195 P3d 414 (2008), the plaintiffs sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiffs failed to state an inverse condemnation claim because the plaintiffs had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to plaintiffs' property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id*. (emphasis omitted). The court rejected the plaintiffs' inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, plaintiffs' property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiffs' property as a natural and ordinary consequence of the project. *Id*.

As Judge Johnson of the Douglas County Circuit Court recognized in rejecting inverse condemnation claims identical to those Plaintiffs assert here, *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege ultimate facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by

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Plaintiffs." (Keating Decl., Ex. 5 at 4.) Under *Dunn*, it is not enough to allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiffs' properties. Instead, Plaintiffs must allege facts that the invasion "into plaintiff's [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiffs' damages must have been "substantially certain" to occur. *Dunn*, 355 Or at 360-61 (internal quotation marks and citation omitted).

Judge Conover of Lane County Circuit Court dismissed nearly identical inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of similar Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the plaintiffs' properties." (Keating Decl., Ex. 3 at 30 (page 71 of the transcript); *see also id.*, Ex. 4 at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover dismissed the amended inverse condemnation claims as well. (*Id.*, Ex. 2.)

Judge Johnson of Douglas County Circuit Court also dismissed inverse condemnation claims against PacifiCorp in *Roseburg Resources*, Case No. 22CV09346, and *Beamer*, Case No. 22CV29851. (*Id.*, Exs. 1, 8, 13.) Judge Johnson dismissed the original complaint, granting leave to replead if the plaintiffs could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id.*, Ex. 1.) Plaintiffs repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (*Id.*, Ex. 8.) In reaching that conclusion, Judge Johnson found that the plaintiffs' allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites" were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id.*) Although Judge Johnson considered those findings dispositive, the ruling continued:

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> I have serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law or taken for a public purpose. While Pacific Power may have the power to condemn, they may only condemn such property as is needed for public use. The cases that interpret this address situations such as erosion, which will always occur where water flows, as opposed to the spread of fire, which will only occur **IF** a fire ignites.
>
> Moreover, while Plaintiffs allege that you can model how a fire will travel after ignition, it does not necessarily follow that they can model the precise location of ignition where there are presumably many branches and debris that have been displaced around, and possibly within the ignition possibilities of, the power lines during a storm of this magnitude.
>
> It is not and cannot be the law that a claim for inverse condemnation lies for all property damaged as a result of a utility's actions simply because that party also has the power to condemn.

(*Id*. (emphasis in all caps and bold in original).)[12]

Finally, Judge Baggio of Multnomah County Circuit Court recently dismissed nearly identical inverse condemnation claims in *Lee et al. v. PacifiCorp et al.*, Case No. 22CV29685, concluding that the plaintiffs were required to allege facts that "Defendants' intentional acts resulted with substantial certainty to each of the chain of events leading to Plaintiffs' damages." (*Id.*, Ex. 14.)

[12] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order in another case, *Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 22CV29695, denying PacifiCorp's motion to dismiss an inverse condemnation claim brought pursuant to Article XI, section 4, arising out of a different 2020 Labor Day fire (the Pike Road wildfire in Tillamook County). (Keating Decl., Ex. 6.) Based on the facts alleged in that complaint, Judge Allen concluded that the requirements of *Dunn* were sufficiently pled. Although PacifiCorp does not concede that the *Stroh* allegations were legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case. The plaintiff in *Stroh* alleged that wildfire damage to the plaintiff's property was substantially certain because, among other things, the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (*Id*. at 7-8.)

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Here, too, Plaintiffs cannot allege that any of the necessary causal steps to damage their specific property were "substantially certain" to occur. Start with the alleged ignition. Plaintiffs allege that the Slater Fire occurred because PacifiCorp "failed to deenergize their powerlines on September 7"; "intended, designed and constructed [its] utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas"; "failed to prudently inspect, maintain, and operate the electrical equipment in their utility infrastructure"; and "failed to maintain the appropriate clearance area between its electrical equipment and surrounding vegetation." (Compl. ¶ 44.) Plaintiffs then conclusorily allege that the "predictable and inevitable" consequences of PacifiCorp's conduct were "damage" to Plaintiffs' property, and that the "taking was a necessary, substantially certain, and/or inevitable consequence of [PacifiCorp's] actions and inactions in designing, constructing, using and/or maintaining their utility infrastructure." (*Id.* ¶ 92.) Plaintiffs then generally allege that "[w]ildfires move in a direction and at a speed that is predictable and inevitable given known wind patterns, heat, and humidity at the time of ignition." (*Id.*) These generalized allegations are not tied to any specific geographic location and do not allege ultimate facts sufficient to support a claim that the inevitable or natural result of a fire that ignited in *California* was damage to Plaintiffs' property in *Oregon*; rather, they are merely "conclusion[] of law" that does not suffice to state "ultimate facts" entitling Plaintiffs to relief. *Huang*, 147 Or App at 332.

Nor have Plaintiffs alleged any other specific facts supporting a finding of "substantial certainty." Indeed, the fact that Plaintiffs' factual allegations center on fire "risk" confirm that Plaintiffs cannot do so. The Complaint refers to "risk" or "fire risk" numerous times, alleging, for example, that there was a "risk of arcing" and a "fire potential" that was "well-above normal," among other things. (*See, e.g.*, Compl. ¶¶ 12, 20, 26, 32, 60.) The reason Plaintiffs focus on "risk" is that it is the best they can do; it is implausible (at best) to suggest that actions like failing to inspect vegetation or designing and constructing

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"utility infrastructure to pass electricity through exposed powerlines in dry, vegetated areas" are *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, etc.) are necessary for an ignition to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357. In *Cary*, the plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." 552 F3d at 1377. The court rejected the plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "direct, natural, or probable" result of government conduct to state a claim. *Id*. at 1378. As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id*. For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53; *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiffs could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiffs make no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of *the plaintiff's property* that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59 (emphasis added). Indeed, Plaintiffs do not even allege specifically where their properties were located, much less why the fire was substantially certain to consume their properties once it started. Read in the most generous possible light, the most Plaintiffs allege that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of a larger fire that was the but-for cause of Plaintiffs' damages. But

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as the Oregon Supreme Court explained in *Dunn*, "under the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id*. at 361 (emphasis in original and added). Alleging that PacifiCorp's actions were substantially certain to cause a fire is alleging substantial certainty only at an intermediate step—and does not suffice to establish a substantial certainty of *the* invasions of Plaintiffs' properties.

That problem is especially striking with respect to the claims at issue in this case. The Complaint contains very few details about the specific property interests held by Plaintiffs. The only allegations about those property interests are that they are "located in Josephine County." (Compl. ¶ 7.) Plaintiffs state no facts at all—let alone ultimate facts—concerning the nature of Plaintiffs' properties, the size of the properties, the use of the properties (*i.e.*, commercial, residential, etc.), or specific details regarding the extent of the alleged damage to Plaintiffs' specific properties. Without any ultimate facts alleged as to the specific properties that Plaintiffs allege were taken by PacifiCorp's actions, Plaintiffs cannot state a claim for inverse condemnation.

Moreover, as pled in the Complaint, Plaintiffs are Oregon residents seeking damages for property injuries that Plaintiffs allege occurred as a result of a fire that ignited in another state (California). Even if Plaintiffs could allege that some set of actions were "substantially certain" to ignite the fire in California (and they have not done so), they cannot conceivably allege that PacifiCorp's conduct was further "substantially certain" to damage Plaintiffs' properties in another state. Whether or not an inverse condemnation claim can properly be asserted against a private electrical utility relating to a wildfire under *any* facts, this case is an especially egregious example of geographically disparate claims that cannot meet the *Dunn* standard.

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b. Plaintiffs Cannot State an Inverse Condemnation Claim Under Article I, Section 18, of the Oregon Constitution Because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use.

(i) PacifiCorp is not a public entity.

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, section 18, "requires a showing that the *governmental defendant* intended to take private property for a public use." *Vokoun*, 335 Or at 29 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiffs' invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, multiple Oregon trial courts have recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, Section 18, against a private entity like PacifiCorp. (Keating Decl., Ex. 7 at 17; *id.*, Ex. 3 at 30; *id.*, Ex. 4 at 1.)

Just as PacifiCorp is not a public entity for purposes of California law, it is not a public entity under Oregon law. PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the OPUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). Nor would PacifiCorp qualify as a "government body" under Oregon's tort claim statute. *See* ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental

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bod[ies]"). Plaintiffs' Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiffs' Article I, section 18, claim. *Vokoun*, 335 Or at 28.

(ii) Plaintiffs do not allege that PacifiCorp took property for "public use."

Plaintiffs' Article I, section 18, inverse condemnation claim also fails for the independent reason that Plaintiffs cannot demonstrate that their property was taken "for a public use," as they must. *Id.* at 29; *see also Worman*, 223 Or App at 236 (plaintiffs could not state inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). Plaintiffs allege only that PacifiCorp's "utility infrastructure, including [its] powerlines, are public improvements for the supplying of electricity to the general public for the community's public use." (Compl. ¶ 85.) Plaintiffs confuse public "use" with public "benefit." As the Oregon Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Or.*, 240 Or App 490, 500-01, 247 P3d 331 (2011) (internal quotation marks and citation omitted). In other words, Plaintiffs must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. at 501. They have not done and cannot do so.

In *Lee*, Judge Baggio recently dismissed the Article I, section 18, inverse condemnation claim against PacifiCorp, on the grounds that the plaintiffs insufficiently pled that PacifiCorp's actions involved a taking of the plaintiffs' property for "public use." (Keating Decl., Ex. 14.) Judge Baggio concluded: "While installing poles to run electrical lines by a public utility may constitute a taking for public use, a tragic fire that consumed nearly 125,000 acres of public and private land is not a taking for public used." (*Id*.)

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Further, Judge Conover of Lane County dismissed nearly identical inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * [F]urther, there was no intent to put the plaintiffs' property to public use." (*Id.*, Ex. 3 at 30 (page 71 of the transcript); *see also id.*, Ex. 4 at 1.)

The same is true here. Plaintiffs must meet the test for public use set forth in *Mossberg*: they must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiffs cannot make that showing, they make no effort to do so, and thus fail to state an inverse condemnation claim under Article I, section 18, of the Oregon Constitution.

c. Plaintiffs Cannot State an Inverse Condemnation Claim Under Article XI, Section 4.

Plaintiffs' Article XI, section 4, inverse condemnation claim also fails for several reasons. First, for the same reasons discussed above, the claim cannot be stated because Plaintiffs' property was not taken for public use. Although Article XI, section 4, does not use the term "public use," the "text and context," "the case law surrounding [that provision], and the historical circumstances that led to its creation," *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), demonstrate that it includes a "public use" requirement. Beginning with the context and case law, although the phrase "public use" only appears in Article I, section 18—not in Article XI, section 4—courts consistently construe these two constitutional provisions as being coterminous in meaning and effect. *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 313, 711 P2d 119 (1985) (en banc); *Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 162, 150 P 252 (1915); *Emmert v. Clackamas County*, No. 3:13-cv-01317-ST, 2015 WL 4077239 at *8-9 (D Or May 12, 2015) (construing Article I, section 18, and Article XI, section 4, together), *report and recommendation*

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adopted as modified, No. 03:13-CV-01317-ST, 2015 WL 4078780 (D Or July 1, 2015); *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980) (Article XI, section 4, "has been construed by the Oregon Supreme Court to have the same meaning as Article I Section 18" (citing *MacVeagh v. Multnomah County*, 126 Or 417, 270 P 502 (1927))), *aff'd*, 701 F2d 99 (9th Cir 1983).

The history of Article XI, section 4's adoption also suggests that it was intended to have a "public use" element. "Article XI, section 4, was taken from the Michigan Constitution of 1850," which "included a provision barring the taking of property 'by any corporation *for public use*' without compensation." *City of Keizer*, 185 Or App at 437-38 (emphasis added; citation omitted). And *City of Keizer* explained that this provision of the Michigan Constitution was adopted into Oregon's Constitution "as part of a larger article regarding 'Corporations and Internal Improvements' *without discussion or debate* concerning the takings clause." *Id.* at 438 (emphasis added). The fact that the Michigan corporations takings clause was adopted by the Oregon Constitutional Convention without any debate suggests that any change in language between the Michigan corporations takings clause (which includes express "public use" language) and the Oregon clause in Article XI, section 4 (which did not) was inadvertent or immaterial. As explained above, Plaintiffs have not alleged and cannot allege that their property was taken for a public use, and thus they cannot state an inverse condemnation claim pursuant to Article XI, section 4, for that reason alone.

Additionally, Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiffs contend damaged them. By its own terms, the takings clause in Article XI, section 4, only applies to takings "under authority of law." Plaintiffs may attempt to meet that showing by arguing that PacifiCorp has the general power of condemnation or that it operates as a public utility. Here, Plaintiffs merely allege that PacifiCorp is an entity with "the power of condemnation pursuant to ORS chapter 35 and the Oregon Constitution." (Compl. ¶ 84.) But they fail to allege that any of PacifiCorp's alleged

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conduct was "under authority of law." Because they cannot do so, their inverse condemnation claim under Article XI, section 4, fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiffs cannot state an Article XI, section 4, claim. In that case, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, section 4, inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs' property." (Keating Decl., Ex. 3 at 30 (page 71 of the transcript); *see also id*., Ex. 4 at 1.) Similarly, as discussed previously, Douglas County Circuit Court Judge Johnson dismissed the plaintiffs' Article XI, section 4, claim, stating that the court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (*Id.*, Ex. 8.)

Nor can Plaintiffs cite any authority to the contrary. Article XI, section 4, is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer*, 185 Or App 425—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiffs allege).[13] 185 Or App at 443 n 5 (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4").

[13] A handful of other modern cases have addressed Article XI, section 4, takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co.*, 300 Or at 312-13 (no liability under either Article I, section 18, or Article XI, section 4, because revocation of a right of way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006) (rejecting Article XI, section 4, claim in passing, and collecting cases doing the same thing).

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Nevertheless, the only Oregon cases permitting Article XI, section 4, claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, section 4, were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze*, 77 Or at 159 (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co*., 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). In contrast, PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" within the meaning of Article XI, section 4, whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

It makes sense that the phrase "under authority of law" requires a direct connection between a corporation's legal authority and the alleged taking. As discussed above, because, unlike Article I, section 18's takings clause, Article XI, section 4, contains no textual "public use" requirement, the "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiffs' Complaint were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of*

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Keizer, 185 Or App at 430 (quoting *Tomasek v. Or. State Hwy. Comm'n*, 196 Or 120, 147, 248 P2d 703 (1952)).

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In *Jackson v. Metropolitan Edison Co.*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. 419 US 345, 350, 95 S Ct 449, 42 L Ed 2d 477 (1974). The United States Supreme Court nevertheless found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id*. at 353 (emphasis added). And although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States * * *."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

Properly construed, Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fire at issue here, nor do Plaintiffs attempt to do so. Plaintiffs do not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires; they allege that PacifiCorp *violated* those regulations. Plaintiffs similarly do not allege that PacifiCorp used the power of eminent domain to take their property, or to take any relevant land at issue in this case. The most Plaintiffs allege is that PacifiCorp generally has the "power of condemnation"—not that PacifiCorp used that power in any relevant way to their takings claim. (Compl. ¶ 84.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*,

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Kurtz, and other early Oregon cases—and Plaintiffs do not allege any connection, let alone a direct one—Plaintiffs' Article XI, section 4, claim fails as a matter of law.

3. The Complaint Contains No Allegations—Let Alone "Ultimate Facts"—Concerning the Property Interests Allegedly Taken by PacifiCorp or the Extent of the Alleged Damage to Plaintiffs' Properties.

Finally, the First and Fifth Claims for Relief should be dismissed for an additional reason: they fail to allege any facts—let alone ultimate facts—concerning the specific property interests that Plaintiffs allege were taken by PacifiCorp's actions or the extent to which Plaintiffs' properties were damaged.

To maintain an inverse condemnation claim, a plaintiff must show that the property or property interest alleged to have been taken belonged to that person in the first place. *Kinross Copper Corp. v. State*, 160 Or App 513, 519, 981 P2d 833 (1999) ("[A] settled principle of takings law is that, even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it did not ever have."); *Regency Outdoor Advert., Inc. v. City of Los Angeles*, 139 P3d 119, 123 (Cal 2006) (as modified Oct. 11, 2006) ("As part of this threshold showing, the plaintiff must demonstrate that the government has 'taken or damaged' a cognizable property right."); *County of San Diego v. Miller*, 532 P2d 139, 141 (Cal 1975) ("To [be] constitutionally entitled to compensation, the claimant customarily must show he owned a property interest taken by the state."). It is axiomatic that a plaintiff must allege facts that establish what "property" is alleged to have been taken and facts concerning the plaintiff's interest or right to that property to state a claim for inverse condemnation.

Plaintiffs have not done so here. Plaintiffs broadly allege that they "were the owners of, or otherwise held an interest in, property in Josephine County." (Compl. ¶¶ 53, 83.) Other than these generalized allegations, the Complaint contains no facts about the properties at issue. For example, there are no allegations about the precise locations of the properties

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(such as the property addresses or legal descriptions), the nature of the properties (residential, commercial, industrial, etc.), or Plaintiffs' purported interests in the land (whether Plaintiffs are fee owners, tenants, easement holders, etc.). And as noted above, the Complaint generally describes Plaintiffs as "individuals, representatives, and legal entities" without any other facts concerning who the Plaintiffs are. Without such basic factual allegations, Plaintiffs have not stated a claim for inverse condemnation.

Moreover, Plaintiffs do not allege ultimate facts concerning the extent to which their properties were damaged. Oregon courts have long held that "property is not 'taken' if it is simply damaged." *Hawkins*, 315 Or at 68. Rather, the test is whether "there has been a 'substantial' interference with property rights." *Id*. (citing *Lincoln Loan Co.*, 274 Or at 57); *Lombardy v. Peter Kiewit Sons' Co.*, 72 Cal Rptr 240, 242 (App 1968) ("No recovery in inverse condemnation may be had unless damage in a substantial amount to the property itself has been sustained."), *overruled on other grounds by S. Cal. Edison Co. v. Bourgerie*, 507 P2d 964 (Cal 1973). Here, Plaintiffs conclusorily allege that they suffered "substantial harm" to their properties and that PacifiCorp's conduct "deprived or substantially interfered with Plaintiffs' use and enjoyment of their property." (Compl. ¶ 91.) But Plaintiffs do not allege any *facts* describing that purported interference. Again, without any factual allegations describing the way in which Plaintiffs' specific properties were damaged (or interfered with because of PacifiCorp's actions), Plaintiffs have not stated a claim for inverse condemnation.

For all of the foregoing reasons, the First and Fifth Claims for Relief should be dismissed.

C. Plaintiffs' Negligence *Per Se* Claim Fails as a Matter of Law.

Plaintiffs' Eighth Claim for Relief for negligence *per se* alleges numerous distinct sources of potential liability (*see id.* ¶¶ 109-16), taking a "spaghetti approach" to Oregon's electrical utility statutes and regulations: that is to say, "heav[ing] the entire contents * * *

against the wall in hopes that something would stick." *Indep. Towers of Wash. v. Washington*, 350 F3d 925, 929 (9th Cir 2003). Neither the Court nor the jury should have to "sort th[r]ough the noodles in search of [Plaintiffs'] claim." *Id.* Multiple trial courts have dismissed nearly identical negligence *per se* claims against PacifiCorp, and the result should be no different here. (*See, e.g.*, Keating Decl., Exs. 9, 13, 14.) As explained below, Plaintiffs cannot, as a matter of law, assert a claim for negligence *per se*, and thus the claim should be dismissed.

1. Statutes That Only Set Forth General Guidance to "Operate Safely" Do Not Fix the Standard of Care Sufficient to Support Negligence *Per Se*.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout*, 298 Or at 601. Plaintiffs rely on two statutes—ORS 757.020 and 757.035(1)—that fail that test, offering only general guidance that PacifiCorp must operate "safely." As a matter of law, those statutes do not support a negligence *per se* claim under Oregon law.

The Oregon Supreme Court's decision in *Kim v. Multnomah County ex rel. Multnomah County Community Department of Corrections*, 328 Or 140, 153, 970 P2d 631 (1998), is instructive. In *Kim*, the plaintiffs sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Court of Appeals affirmed, the Supreme Court noted that even if plaintiffs had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id*. at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id*. And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise

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reasonable care" do not "provide a foundation for plaintiffs' negligence *per se* claim" as a matter of law. *Id*.

The same problem exists here: Plaintiffs rely on ORS 757.020 and ORS 757.035, but neither statute fixes the standard of care in any meaningful way. (Compl. ¶ 108.) ORS 757.020 requires public utilities to "furnish adequate and safe service, equipment and facilities." And ORS 757.035 authorizes the OPUC to "require by general or special orders" that a "person or municipality * * * construct, maintain and operate every line, plant, system, equipment or apparatus in such manner as to protect and safeguard the health and safety of all employees, customers and the public." ORS 757.035(1). Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, ORS 757.035's authorization that the OPUC may adopt "orders" requiring persons to "protect and safeguard the health and safety of all employees" provides no guidance to a factfinder, ORS 757.035(1). Indeed, that statute provides for the scope of the OPUC's regulatory authority—the statute does not establish *any* standard of care for private parties. Equally vague is ORS 757.020: a direction to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601.

For these reasons, the Court should dismiss the portions of Plaintiffs' Eighth Claim for Relief for negligence *per se* to the extent it is based on ORS 757.020 and 757.035(1).

2. Plaintiffs Cannot Show That They Were Meant to Be Protected by ORS 477.720 or That Their Private Property Damage Is the Type of Injury That the Statute Was Enacted to Prevent.

To allege a negligence *per se* claim, a plaintiff must allege, *inter alia*, "that plaintiff was a member of the class of persons meant to be protected by the statute" *and* "that the injury plaintiff suffered is of a type that the statute was enacted to prevent." *McAlpine v. Multnomah County*, 131 Or App 136, 144, 883 P2d 869 (1994). Plaintiffs cannot meet that burden with respect to ORS 477.720. (*See* Compl. ¶ 110.)

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ORS 477.720 provides that certain conduct of failing to extinguish a fire or allowing a fire to spread through carelessness or neglect is "unlawful." ORS 477.993(1), in turn, provides that a violation of ORS 477.720 "is a violation punishable" as a Class A, C, or D violation per the terms outlined in the statute. And ORS 477.980, in turn, provides that "[t]he State Board of Forestry, by rule, shall establish the enforcement policy for violations prescribed in ORS 477.993." The Board of Forestry has adopted administrative rules setting forth that enforcement policy. *See* OAR 629-047-0040 (basic enforcement process); OAR 629-047-0270 (providing that the enforcement process in OAR 629-047-0040 shall apply to violations of ORS 477.720).

Thus, the context makes clear that the purpose of the statute is to ensure that the Board of Forestry has enforcement authority over fires that violate ORS 477.720, not to create a civil cause of action for any member of the public. "[N]othing on the face of" ORS 477.720 or "in the surrounding provisions" or ORS 477.980-.993 suggests that it was meant to protect the general public from property damage occurring on private property. *McAlpine*, 131 Or App at 145. Rather, the concern of the statute is the failure to extinguish fire set on or near forestland, or the spread of the fire to or through forestland. *See also* ORS 477.005(1) (policy of state of Oregon is "prevention and suppression of forest fires"). Further, like in *McAlpine*, this statute is part of a broader statutory scheme that delegates to a particular agency—here, the Board of Forestry—the authority to take enforcement action. Such statutes do not support a negligence *per se* claim for civil liability by a private party. *McAlpine*, 131 Or App at 144-46 (statute delegating to Board of Parole and Post-Prison Supervision discretion to order the arrest and detention of certain parolees not intended to specifically protect the public, but rather "gives the Board the means to enforce compliance with the conditions of parole").

For these reasons, the Court should dismiss the portions of Plaintiffs' negligence claim premised on a negligence *per se* theory based on ORS 477.720.

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3. The Administrative Regulations Cited by Plaintiffs Cannot Support Negligence *Per Se* Because Plaintiffs Cannot Show That (a) Any Purported Violations Injured Them, and (b) the Legislature Contemplated Imposition of Private Liability for Violations of Those Regulations.

Once a statute "fixes the legal standard of conduct," *Shahtout*, 298 Or at 601, to recover for negligence *per se*, Plaintiffs still must show that "(1) [D]efendants violated a statute; (2) that [P]laintiff[s] w[ere] injured as a result of that violation; (3) that [P]laintiff[s] w[ere] * * * member[s] of the class of persons meant to be protected by the statute; and (4) that the injury [P]laintiff[s] suffered is of a type that the statute was enacted to prevent," *McAlpine*, 131 Or App at 144 (emphasis omitted). Although negligence *per se* may be based on application of a regulation, two conditions must be satisfied: "First, the regulation must, in fact, support a private right of action under the four-part test prescribed in [*McAlpine*]. Second, even if the regulation meets the *McAlpine* factors, its terms permitting the imposition of private liability must not be *ultra vires*." *Ettinger v. Denny Chancler Equip. Co.*, 139 Or App 103, 107, 910 P2d 420 (1996) (citation omitted).

Plaintiffs' claims based on various regulations' recordkeeping requirements—specifically OAR 860-024-0011(1)(a)-(b), OAR 860-024-0011(1)(d), and OAR 860-024-0016(2)—cannot support negligence *per se* for numerous reasons. First, Plaintiffs cannot establish that any of these regulations fix a standard of care in a way that satisfies the requirements of *Shahtout* and *Kim*. Second, if the regulations do fix a standard of care, the claim fails because Plaintiffs cannot show that any purported failure to keep "adequate written records" caused Plaintiffs' alleged harm. (*See* Compl. ¶¶ 111-13.) The Complaint alleges several such failures, including to "[m]aintain adequate written records of policies, plans, and schedules to show inspections and corrections are being carried out" (*id.* ¶ 111(c) (citing OAR 860-024-0011(1)(d))); to "file reports with the [OPUC]" regarding PacifiCorp's "detailed inspections of * * * overhead facilities" (*id.* ¶ 111(b) (citing OAR 860-024-

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0011(1)(b))); and to "keep appropriate records" of PacifiCorp's "vegetation management program" (*id.* ¶ 112 (citing OAR 860-024-0016(2))).

Plaintiffs do not allege that poor recordkeeping caused the fires in question. Indeed, the Complaint does not suggest any causal link between PacifiCorp's recordkeeping practices and Plaintiffs' alleged injuries. Thus, Plaintiffs have failed to show that the above recordkeeping regulations have any bearing on the applicable standard of care. Plaintiffs cannot proceed on a negligence *per se* theory when "the regulation is not applicable under the circumstances," and the same is true here. *Lovins v. Jackson*, 233 Or 369, 377, 378 P2d 727 (1963). Because none of these alleged recordkeeping failures could have "caused" Plaintiffs' alleged injuries, Plaintiffs' negligence claim—to the extent it is based on a negligence *per se* theory based on these regulations (OAR 860-024-0011(1)(a)-(b), (d); OAR 860-024-0016(2))—fails as a matter of law.

Plaintiffs also have failed to show that application of any of the cited regulations—including those referenced above and the remaining regulations cited in their Complaint, (OAR 860-024-0010; OAR 860-024-0011(2); OAR 860-024-0016(5))—would be anything other than *ultra vires*. Each of those regulations implements ORS 757.035. That statute delegates to the OPUC the power, *inter alia*, to adopt and prescribe rules for owners and operators of power lines and power systems "for the protection of the health or safety of all employees, customers or the public." ORS 757.035(1). OPUC also has the power to waive any such rules. *See* OAR 860-024-0000(2). Further, the legislature delegated to the OPUC the ability to fine or impose civil penalties on any person who fails to comply with any statutes, rules, regulations, or orders of the OPUC. *See* ORS 757.990, 757.991. Certainly, the OPUC's authority is broad. However, "[t]here is no suggestion in those statutes * * * that they contemplate private, as opposed to governmental, rights of action" for violations of OPUC statutes or rules adopted pursuant thereto. *Ettinger*, 139 Or App at 110.

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For these reasons, Plaintiffs cannot maintain a negligence *per se* claim based on any of the statutes or regulations cited in the Complaint, so the Eighth Claim for Relief should be dismissed.

D. Plaintiffs' Tenth Claim for Relief for Public Nuisance Pursuant to ORS 477.064 Fails as a Matter of Law.

Plaintiffs purport to allege a claim for "public nuisance" pursuant to ORS 477.064. That claim fails as a matter of law and should be dismissed because that statute does not create a private right of action.

"When a party asserts a right of action to enforce a duty created by a statute, the first question is whether the statute expressly or impliedly indicates that the legislature intended to create or to deny such a right of action." *Doyle v. City of Medford*, 356 Or 336, 363, 337 P3d 797 (2014). In answering this question, the court examines "the text, context, and legislative history * * * to determine if there is an indication that the legislature" intended to create a private right of action. *Cruz v. Multnomah County*, 279 Or App 1, 21, 381 P3d 856 (2016). In examining the text, context, and legislative history, the court focuses on two factors: (1) "whether the statute refers to civil liability in some way," and (2) "whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore, there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle*, 356 Or at 345-46.

ORS 477.064 states as follows:

> "Any fire on any forestland in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life, forest resources or property. The spread of fire in forestland across an ownership boundary is prima facie evidence of fire burning uncontrolled."

Nothing in the plain text of the statute suggests that private parties, such as Plaintiffs, can base a civil action on an alleged violation of the law. First, ORS 477.064 does not

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refer—explicitly or implicitly—to civil liability. At most, that statute declares certain conduct to be a tort and provides an evidentiary standard for assessing that tort; there is no indication from the text of the statute that the Oregon legislature intended to create a private right of action. Second, the statute's context also suggests that it does not create a private cause of action. ORS 477.064 is contained in the same chapter as ORS 477.089, which specifically states (in part): "This section *does not create a new cause of action* or alter any existing cause of action." ORS 477.089(5) (emphasis added).

Further, under *Doyle*, a court may not imply a cause of action from an Oregon statute when a plaintiff has an "existing claim for relief and associated remedies." *Doyle*, 356 Or at 371. Here, Plaintiffs have brought common law public nuisance and negligence claims. Thus, they have existing common law remedies, and the Court should decline to infer that they are entitled to bring a separate statutory cause of action pursuant to ORS 477.064. Indeed, that is precisely the conclusion reached by Judge Johnson in the Douglas County Circuit Court, who expressly found that "ORS 477.064 does not create a private statutory cause of action" but rather "only defines a certain circumstance to be a nuisance" and dismissed the plaintiffs' claim based upon ORS chapter 477. (*See* Keating Decl., Ex. 8.)

For the foregoing reasons, because ORS 477.064 does not give rise to a private right of action, Plaintiffs' "public nuisance" claim premised on that statute fails as a matter of law and should be dismissed.

E. The Court Should Dismiss Plaintiffs' Claims Because the OPUC Has Exclusive and Primary Jurisdiction Over Specific Portions of This Case.

Finally, the Court should dismiss Plaintiffs' liability claims to the extent they are based on PacifiCorp's decision to institute or not institute a PSPS in connection with the Slater Fire. "'[W]here the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation.'" *Boise Cascade*, 325 Or at 191 n 8 (citation

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omitted). To determine whether an agency has primary jurisdiction over an issue, "'courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.'" *Id*. at 192 (citation omitted). Here, the OPUC is uniquely qualified to develop and enforce a comprehensive regulatory framework governing the PSPS practices of Oregon utilities—including, but not limited to, the circumstances warranting a PSPS and liability arising out of PSPS decisions. All three factors squarely support keeping the propriety of PacifiCorp's PSPS decisions out of the purview of the factfinder.

First, the OPUC has the comparative advantage when it comes to specialized expertise related to the implementation of PSPS. It has promulgated rules defining PSPS and regulations governing PSPS. *See* OAR 860-300-0010(8) ("'Public Safety Power Shutoff' or 'PSPS' means a proactive de-energization of a portion of a Public Utility's electrical network, based on the forecasting of and measurement of extreme wildfire weather conditions."); OAR 860-300-0050 (Communication Requirements Prior, During, and After a PSPS). The OPUC has applied those rules and regulations to real-life fact patterns and, in doing so, has developed an extensive understanding of the factors that affect utility assessment of fire risk.

Second, there is a need for uniform resolution of this issue because PacifiCorp's service territory stretches across several counties throughout the entire state. If various circuit courts craft remedies differently from one another, the standards to trigger PSPS events will fragment along county lines, even though transmission and distribution circuits frequently cross county lines, and weather events do too. Asking the jury to decide once and for all whether a utility acted prudently in instituting (or not instituting) a PSPS only serves

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to invite confusion and inconsistency into an already-complicated and still-evolving regulatory framework.

The same is true for statewide regulatory tariffs, which are one of the OPUC's most powerful policy tools to prevent piecemeal judicial determinations. PacifiCorp provides service in its disparate service areas consistent with the terms of its statewide, OPUC-approved tariffs. And here, Oregon Tariff Rule 14(c) gives PacifiCorp "sole judgment" to take actions that are "necessary or prudent to protect the performance, integrity, reliability or stability of the Company's electrical system or any electrical system with which it is interconnected." PacifiCorp is unaware of any OPUC or appellate decision construing Rule 14(c). Until then, if various circuit courts interpret PacifiCorp's liability limitations differently from one another, then PacifiCorp's duties under the tariff will vary based on where the plaintiff resides.

Third, the OPUC is closely reviewing the decisions leading up to the Labor Day 2020 fires (including the Slater Fire) and has already indicated that it may impose more detailed standards for PSPS decisions in the wake of these fires. Judicial resolution of this issue could undermine two critical components of the OPUC's regulatory scheme: the construction of its tariffs and its ongoing revision of its regulatory framework following the Labor Day 2020 fires.

The result should be no different if the Court determines that California law applies. Indeed, California law is even more clear-cut that decisions about whether to implement a PSPS are within the primary jurisdiction of the CPUC. *See* Cal Pub Util Code § 1759(a) ("No court of this state * * * shall have jurisdiction to review" the CPUC's decisions or "interfere[nce] with the [CPUC] in the performance of its official duties").

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court: (1) determine that Oregon, not California, law applies and dismiss Plaintiffs' First through

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Fourth Claims, or alternatively, dismiss Plaintiffs' Fifth through Twelfth Claims if the Court determines that California, not Oregon, law applies; (2) dismiss Plaintiffs' inverse condemnation claims (First and Fifth Claims), negligence *per se* claim (Eighth Claim), and public nuisance claim (Tenth Claim); and (3) dismiss all of Plaintiffs' liability claims to the extent they are based on a PSPS-related decision based on the exclusive and primary jurisdiction of the OPUC (or to the extent applicable, CPUC).

DATED: November 8, 2023

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s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' PARTIAL MOTION TO DISMISS** on the following named person(s) on the date indicated below by:

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☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.

☒ eService via Odyssey File & Serve.

DATED: November 8, 2023

s/ Reilley D. Keating
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

IN RE SLATER FIRE LITIGATION

RONALD GLEN THOMASON, et al.,

Plaintiffs,

v.

PACIFICORP, et al.,

Defendants.

Case No. 23CV008033

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Relates to: Hitchcock et al. v. PacifiCorp et al., No. 34-2020-00290833

Pursuant to the provisions of Code of Civil Procedure Section 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiffs' Complaint[1] ("Complaint"), and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

[1] Following the Court's January 13, 2023 Order Granting Defendant PacifiCorp's Motions to Sever and Dismiss Oregon-Resident Plaintiffs, the remaining *Hodges* plaintiffs are: George W. Thorward; Ronald D. Sharp; Taft Tinnin; Shari Tinnin; Tracy Ledbetter; Teresa Ledbetter; Alaina Ledbetter; Erik A. Wheaton; Peggy L. Wheaton; Perry Ervin Murphy; Sandra Jean Morgan; David Louis Poeschel; Stormy Springer; Susan Tarpley; Steven White; Cierra Rhodes-Silva; and Karen Haas.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack standing to bring their claims.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the allegations in the Complaint are barred, in whole or in part, for lack of jurisdiction, including but not limited to the limitations of California Public Utilities Code Section 1759.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other beach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damages awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and the California Public Utilities Commission.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County and City of Los Angeles, the County and City of Ventura, the City of Santa Monica, the City of Malibu, the State of California, the California Public Utilities Commission, the United States of America, and any other relevant public entities including their agencies, and pursuant to the law.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, at all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on waiver.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on laches.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on estoppel.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that if responsible for Plaintiffs' injuries, damages, and

expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the action is barred by the statute of limitations including, but not limited to, Code of Civil Procedure §§ 335.1, 338(a)-(c), (j), and 339.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire(s), it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the claims in the Complaint are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense, PacifiCorp alleges that Plaintiffs are not entitled to treble or double damages per Civil Code §§ 3346, 733, and 3294, especially because PacifiCorp's conduct or trespass was not causal, involuntary, willful or malicious; PacifiCorp did not negligently, intentionally, or willfully and maliciously trespass on Plaintiffs' property or damage Plaintiffs' trees; and due to the penal nature of the requested damages, Plaintiffs are not entitled to either double or treble damages if Plaintiffs are awarded punitive damages.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

THIRTIETH AFFIRMATIVE DEFENSE

32. As a thirtieth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

THIRTY-FIRST AFFIRMATIVE DEFENSE

33. As a thirty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the claims in the Complaint for punitive damages are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and any claim for punitive damages is limited by state and federal law,

including but not limited to the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 123 S. Ct. 1513.

THIRTY-SECOND AFFIRMATIVE DEFENSE

34. As a thirty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the allegations in the Complaint fail to state facts sufficient to support an award of exemplary or punitive damages or other statutory fines or penalties against PacifiCorp. No alleged act or omission of PacifiCorp was oppressive, fraudulent, or malicious under California Civil Code section 3294, and therefore, any award of punitive damages is barred. Any claim for punitive damages also is barred under California Civil Code section 3294(b). No alleged act or omission of PacifiCorp was willful under California Public Utilities Code section 2106, and therefore, any award of punitive damages is barred.

THIRTY-THIRD AFFIRMATIVE DEFENSE

35. As a thirty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' claims are preempted, in whole or in part, by federal law.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

36. As a thirty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs, the person(s) insured by Plaintiffs, or the underlying insureds from which Plaintiffs' claims arise, knew about the risk, and voluntarily undertook the risk that led to the accident or injuries complained of in this case.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

37. As a thirty-fifth separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the California Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions. (Pub. Util. Code § 1759.)

THIRTY-SIXTH AFFIRMATIVE DEFENSE

38. As a thirty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

Dated: November 20, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen

Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

SLATER FIRE CASES

Lead Case No. 34-2020-00290833

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On November 20, 2023 I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 20, 2023, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.186

By Fax

Filed
Superior Court of California
Sacramento
12/04/2023
stewarl
By _____, Deputy
34-2020-00290833-CU-MT-GDS

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Attorneys for Defendant PacifiCorp

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

IN RE SLATER FIRE LITIGATION

LYLA HITCHCOCK, et al.,

Plaintiffs,

v.

PACIFICORP, et al.,

Defendants.

Case No. 34-2020-00290833 (Lead Case)

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

Relates to: Fernandez et al. v. PacifiCorp et al., No. 23CV007154

Pursuant to the provisions of Code of Civil Procedure Section 431.30, Defendant PacifiCorp ("PacifiCorp") for itself alone, and no other Defendant, hereby answers Plaintiffs' Complaint ("Complaint"), and generally and specifically denies and alleges as follows:

GENERAL DENIAL

1. PacifiCorp, without the benefit of completing discovery as to each individual Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

AFFIRMATIVE DEFENSES

2. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. Discovery in this case has only recently commenced and many of these affirmative defenses are set forth merely as a precaution. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to any individual Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to all Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

3. As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

4. As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

5. As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack standing to bring their claims.

FOURTH AFFIRMATIVE DEFENSE

6. As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

FIFTH AFFIRMATIVE DEFENSE

7. As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the allegations in the Complaint are barred, in whole or in part, for lack of jurisdiction, including but not limited to the limitations of California Public Utilities Code Section 1759.

SIXTH AFFIRMATIVE DEFENSE

8. As a sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

9. As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other beach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

10. As an eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

NINTH AFFIRMATIVE DEFENSE

11. As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

12. As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damages awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

ELEVENTH AFFIRMATIVE DEFENSE

13. As an eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable.

TWELFTH AFFIRMATIVE DEFENSE

14. As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that discovery will determine whether various individual

Plaintiffs and their agents, who have yet to be determined, may have acted negligently, recklessly, or intentionally in and about the matters alleged in the Complaint; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

THIRTEENTH AFFIRMATIVE DEFENSE

15. As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

16. As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of California and the California Public Utilities Commission.

FIFTEENTH AFFIRMATIVE DEFENSE

17. As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, the County and City of Los Angeles, the County and City of Ventura, the City of Santa Monica, the City of Malibu, the State of California, the California Public Utilities Commission, the United States of America, and any other relevant public entities including their agencies, and pursuant to the law.

SIXTEENTH AFFIRMATIVE DEFENSE

18. As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

SEVENTEENTH AFFIRMATIVE DEFENSE

19. As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

EIGHTEENTH AFFIRMATIVE DEFENSE

20. As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, at all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

NINETEENTH AFFIRMATIVE DEFENSE

21. As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on waiver.

TWENTIETH AFFIRMATIVE DEFENSE

22. As a twentieth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on laches.

TWENTY-FIRST AFFIRMATIVE DEFENSE

23. As a twenty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on estoppel.

TWENTY-SECOND AFFIRMATIVE DEFENSE

24. As a twenty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-THIRD AFFIRMATIVE DEFENSE

25. As a twenty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the action is barred by the statute of limitations including, but not limited to, Code of Civil Procedure §§ 335.1, 338(a)-(c), (j), and 339.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

26. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

27. As a twenty-fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that in relation to the subject fire(s), it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

28. As a twenty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the claims in the Complaint are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the California Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment and California Constitution Article I, section 19.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

29. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

30. As a twenty-eighth and separate affirmative defense, PacifiCorp alleges that Plaintiffs are not entitled to treble or double damages per Civil Code §§ 3346, 733, and 3294, especially because PacifiCorp's conduct or trespass was not causal, involuntary, willful or malicious; PacifiCorp did not negligently, intentionally, or willfully and maliciously trespass on Plaintiffs' property or damage Plaintiffs' trees; and due to the penal nature of the requested damages, Plaintiffs are not entitled to either double or treble damages if Plaintiffs are awarded punitive damages.

TWENTY-NINTH AFFIRMATIVE DEFENSE

31. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

THIRTIETH AFFIRMATIVE DEFENSE

32. As a thirtieth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

THIRTY-FIRST AFFIRMATIVE DEFENSE

33. As a thirty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the claims in the Complaint for punitive damages are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and any claim for punitive damages is limited by state and federal law, including but not limited to the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 123 S. Ct. 1513.

THIRTY-SECOND AFFIRMATIVE DEFENSE

34. As a thirty-second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the allegations in the Complaint fail to state facts

sufficient to support an award of exemplary or punitive damages or other statutory fines or penalties against PacifiCorp. No alleged act or omission of PacifiCorp was oppressive, fraudulent, or malicious under California Civil Code section 3294, and therefore, any award of punitive damages is barred. Any claim for punitive damages also is barred under California Civil Code section 3294(b). No alleged act or omission of PacifiCorp was willful under California Public Utilities Code section 2106, and therefore, any award of punitive damages is barred.

THIRTY-THIRD AFFIRMATIVE DEFENSE

35. As a thirty-third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs' claims are preempted, in whole or in part, by federal law.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

36. As a thirty-fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs, the person(s) insured by Plaintiffs, or the underlying insureds from which Plaintiffs' claims arise, knew about the risk, and voluntarily undertook the risk that led to the accident or injuries complained of in this case.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

37. As a thirty-fifth separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the California Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions. (Pub. Util. Code § 1759.)

THIRTY-SIXTH AFFIRMATIVE DEFENSE

38. As a thirty-sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

Dated: November 6, 2023

HUESTON HENNIGAN LLP

By: _____

Alison L. Plessman
Douglas J. Dixon
William M. Larsen

Attorneys for Defendant PacifiCorp

ELECTRONIC PROOF OF SERVICE

SLATER FIRE CASES

Lead Case No. 34-2020-00290833

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On December 4, 2023 I served the foregoing document(s) described as:

DEFENDANT PACIFICORP'S ANSWER TO COMPLAINT

on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to Case Anywhere through the upload feature at www.caseanywhere.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2023, at Newport Beach, California.

Sarah Jones

Sarah Jones

PAC_256.07.187

Per A. Ramfjord, OSB No. 934024
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Attorneys for Defendants PacifiCorp and Pacific Power
[*Additional attorneys listed on signature page*]

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SUSAN BLACK; DYARLA BURNS; SEAN LEYLAND CAMPBELL; DIANNA LYNN EKIS; SHANE AYRSMAN; BARE ROOTS FARM, LLC, an Oregon limited liability company; SARAH DEVORE; MICHAEL GARNIER; PEGGY MALONE; OUT 'N' ABOUT TREEHOUSE TREESORT, LLC, an Oregon limited liability company; TREEHOUSE ZIP LINE, LLC, an Oregon limited liability company; ANGELA GRAVES; ELIJAH GRAVES; JEREMY HARRISON; MISTY MAIN; BILL JACKSON; PETER CAMEMDZEN; JONATHAN HULSE; CHERI JOHNSON; ASHLEY NICOLE LARSON; ADAM MEIVES; JODIE MOSKIOS; PHILLIP MOSKIOS, individually and as trustee of the PHILLIP MOSKIOS, SR. LOVING TRUST DATED OCTOBER 30, 1998; ALICE W. RAVIOLO; JOHN B RAVIOLO; WALTER SLATER; ANATHEA SPARROW; AARON VAIL,

Case No.: 3:22-cv-00566-HZ

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS PACIFICORP AND PACIFIC POWER

JURY TRIAL DEMANDED

Plaintiffs,

v.

PACIFICORP, an Oregon corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp,

Defendants.

Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") answer Plaintiffs' Complaint ("Complaint") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in said Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and deny each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

1. PacifiCorp denies the allegations of Paragraph 1.

2. PacifiCorp admits that, on September 7, 2020, the National Weather Service issued fire weather messages regarding critical fire weather. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations of Paragraph 2, and on that basis denies them.

3. Paragraph 3 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 3.

4. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 4, and on that basis denies them.

5. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 5, and on that basis denies them.

6. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 6, and on that basis denies them.

7. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 7, and on that basis denies them.

8. The allegations of Paragraph 8 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 8.

9. PacifiCorp admits that it operates under its Pacific Power assumed business name as an investor-owned utility, which is authorized to do business in Oregon with its principal place of business in Portland, Oregon. PacifiCorp admits that it provides electricity to customers in Washington, Oregon, and California. PacifiCorp denies the remaining allegations of

Paragraph 9, including that Pacific Power is a "company"; Pacific Power is an assumed business name of PacifiCorp, not a separate entity.

10. PacifiCorp admits that PacifiCorp is an electric-power company with a principal place of business in Multnomah County. PacifiCorp denies the remaining allegations of Paragraph 10.

11. Paragraph 11 consists of conclusions of law to which no response is necessary or appropriate.

12. PacifiCorp admits that it provides electricity to customers in California. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13. Paragraph 13 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 13.

14. Paragraph 14 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 14.

15. Paragraph 15 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 15.

16. Paragraph 16 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 16.

17. PacifiCorp Paragraph 17 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 17.

18. PacifiCorp Paragraph 18 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 18.

19. PacifiCorp Paragraph 19 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 19.

20. PacifiCorp Paragraph 20 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 20.

21. PacifiCorp Paragraph 21 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 21.

22. Paragraph 22 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 22.

23. PacifiCorp admits that it filed its 2019 California Wildfire Mitigation Plan with the California Public Utilities Commission on or about February 6, 2019. PacifiCorp admits that the terms of its 2019 California Wildfire Mitigation Plan speak for themselves and further admits that the plan includes language related to proactive de-energization and vegetation management. PacifiCorp denies the remaining allegations of Paragraph 23.

24. PacifiCorp admits that its 2019 Wildfire Mitigation Plan included a section related to Public Safety Power Shutoffs and a Proactive De-energization Zone named "Happy Camp." PacifiCorp denies the remaining allegations of Paragraph 24.

25. PacifiCorp admits that its 2019 Wildfire Mitigation Plan included the Hourly Fosberg Fire Weather Index, the Keetch-Byram Drought Index, wind gust speed, and sustained wind speed as potential "criteria inputs" for proactive de-energization. PacifiCorp denies the remaining allegations of Paragraph 25.

26. PacifiCorp admits that its 2019 California Wildfire Mitigation Plan included a section related to vegetation management. PacifiCorp denies the remaining allegations of Paragraph 26.

27. PacifiCorp admits that the direct quotations in Paragraph 27 accurately quote the KATU article available at https://katu.com/news/local/pacific-power-takes-steps-to-reduce-wildfire-risk-may-shut-off-power-in-severe-weather. PacifiCorp denies the remaining allegations of Paragraph 27.

28. PacifiCorp admits that Heidi Caswell, Pacific Power's Director of T&D Asset Performance/Wildfire Mitigation, participated in a meeting before the Oregon Public Utilities Commission in June 2019 and that the direct quotations in Paragraph 28 accurately quote a portion of Ms. Caswell's statements. PacifiCorp denies the remaining allegations in Paragraph 28.

29. PacifiCorp admits that it filed its 2020 California Wildfire Mitigation Plan with the California Public Utilities Commission on February 7, 2020, the terms of which speak for themselves. PacifiCorp denies the remaining allegations of Paragraph 29.

30. Paragraph 30 consists of conclusions of law to which no response is necessary or appropriate and/or quotations from a Federal Energy Regulatory Commission document, the terms of which speaks for themselves. To the extent any further response is required, PacifiCorp denies the allegations of Paragraph 30.

31. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 31 and therefore denies the same.

32. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 32 and therefore denies the same.

33. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 33 and therefore denies the same.

34. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 34 and therefore denies the same.

35. PacifiCorp admits that its Twitter account posted on September 7, 2020, regarding a warning from the National Weather Service and that the direct quotations in Paragraph 35 accurately quote portions of that tweet. PacifiCorp denies the remaining allegations in Paragraph 35.

36. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36 and therefore denies the same.

37. Paragraph 37 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 37.

38. Paragraph 38 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 38.

39. Paragraph 39 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 39.

40. PacifiCorp denies the first sentence of Paragraph 40. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 40 and therefore denies the same.

41. PacifiCorp denies the allegations of Paragraph 41.

42. Paragraph 42 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 42.

43. Paragraph 43 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 43.

44. Paragraph 44 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 44.

45. PacifiCorp denies the first sentence of Paragraph 45. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 45 and therefore denies the same.

46. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 46 and therefore denies the same.

47. Paragraph 47 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 47 and therefore denies the same.

48. Paragraph 48 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 48 and therefore denies the same.

49. In response to Paragraph 49, PacifiCorp incorporates its responses to Paragraphs 1 to 48.

50. Paragraph 50 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 50 and therefore denies the same.

51. Paragraph 51 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 51.

52. PacifiCorp admits that it provides electricity to customers in California. The remaining allegations of Paragraph 52 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 52.

53. Paragraph 53 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 53.

54. Paragraph 54 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 54.

55. Paragraph 55 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 55.

56. Paragraph 56 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 56.

57. Paragraph 57 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 57.

58. Paragraph 58 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 58.

59. Paragraph 59 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 59.

60. Paragraph 60 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the first sentence of Paragraph 60 and therefore denies the same. PacifiCorp denies the remainder of Paragraph 60.

61. Paragraph 61 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 61 and therefore denies the same.

62. The allegations of Paragraph 62 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63. The allegations of Paragraph 63 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64. In response to Paragraph 64, PacifiCorp incorporates its responses to Paragraphs 1 to 63.

65. Paragraph 65 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 65.

66. Paragraph 66 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 66.

67. Paragraph 67 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

68. Paragraph 68 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 68.

69. Paragraph 69 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 69.

70. In response to Paragraph 70, PacifiCorp incorporates its responses to Paragraphs 1 to 63.

71. Paragraph 71 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72. Paragraph 72 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 72.

73. In response to Paragraph 73, PacifiCorp incorporates its responses to Paragraphs 1 to 63.

74. PacifiCorp admits that it owns, controls, operates, and maintains electrical transmission and distribution lines. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 74, and on that basis denies them.

75. Paragraph 75 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76. Paragraph 76 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 76.

77. Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78. In response to Paragraph 78, PacifiCorp incorporates its responses to Paragraphs 1 to 48.

79. Paragraph 79 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 79.

80. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 80, and on that basis denies them.

81. Paragraph 81 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82. Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83. Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84. Paragraph 84 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

85. Paragraph 85 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 85.

86. Paragraph 86 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 86.

87. Paragraph 87 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 87.

88. Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

89. Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90. Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 91, and on that basis denies them.

92. The allegations of Paragraph 92 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93. In response to Paragraph 93, PacifiCorp incorporates its responses to Paragraphs 1 to 48 and 79 to 91.

94. Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 94.

95. Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 95.

96. Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 96.

97. Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 97.

98. Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 98.

99. The allegations of Paragraph 99 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100. Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 100.

101. In response to Paragraph 101, PacifiCorp incorporates its responses to Paragraphs 1 to 48, 79 to 91, and 94 to 96.

102. Paragraph 102 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 102.

103. Paragraph 103 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 103.

104. Paragraph 104 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 104.

105. Paragraph 105 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 105.

106. The allegations of Paragraph 106 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 106.

107. In response to Paragraph 107, PacifiCorp incorporates its responses to Paragraphs 1 to 48, 79 to 91, 94 to 96, and 102 to 105.

108. Paragraph 108 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 108.

109. Paragraph 109 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 109.

110. Paragraph 110 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 110.

111. Paragraph 111 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 111.

112. Paragraph 112 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 112.

113. Paragraph 113 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 113.

114. The allegations of Paragraph 114 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 114.

115. In response to Paragraph 115, PacifiCorp incorporates its responses to Paragraphs 1 to 48, 79 to 91, 94 to 96, and 102 to 105.

116. Paragraph 116 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 116, and on that basis denies them.

117. Paragraph 117 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the first sentence of Paragraph 117. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 117, and on that basis denies them.

118. Paragraph 118 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 118.

119. Paragraph 119 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 119.

120. Paragraph 120 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 120, and on that basis denies them.

121. Paragraph 121 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 121.

122. Paragraph 122 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 122, and on that basis denies them.

123. The allegations of Paragraph 123 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 123.

124. Paragraph 124 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 124.

125. In response to Paragraph 125, PacifiCorp incorporates its responses to Paragraphs 1 to 48, 79 to 91, 94 to 96, and 102 to 105.

126. Paragraph 126 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 126.

127. Paragraph 127 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the second sentence of Paragraph 127. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 127, and on that basis denies them.

128. Paragraph 128 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 128.

129. Paragraph 129 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 129, and on that basis denies them.

130. Paragraph 130 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 130.

131. Paragraph 131 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 131, and on that basis denies them.

132. The allegations of Paragraph 132 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 132.

133. Paragraph 133 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 133.

134. In response to Paragraph 134, PacifiCorp incorporates its responses to Paragraphs 1 to 48, 79 to 91, 94 to 96, and 103 to 105.

135. Paragraph 135 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 135, and on that basis denies them.

136. Paragraph 136 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 136.

137. Paragraph 137 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 137, and on that basis denies them.

138. Paragraph 138 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 138, and on that basis denies them.

139. Paragraph 139 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 139, and on that basis denies them.

140. Paragraph 140 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 140.

141. Paragraph 141 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 141, and on that basis denies them.

142. Paragraph 142 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 142.

143. In response to Paragraph 143, PacifiCorp incorporates its responses to Paragraphs 1 to 48, 79 to 91, 94 to 96, and 102 to 105.

144. Paragraph 144 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 144, and on that basis denies them.

145. Paragraph 145 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 145.

146. Paragraph 146 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 146.

147. Paragraph 147 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 147.

148. Paragraph 148 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 148, and on that basis denies them.

149. The allegations of Paragraph 149 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 149.

150. The allegations of Paragraph 150 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 150.

151. The allegations of Paragraph 151 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 151.

152. The allegations of Paragraph 152 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 152.

153. The allegations of Paragraph 153 state the nature of Plaintiffs' claims and do not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 153.

GENERAL DENIAL

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

PacifiCorp expressly incorporates all allegations of its Answer as if fully set forth in each of the following Affirmative Defenses.

Without admitting any wrongful conduct on the part of PacifiCorp, and without admitting that Plaintiffs have suffered any loss, damage, or injury, PacifiCorp alleges the following Affirmative Defenses to the Complaint. By designating the following as Affirmative Defenses, PacifiCorp does not in any way waive or limit any defenses which are or may be raised by the denial, allegations, and averments set forth herein. Certain Affirmative Defenses are asserted for completeness and refer to facts and proof which also negate required elements of Plaintiffs' claims, and by raising such Affirmative Defenses PacifiCorp does not admit that Plaintiffs lack the burden of proof and/or the burden of persuasion for any or all facts underlying any of those Affirmative Defenses or suggest that Plaintiffs are not required to carry the burden as to such elements.

The Affirmative Defenses are pleaded in the alternative, are raised to preserve the rights of PacifiCorp to assert such Affirmative Defenses and are without prejudice to PacifiCorp's ability to raise other and further Affirmative Defenses.

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as by third parties. In addition to the Affirmative Defenses set forth below, PacifiCorp reserves the right to allege additional Affirmative Defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

154. Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged in the complaint by reason of their failure to mitigate such alleged damages. On information and belief, Plaintiffs, their agents, and/or their insureds failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages, such as (but not limited to) by failing to take steps to salvage harvestable timber on Plaintiffs' insureds' properties.

SECOND AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

155. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the unforeseeable intervening or superseding acts or omissions of others over whom PacifiCorp had no control and for whose conduct PacifiCorp is not responsible, or other unforeseeable, independent, intervening, or superseding event(s) or circumstance(s) beyond the control of PacifiCorp, such as negligent forestry practices, firefighting, or lack of compliance with Oregon's Defensible Space Law.

THIRD AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

156. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties who PacifiCorp had neither the right, duty or opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp, such as Plaintiffs' insureds.

FOURTH AFFIRMATIVE DEFENSE

(Unavoidable Accident / Act of God)

157. Plaintiffs' damages, if any, were caused by an unavoidable accident or Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the plaintiffs. On information and belief, one or more of the alleged ignitions in this case may have been caused by an unavoidable Act of God, such as a lightning strike.

FIFTH AFFIRMATIVE DEFENSE

(Compliance with Duty of Care)

158. Plaintiffs' claims are barred because PacifiCorp complied with the law and acted reasonably with the intent to obey the law and such compliance demonstrates that PacifiCorp exercised due care and reasonable prudence. Among other things, PacifiCorp alleges that its de-energization policies and practices complied with the Oregon Public Utility Commission's requirements and Oregon law.

SIXTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

159. Plaintiffs' claims are barred because PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the complaint. Among other things, PacifiCorp alleges that its de-energization policies and practices met or exceeded industry standards for utility operation in Oregon.

SEVENTH AFFIRMATIVE DEFENSE

(Justification/Necessity)

160. In connection with the acts and omissions alleged by Plaintiffs, PacifiCorp was justified in its actions or acting out of necessity; therefore Plaintiffs may not recover against PacifiCorp. Among other things, PacifiCorp acted reasonably in the face of urgent requirements to restore power during a historic wind storm in its inspection and reenergization actions.

EIGHTH AFFIRMATIVE DEFENSE

(Contributory/Comparative Negligence)

161. At all times mentioned herein Plaintiffs, their agents, or their insureds were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to their alleged injuries and damages, if any. The fault of Plaintiffs, their agents, or their insureds bars, in whole or in part, the damages which Plaintiffs seek to recover herein. On information and belief, Plaintiffs' insureds failed to comply with the requirements of Oregon's Defensible Space Law and/or otherwise failed to maintain their properties in a fire safe condition.

NINTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

162. Plaintiffs may not recover on claims of damages or losses paid by any other sources.

TENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

163. Plaintiffs may not recover on claims of damages or losses paid by any other sources.

ELEVENTH AFFIRMATIVE DEFENSE

(Requirement to Show Negligence)

164. To the extent Plaintiffs seek to recover without showing that PacifiCorp was negligent or acted with a higher degree of fault, Plaintiffs' claims are barred, in whole or in part, by ORS 477.092.

TWELFTH AFFIRMATIVE DEFENSE

(No Duty to De-Energize)

165. To the extent Plaintiffs' negligence claims rest on PacifiCorp's alleged failure to de-energize its power lines, Plaintiffs' claims fail because Oregon law does not impose an affirmative duty in tort to proactively de-energize power lines distinct from PacifiCorp's general duty under ORS 757.020 to furnish adequate and safe service.

THIRTEENTH AFFIRMATIVE DEFENSE

(Authorization by Statute or Regulation)

166. Plaintiffs' claims are barred, in whole or in part, because the actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission, including but not limited to because PacifiCorp's

vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FOURTEENTH AFFIRMATIVE DEFENSE

(Compliance with Statutes or Regulations)

167. Plaintiffs' claims for negligence per se and negligence (to the extent based on purported statutory or regulatory violations) are barred, in whole or in part, because PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation, including but not limited to because (1) PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements and vegetation management program and recordkeeping requirements set forth in OAR 860-024-0016, (2) PacifiCorp constructed, operated, and maintained its electrical facilities in compliance with the 2017 NESC code requirements pursuant to OAR 860-024-0010, (3) PacifiCorp complied with the requirements of OAR 860-024-0011(1)(a)-(b) by conducting detailed inspections at least every ten years and filing reports with the PUC, (4) PacifiCorp maintained adequate written records of policies, plans and schedules to demonstrate its compliance with the OAR, and (5) PacifiCorp performed routine safety patrols of overhead electrical supply lines and accessible facilities in compliance with OAR 860-024-0011(2).

FIFTEENTH AFFIRMATIVE DEFENSE

(Negligence Per Se)

168. Plaintiffs' claim for negligence per se is barred because none of the relevant statutes or regulations, including ORS 757.020 or applicable rules, regulations or orders by the Oregon Public Utilities Commission, fix the standard of conduct applicable to PacifiCorp or were implemented to prevent the harm Plaintiffs allege or to protect the class of persons

including Plaintiffs. Among other things, liability exists under a negligence per se theory only when a "governmental rule * * * though it was not itself meant to create a civil claim, nevertheless so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout ex rel. Shahtout v. Emco Garbage Co.*, 298 Or 598, 602, 695 P2d 897 (1985). Many, if not all, of the statutes and regulations cited by Plaintiffs do not fix the legal standard, such as OAR 757.035(1), which requires PacifiCorp to "construct, maintain and operate every line, plant, system, equipment or apparatus in such a manner as to protect and safeguard the health and safety of all employees, customers and the public."

SIXTEENTH AFFIRMATIVE DEFENSE

(No Punitive Damages - Unconstitutionality)

169. To the extent Plaintiffs reserve the right to assert a claim for punitive damages, PacifiCorp alleges that such claim for punitive damages is barred, in whole or in part, because it violates PacifiCorp's state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and that any claim for punitive damages is limited by state and federal law, including but not limited to the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

SEVENTEENTH AFFIRMATIVE DEFENSE

(Offset)

170. Plaintiffs may not recover damages, in whole or in part, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers. PacifiCorp alleges that such compensation may constitute an offset.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Reservation of Right to Amend to Add Further Affirmative Defenses)

171. PacifiCorp presently has insufficient knowledge or information to form a belief as to whether it may have additional, as yet unstated, defenses available and therefore reserves the right to assert such additional defenses that are proper based on discovery, investigation or further analysis.

PRAYER FOR RELIEF

WHEREFORE, having fully answered the Complaint, PacifiCorp requests that the Court enter judgment in its favor on all claims asserted by Plaintiffs in their complaint, award PacifiCorp its costs in this action, and grant such other relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

PacifiCorp hereby demands a jury trial.

DATED: April 21, 2022.

STOEL RIVES LLP

s/ Per A. Ramfjord

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS PACIFICORP AND PACIFIC POWER** on the following named person(s) on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery
- ☒ email
- ☐ notice of electronic filing using the Cm/ECF system

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

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DATED: April 21, 2022.

STOEL RIVES LLP

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Of Attorneys for Defendants PacifiCorp and Pacific Power

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF POLK

RETRAITE, LLC (FKA LINGUA FRANCA-LS VINEYARDS HOLDINGS, LLC), a domestic business corporation; PARLANCE, LLC (FKA LINGUA FRANCA, LLC), a domestic business corporation; VENDANGE, LLC (FKA LS VINEYARDS, LLC), a domestic business corporation; and SAMUEL ROBERT WINERY, LLC, a domestic business corporation, Plaintiffs, v. PACIFICORP, an Oregon corporation; PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50, Defendants.	No. 23CV28213 DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 40 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Under ORCP 21 A(1)(h), PacifiCorp moves to dismiss Plaintiffs' claims for inverse condemnation, negligence, gross negligence, trespass, nuisance, "spoliation of evidence," and injunction, as well as Plaintiffs' requests for treble damages. This Motion is supported by the

following points and authorities and Declaration of Reilley D. Keating in Support of Defendant PacifiCorp's Motion to Dismiss ("Keating Decl."), filed contemporaneously herewith.

POINTS AND AUTHORITIES

I. INTRODUCTION

The 2020 Labor Day windstorm caused at least 17 separate wildfires across Oregon and burned more than 1 million acres.[1] Nearly three years later, four Willamette Valley wine producers bring this lawsuit claiming that PacifiCorp ignited five fires that caused smoke particles to travel across the state to damage Plaintiffs' vineyards. (Compl. ¶¶ 32-33, 40-46.) Plaintiffs take a scattershot approach to pleading, alleging eight claims for negligence, gross negligence, inverse condemnation, private nuisance, public nuisance, trespass, "spoliation of evidence," and injunction.

Even setting aside the obvious factual problem of proving that any smoke damage to Plaintiffs' grapes resulted from PacifiCorp equipment dozens or even hundreds of miles away rather than from any of the other dozen or more wildfires burning over Labor Day weekend 2020—a problem that pervades every claim in this case—each of Plaintiffs' claims fail, as pleaded, as a matter of law. Plaintiffs are or should be well aware of these fatal flaws. Over the course of the last three years, similar claims have been dismissed with prejudice or voluntarily withdrawn by parties represented by Plaintiffs' counsel in parallel suits in Douglas County Circuit Court, where only the negligence claims are proceeding to trial. There is no reason why these same claims can withstand dismissal here, just because they are filed by different clients in this county. The Court should reject that tactic and dismiss each of Plaintiffs' claims.

First, Plaintiffs' claim for inverse condemnation fails on every element. To state a claim for inverse condemnation, Plaintiffs must allege that (1) "the government" (2)

[1] See Oregon Forest Resources Institute, "The 2020 Labor Day Fires," available online at https://oregonforests.org/2020-labor-day-fires (last visited August 21, 2023).

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"intentionally" acted "in a manner that necessarily caused" the injury to Plaintiffs' property (3) for a "public use," in the case of claims under Article I, Section 18, or by a corporation acting under authority of law in the case of claims under Article XI, Section 4. *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P3d 1261, 1272 (2014). PacifiCorp is not the government, and there is no allegation anywhere in the complaint that PacifiCorp acted "under authority of law" in any relevant way. Nor do Plaintiffs allege ultimate facts sufficient to show that any of PacifiCorp's "intentional" acts were inevitable or "substantially certain" to cause smoke damage to Plaintiffs' vineyards. Just as occurred in the Douglas County case arising from one of the same fires at issue here, the Court should dismiss the inverse condemnation claim with prejudice.

Second, Plaintiffs' other claims should be dismissed based on similar flaws. For example, take only the requirement that Plaintiffs allege that the harm they suffered was a "foreseeable risk" of negligent conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Plaintiffs offer no factual allegations—whatsoever—to show that smoke damage to vineyards dozens or hundreds of miles away was a foreseeable risk of Plaintiffs' allegation that PacifiCorp was negligent in not installing "insulated[] distribution line conductors" months or years prior to Labor Day 2020 or any of Plaintiffs' other allegations of negligent conduct. (Compl. ¶ 35.) As described more below, each of Plaintiffs' other claims suffers from similar legal flaws.

Third, Plaintiffs' requested multiple damages are unavailable as a matter of law. As just one example, Plaintiffs rely on ORS 756.185, which permits treble damages if a utility violates Oregon utility law in a grossly negligent or willful way. ORS 756.185(1). But the statute explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). That clause forecloses trebling damages here, among other issues discussed below.

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Fourth, Plaintiffs' claim for "spoliation of evidence" fails. Even if Oregon law recognized a freestanding claim for spoliation—and it does not—the Oregon Court of Appeals has expressly rejected bringing claims for spoliation unless a party "first br[ings] the underlying claim and los[es] or suffer[s] diminution in its value." *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012). Though Plaintiffs ultimately will lose, that will not be the result of any purported spoliation. And in any event, it has not happened yet—a prerequisite for a spoliation claim.

Fifth, Plaintiffs seek a facially absurd injunction requiring, among other things, PacifiCorp to "refrain from re-energizing powerlines on red flag warning days" and to "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws." (Compl. ¶ 117.) Oregon law does not recognize a freestanding claim for an injunction. *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiffs' purported fifth claim for relief, labeled 'Injunction,' is a remedy and not an independent cause of action."). Even if it did, an injunction that effectively would permit Plaintiffs' counsel to run Oregon's second-largest utility, substituting their own judgment for that of the Oregon Public Utility Commission ("PUC"), usurps the PUC's statutory and regulatory authority, and is barred by the doctrines of exclusive and primary jurisdiction.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers, including around 596,000 customers in Oregon under the Pacific Power brand. (*See* Compl. ¶ 15.) PacifiCorp is regulated by the PUC, which has established comprehensive regulations regarding vegetation management practices, public safety power shutoffs ("PSPS"), and many other aspects of running an electric utility in Oregon.

Plaintiffs produce wine from grapes they grow within the Willamette Valley and from grapes purchased from other Willamette Valley vineyards. (*See* Compl. ¶¶ 12-13.) Plaintiffs

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sell their bottled wine at wineries and via wholesale and retail wine distribution systems. *Id.* Plaintiff Samuel Robert Winery does not own a vineyard but rather owns the right to grow grapes on the vineyard of non-party Perrydale Hills Vineyard LLC. (Compl. ¶ 13.)

Plaintiffs allege damages in Willamette Valley from smoke and soot that allegedly traveled there specifically from the Santiam Fire (located in the Santiam Canyon), the Echo Mountain Fire (located near Otis and Lincoln City), the Archie Creek Complex Fire (located near Glide), the 242 Fire (located near Chiloquin), and the South Obenchain Fire (located near Eagle Point). (*See* Compl. ¶¶ 6, 32-33.) Plaintiffs allege that after Labor Day, they harvested their grapes and turned the grapes into wine. (Compl. ¶¶ 40-46.) Plaintiff Samuel Robert Winery sold its wine into the marketplace, but later discovered a smoke taint, despite efforts to cleanse it. (Compl. ¶ 46.). Similarly, Plaintiff Retraite alleges its wine sales were "reduced or damaged." (Compl. ¶ 41.)

Plaintiffs filed this eight-count Complaint on July 14, 2023 and served PacifiCorp on July 21, 2023. In addition to this case (*Retraite, LLC, et al. v. PacifiCorp, et al.*, No. 23CV28213), multiple other groups of winery plaintiffs have filed suits against PacifiCorp alleging smoke damage from the same fires. Each winery case is brought by the same Plaintiffs' counsel currently litigating a negligence-only case in Douglas County Circuit Court.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations or legal conclusions are insufficient. *See, e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997), *rev den,* 325 Or 438 (1997) (citations omitted). When a

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pleaded claim is legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. Plaintiffs' Inverse Condemnation Claim Fails as a Matter of Law

Multiple trial courts in Oregon have dismissed similar inverse condemnation claims, including some brought by Plaintiffs' attorneys, in cases arising out of the Labor Day fires. (*See* Keating Decl., Exs. A-F, H.) Here too, Plaintiffs' Third Claim for Relief for inverse condemnation is subject to dismissal for multiple reasons.

Typically, a taking begins with a formal eminent domain proceeding. However, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Dunn v. City of Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014). In those cases, a property owner may recover under the doctrine of inverse condemnation. In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

The Oregon Constitution has two takings clauses. Article I, section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." Here, Plaintiffs do not state under which clause they assert their Third Claim for Relief for inverse condemnation.

Plaintiffs cannot satisfy the elements of either clause as a matter of law. *First*, Plaintiffs cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358–59. *Second*, Plaintiffs

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cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public use" as required by Article I, section 18. *Third*, Plaintiffs cannot show that PacifiCorp acted "under authority of law" as required by Article XI, section 4 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

1. Plaintiffs Fail to Allege that PacifiCorp Intentionally Undertook to Act in a Manner that Necessarily Caused Plaintiffs' Injuries

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation by proving that the government "intentionally undertook * * * actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the * * * inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas Cnty.*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If plaintiffs' evidence shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("[A] takings claim cannot be based on * * * 'negligent government conduct.'" (citation omitted)).

Dunn illustrates the high standard Plaintiffs must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. *Dunn*, 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in

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other words, that because the city intended the public improvement, it intended any "'natural and ordinary consequence[]'" of that improvement, and so was liable for inverse condemnation. *Id*. at 345-46 (citation omitted). The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id.* at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiffs must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id.* (emphasis added).

Under *Dunn*, Plaintiffs cannot allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiffs' properties. Instead, Plaintiffs must allege that the invasion "into [Plaintiffs'] [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiffs' damages must have been "'substantially certain'" to occur. *Dunn*, 355 Or at 360-61.

In *Worman v. Columbia Cnty.*, 223 Or App 223, 236, 195 P3d 414 (2008), the plaintiffs sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiffs failed to state an inverse condemnation claim because the plaintiffs had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to plaintiffs' property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id.* (emphasis omitted). The court rejected the plaintiffs' inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, plaintiffs' property would not have

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been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiffs' property as a natural and ordinary consequence of the project. *Id.*

Courts have rejected recent attempts to use an inverse condemnation claim against utility companies for wildfire damages, including in cases brought by Plaintiffs' attorneys. In rejecting inverse condemnation claims against a utility for wildfire damages, Judge Johnson of the Douglas County Circuit Court recognized that *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Keating Decl., Ex. E at 4.)

Judge Conover of Lane County dismissed inverse condemnation claims against the Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the plaintiffs' properties." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims with prejudice. (Keating Decl., Ex. B.)

In another case, Judge Johnson of Douglas County recently dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case, Douglas County Circuit Court Case No. 22CV09346. (Keating Decl., Ex. A.) Judge Johnson dismissed the original complaint, granting leave to replead if the plaintiffs could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id*.) Plaintiffs repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (Keating Decl., Ex. H.) In reaching that conclusion, Judge Johnson found that the plaintiffs'

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allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites" were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id*.)[2]

Plaintiffs here cannot allege that any of the necessary causal steps from PacifiCorp's actions to Plaintiffs' damaged grapes were "substantially certain" to occur. Plaintiffs conclusorily allege that "the damages caused to Plaintiff's lands and grapes, by each of the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires' harmful smoke was the inevitable result of PacifiCorp's actions," but Plaintiffs have pled no facts to support this. (Compl. ¶ 84.) Plaintiffs allege PacifiCorp was negligent in nine potential ways, including: trimming vegetation adjacent to electrical lines, replacing electrical equipment with "strong and safe parts," including the Santiam Canyon, North Umpqua Canyon, and Echo Mountain in areas "designed for a power shutoff program," turning off power in "the service area adjacent to the Willamette Valley," and ensuring "operations personnel understood and knew how and when to de-energize power lines during high-wind, high-fire conditions. (Compl. ¶ 35.) But this generalized list of actions does not support the conclusions that fires would inevitably start, those fires would inevitably grow large enough

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[2] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order denying PacifiCorp's motion to dismiss inverse condemnation claim brought pursuant to Article XI, section 4 arising out of a different 2020 Labor Day fire (the Pike Road wildfire in Tillamook County). *See Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 22CV29695. Based on the facts alleged in that complaint, Judge Allen concluded that the requirements of *Dunn* were sufficiently pled and that there was a sufficient nexus between PacifiCorp's eminent domain authority and the fire damages under Article XI, section 4. Although PacifiCorp does not concede that the *Stroh* allegations were legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case. As the court recounted, the plaintiff in *Stroh* alleged that wildfire damage to the plaintiff's property was substantially certain because it had specifically alleged that PacifiCorp maintained a utility line easement across the plaintiff's property (i.e., the plaintiff's property was right under a powerline), that the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (Keating Decl., Ex. F at 7-8.)

to create harmful smoke, that smoke would inevitably travel many miles to Plaintiffs' grapes, and that those grapes would inevitably no longer be viable for wine making after the smoke exposure. Plaintiffs' allegations amount to a "conclusion[] of law," and do not suffice to state "ultimate facts" entitling Plaintiffs to relief. *Huang*, 147 Or App at 332.

Plaintiffs have not alleged any other specific facts supporting a finding of "substantial certainty." Rather, Plaintiffs center their factual allegations on fire "risk" because they cannot allege that there was a substantial certainty of Plaintiffs' specific smoke damage. The Complaint refers to "risk" or "fire risk" more than ten times. (*See, e.g.*, Complaint ¶¶ 8, 20, 23, 25, 27, 28, 29, 34, 53.) The reason Plaintiffs focus on "risk" is that it is the best they can do; it is implausible (at best) to suggest that PacifiCorp's alleged actions were *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, dry weather, wind direction and strength to carry the smoke, etc.) are necessary for Plaintiffs' alleged damages to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id.* at 1377. The court rejected plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "'direct, natural, or probable'" result of government conduct to state a claim. *Id.* at 1378 (citation omitted). As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result

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direct, natural, or probable." *Id.* For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998); *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiffs could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiffs make no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. At best, Plaintiffs allege that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of fires that were the but-for cause of smoke, that was the but-for cause of Plaintiffs' damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id.* at 361 (emphasis added). Plaintiffs have not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiffs' properties in particular, and they cannot do so.

Plaintiffs' allegations about computer modeling and analysis do not save their inverse condemnation claim from dismissal. (*See* Compl. ¶ 19 ("Responsible electric utilities use computer modeling and analysis on a regular basis as part of their de-energization programs to predict how a weather pattern will evolve, and how a fire would be spread amidst such winds, heat, and lack of humidity").) Plaintiffs do not allege that computer modeling and analysis would have predicted fires igniting at any particular point, let alone the particular points of ignition alleged in the Complaint. Nor do Plaintiffs allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in

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sufficient proximity to Plaintiffs such that any computer modeling would have predicted the fire would invade Plaintiffs' land. *Id.* at 351.

Fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors. *See City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). Even with an "intentionally set fire[]" that "escape[d] because of intervening winds" or other causes, liability for fire damage "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiffs do not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiffs in particular "for purposes of a takings claim," Plaintiffs fail to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

2. Any Alleged Article I, Section 18 Inverse Condemnation Claim Fails because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use

a. PacifiCorp Is Not a Public Entity

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." 335 Or at 27-29 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiffs' invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, Judge Alexander in Multnomah County recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, section 18 against a private entity like PacifiCorp. (*See supra* at n 1.) Similarly, Judge Conover in Lane County,

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in dismissing the inverse condemnation claims against Lane Electric, specifically found that "Lane Electric is not a government actor." (Keating Decl., Ex. C at 30 (transcript pp. 70-71); *see also* Ex. D at 1.)

Plaintiffs may cite cases showing that private entities may be involved in *direct* condemnation actions, as they have done in other cases. *See, e.g.*, *Grande Ronde Elec. Co. v. Drake*, 46 Or 243, 78 P 1031 (1905). But the fact that corporations may have a *statutory* right to condemnation (*see* ORS 35.245) says nothing about whether corporations may be liable for *constitutional* inverse condemnation claims. *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432, 60 P3d 557 (2002) ("[I]t does not necessarily follow that, because the [defendant] may have violated the [condemnation] statutes, the proper remedy is an action for damages in inverse condemnation.").

Dismissing any Article I, section 18 claim also makes sense from a policy perspective, because PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the PUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). PacifiCorp would also not qualify as a "[g]overnment body" under Oregon's tort claim statute. ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiffs' Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiffs' Article I, section 18 claim. *Vokoun*, 335 Or at 28.

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b. Plaintiffs Do Not Allege that PacifiCorp Took Property for "Public Use"

Any Article I, section 18 inverse condemnation claim also fails for the independent reason that Plaintiffs cannot demonstrate that their property was taken "for a public use." *Vokoun*, 335 Or at 23; *see also Worman*, 223 Or App at 236 (plaintiffs could not state an inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Oregon*, 240 Or App 490, 500-01, 247 P3d 331 (2011), *rev den,* 351 Or 216 (2011) (internal quotation marks and citation omitted). In other words, Plaintiffs must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. Judge Conover of Lane County recently dismissed inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * further, there was no intent to put the plaintiffs' property to public use." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.)

Plaintiffs only allegation here is that "PacifiCorp has the statutory power to condemn property in the State of Oregon and utilizes such property in the operation of its utility for a public use." (Compl. ¶ 82.) Plaintiffs have not alleged that any supposed taking was for public use or even that PacifiCorp used the property in the operation of its utility. Plaintiffs must meet the test for public use set forth in *Mossberg*: they must allege that "the government took private property intending to put that property to public use." 240 Or App at

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501. Because Plaintiffs cannot make that showing and make no effort to do so, they fail to state an inverse condemnation claim under Article I, section 18 of the Oregon Constitution.

3. Plaintiffs' Inverse Condemnation Claim under Article XI, Section 4 Fails Because Plaintiffs Do Not and Cannot Allege that PacifiCorp Acted under Authority of Law

Any Article XI, section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiffs contend damaged them. By its own terms, the takings clause in Article XI, section 4 only applies to a "corporation under authority of law." Plaintiffs attempt to meet this requirement by alleging that PacifiCorp has a general power of condemnation, (Compl. ¶ 82), or that it operates as a public utility, (Compl. ¶ 81). (*See* Compl. ¶ 85 (alleging PacifiCorp "took the Plaintiffs' property via color of its State law monopoly and utility rights").) But Plaintiffs fail to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because they cannot do so, their inverse condemnation claim under Article XI, section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiffs cannot state an Article XI, section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs' property." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Similarly, Douglas County Circuit Court Judge Johnson dismissed plaintiffs' Article XI, section 4 claim, stating that the Court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (Keating Decl., Ex. H.)

Nor can Plaintiffs cite any binding authority to the contrary. Article XI, section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting

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its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiffs allege).[3] *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 443 n5, 60 P3d 557 (2002), *rev den,* 336 Or 60 (2003) (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4").

The only Oregon cases permitting Article XI, section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co.*, 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" whenever it is generally subject to regulation or

[3] A handful of other modern cases have addressed Article XI, section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, section 18 or Article XI, section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006), *rev den,* 341 Or 80 (2006) (rejecting Article XI, section 4 claim in passing, and collecting cases doing the same thing).

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holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

"Under authority of law" must require a direct connection between a corporation's legal authority and the alleged taking because unlike Article I, section 18's takings clause, Article XI, section 4 contains no textual "public use" requirement. The "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiffs were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. State*, 196 Or 120, 147, 248 P2d 703 (1952)).[4]

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Jackson v. Metro. Edison Co.*, 419 US 345, 350, 346, 95 S Ct 449, 42 L Ed 2d 477 (1974). The Supreme Court rejected this argument and found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to

[4] If the Court interprets Article XI, section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, section 4—and Plaintiffs' claim would then fail for the same reason that their Article I, section 18 claim fails, as described above. *See, e.g.*, *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980), *aff'd,* 701 F2d 99 (9th Cir 1983) (Article XI, section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1928)).

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discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id.* at 353 (emphasis added). Although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

Plaintiffs cannot claim that PacifiCorp acted "under authority of law" in allegedly igniting the fires at issue here, nor do Plaintiffs even attempt to do so. Plaintiffs do not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires. In fact, Plaintiffs specifically allege that PacifiCorp was "not authorized under any state law or regulation to take the actions that it took causing ignition of each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and/or South Obenchain Fires and Plaintiffs' resulting damages." (Coml. ¶ 85.) Plaintiffs similarly do not allege that PacifiCorp used the power of eminent domain to take their property, nor to take any relevant land at issue in this case. The most Plaintiffs allege is that PacifiCorp generally has the "power of eminent domain"—not that PacifiCorp used that power in any relevant way vis-à-vis their takings claim. (Compl. ¶ 82.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other Oregon cases, Plaintiffs' inverse condemnation claim under Article XI, section 4 claim fails as a matter of law.

4. Plaintiffs Do Not Allege Any Facts Concerning the Extent of the Alleged Damage

Finally, Plaintiffs' claim for inverse condemnation should be dismissed because it fails to allege any facts concerning the extent to which Plaintiffs' properties were damaged. Indeed, a fair reading of the complaint is that even read in the light most favorable to

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Plaintiffs, Plaintiffs have alleged only an inactionable "damaging" and not an actionable "taking."

Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Moeller v. Multnomah Cnty.*, 218 Or 413, 425-27, 345 P2d 813 (1959). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (citing *Lincoln Loan v. State Hwy Comm.*, 274 Or 49, 57, 545 P2d 105 (1976)). Plaintiffs conclusorily allege that PacifiCorp "took the Plaintiffs' property" (Compl. ¶ 85), but they plead no facts about the extent of the damage to Plaintiffs' grapes—and indeed, the Complaint explicitly pleads that Plaintiffs did not even believe many of the grapes were damaged *at all* until after making wine and bottling it (*see, e.g.*, Compl. ¶ 45). Whether or not Plaintiffs can prove that smoke taint resulting from PacifiCorp's alleged conduct damaged their grapes, damage—even damage that amounts to monetary harm—is not sufficient; Oregon law only permits inverse condemnation claims for takings.

B. Plaintiffs' Negligence and Gross Negligence Claims Fail as a Matter of Law

Plaintiffs have failed to state a claim for negligence or gross negligence. In particular, Plaintiffs have not pled their alleged harm was a foreseeable result of PacifiCorp's alleged actions. It is also not clear whether Plaintiffs intend to plead a claim for negligence *per se* or otherwise claim that PacifiCorp violated ORS 757.020 in relation to their claims. If Plaintiffs do so, that claim fails for independent reasons.

1. Plaintiffs Have Not Stated a Claim for Negligence or Gross Negligence Because They Have Not Pled Injury to their Wine Was Reasonably Foreseeable

Plaintiffs cannot otherwise plead a claim for negligence or gross negligence because they have not suffered a foreseeable harm. When a defendant's duty is not defined by a special relationship, as here,[5] a plaintiff must plead that the harm it suffered was a

[5] Plaintiffs plead that "statutes and regulations regulating utilities" create a "special relationship" between Plaintiffs and PacifiCorp. (Compl. ¶ 69). Such conclusory allegations

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foreseeable risk of defendant's conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987) ("the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff"). This means a plaintiff must plead "harms that a reasonable factfinder, applying community standards, could consider within the range of foreseeable possibilities." 303 Or at 13.

"To gauge the reasonable foreseeability of the harm that occurred to plaintiffs, [courts] must consider whether 'the person harmed is one of the general class threatened' by defendants' conduct and whether the harm resulting from the conduct is 'of the general kind to be anticipated from the conduct.'" *McPherson v. State ex rel. Dep't of Corr.*, 210 Or App 602, 614, 152 P3d 918, 924 (2007) (quoting *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 609, 469 P2d 783 (1970)). A claim for gross negligence also must consider the probability of the harm. *WSB Investments, LLC v. Pronghorn Development Co., LLC*, 269 Or App 342, 360, 344 P3d 548, 560 (2015) ("Gross negligence' generally means negligence characterized by near total disregard or indifference to the rights of others or the probable consequences of a course of conduct."). Where no reasonable juror could find that the kind of harm that befell the plaintiff was the foreseeable result of the defendant's alleged negligent act, the harm is unforeseeable as a matter of law. *Buchler v. State By & Through Oregon Corr. Div.*, 316 Or 499, 509, 853 P2d 798 (1993).

Here, the wineries are not of the general class threatened by PacifiCorp's alleged conduct and the unmarketability of their wine is not the general kind of harm a reasonable

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must be dismissed because they fail to state from which "statutes and regulations" this "special relationship" arises and what duty it entails. However, even if the Court were to find that PacifiCorp has a special statutory or regulatory duty, it could not be a duty to these plaintiffs entirely or largely outside of PacifiCorp's service territory for unforeseeable harm. *See Allstate Ins. Co. v. Tenant Screening Servs., Inc.*, 140 Or App 41, 50, 914 P2d 16, 21 (1996) ("where the special relationship does not prescribe the scope of the duty, common law principles of reasonable care and foreseeability of harm are relevant.") (internal quotation marks and citation omitted).

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factfinder would anticipate. In *Chapman v. Mayfield*, 358 Or 196, 218 P3d 566 (2015), for example, the Oregon Supreme Court rejected allegations that bad acts were the foreseeable result of serving alcohol to a visibly intoxicated person. The court explained that even though it may be "common knowledge that intoxicated people often have impaired judgment and may, therefore, act improperly," such acts are not foreseeable without more specific allegations. *Id.* at 361. Similarly, while it may be common knowledge that smoke results from fire, that is all Plaintiffs can allege. Without more, it is not reasonably foreseeable that smoke would travel dozens or hundreds of miles to damage grape harvests months or years after a wildfire. "Hindsight . . . is not foreseeability." *Id.*

Plaintiffs have not pled that the fires were on adjacent property or even that PacifiCorp operates within the Willamette Valley or on Plaintiffs' land—and indeed, they were not; the furthest fires were more than 200 miles away. (Compl. ¶ 14.)

The tainting of wine made from grapes grown miles away from a fire is not a general way in which injuries occur and is not reasonably foreseeable. Even Plaintiffs themselves, winemaking professionals, apparently did not foresee the harm to their wines. Despite knowing of the Labor Day fires, all Plaintiffs proceeded to harvest and cleanse grapes and, thinking they were untainted, turn them into wine. (Compl. ¶ 41-42, 45.) Plaintiff Samuel Robert Winery "believed the winery had successfully cleansed the smoke compounds" and even "sold much of its 2020 wine vintages in the market place to consumers." (*Id.)* If Plaintiffs, professional grape growers and wine makers, did not know the risk the fires posed to their grapes, the alleged damage cannot be reasonably foreseeable by a reasonable person, a non-expert in wine making.

2. To the Extent Plaintiffs Allege Negligence *Per Se* or Otherwise Pursue a Claim Based on Violations of ORS 757.020, Oregon Law Forecloses Relying on General Safety Statutes like ORS 757.020

It is not clear whether Plaintiffs intend to pursue a negligence *per se* claim. There is no separately labeled count. But Plaintiffs cite and rely on ORS 757.020 several times

throughout the complaint, including to support their request for multiple damages. (*See, e.g.*, Compl. ¶ 92.) Because ORS 757.020 cannot support a negligence *per se* claim and does not set out a standard of care that can be violated, Plaintiffs' claims (if any) based on ORS 757.020 should be dismissed.)

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout By & Through Shahtout v. Emco Garbage Co., Inc.*, 298 Or 598, 601, 695 P2d 897 (1985). In *Kim v. Multnomah Cnty. ex rel. Multnomah Cnty. Cmty. Dep't of Cmty. Corr.*, 328 Or 140, 153, 970 P2d 631 (1998), the plaintiffs sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Oregon Court of Appeals affirmed, the Oregon Supreme Court noted that even if Plaintiffs had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id.* at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id.* And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for plaintiffs' negligence *per se* claim" as a matter of law. *Id.*

The same problem exists here: Plaintiffs rely on ORS 757.020, which does not fix the standard of care in any meaningful way. (Compl. ¶ 69.) The statute offers only general guidance that PacifiCorp must operate "safely" and requires only that public utilities "furnish adequate and safe service, equipment, and facilities." ORS 757.020. Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, the direction in ORS 757.020 to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601. As a

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matter of law, the statute does not support a negligence *per se* claim under Oregon law. The Court should strike any references to ORS 757.020 in Plaintiffs' Complaint and their negligence claim.

For the reasons explained above, Plaintiffs cannot remedy the deficiencies in their claim through repleading because it fails as a matter of law. But to the extent the Plaintiffs contend that they should be granted leave to replead their claim and the Court is inclined to allow them to do so, they must do so with more specificity. PacifiCorp cannot marshal a defense without knowing what statutes, regulations, and special relationship Plaintiffs allege.

C. Plaintiffs Cannot Plead a "Spoliation of Evidence" Claim as a Matter of Law

Plaintiffs also cannot maintain their Seventh Claim for Relief titled "Spoliation of Evidence." Oregon courts repeatedly have refused to state whether a freestanding claim for spoliation even exists under Oregon law. *See Marcum v. Adventist Health Sys./W.*, 215 Or App 166, 191, 168 P3d 1214, 1228 (2007), *rev'd,* 345 Or 237 (2008) (noting that the parties "vehemently dispute" whether a spoliation claim is cognizable, but not deciding the issue); *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012) (same). This Court should reject Plaintiffs' invitation to be the first.

But whether or not an independent claim for "spoliation of evidence" exists under Oregon law, Plaintiffs have not pled it. As the Oregon Court of Appeals explained in *Classen*, whether or not a claim for spoliation even exists, the bare minimum is that Plaintiffs must "first br[ing] the underlying claim and los[e] or suffer[] diminution in its value." *Classen*, 254 Or App 216. Showing actual diminution in a claims value from "actually los[ing]" is necessary because without such a showing any claim is "purely speculative and uncertain." *Id.* (citations omitted). Plaintiffs have not (yet) lost their claims as a result of any spoliation. Their claim is directly foreclosed by *Classen*.

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D. Plaintiffs Cannot State a Private Nuisance Claim as a Matter of Law

Oregon law is clear: smoke is cognizable only as trespass, not as nuisance. A private nuisance "is an unreasonable *non-trespassory* interference with another's private use and enjoyment of land." *Mark v. State Dep't of Fish & Wildlife*, 158 Or App 355, 360, 974 P2d 716 (1999), *rev den,* 329 Or 479 (1999) (emphasis added); *see also State ex rel. Rudd v. Ringold*, 102 Or 401, 404-05, 202 P 734 (1921) ("A private nuisance is anything done to the hurt, annoyance, or detriment of the lands or hereditaments of another, and *not amounting to a trespass*." (emphasis added)). But, in Oregon, smoke is considered a trespassory intrusion. *See Ream v. Keen*, 112 Or App 197, 200, 828 P2d 1038, 1040 (1992), *aff'd,* 314 Or 370 (1992) (concluding that smoke is a trespass as a matter of law). That makes sense. Plaintiffs' theory of the case is that smoke caused by wildfires entered their land and damaged their grapes. Because Plaintiffs allege only the trespassory invasion of smoke and soot, they have failed to allege a non-trespassory interference and the private nuisance claim must fail as a matter of law.

E. The Public Nuisance Claim Fails as a Matter of Law

To state a claim for public nuisance, Plaintiffs must show (1) that PacifiCorp's conduct unreasonably interfered with a right that is common to all members of the public, (2) PacifiCorp's conduct was negligent, reckless, or intentional, and (3) the conduct caused an injury to each plaintiff of a special character distinct and different from that suffered by the public generally. *See Raymond v. S. Pac. Co.*, 259 Or 629, 634, 488 P2d 460 (1971). "Public nuisances must be vindicated by the state unless an individual can show that he has suffered a special damage over and above the ordinary damage caused to the public at large." *Raymond*, 259 Or at 634. It is "not enough that [a plaintiff] suffers the same" injury as "everyone else." *Id.* Plaintiffs plead no specific damages and no injury that is distinct and different from that suffered by the public generally. Plaintiffs plead only the legal conclusion that they have

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"suffer[ed] a special injury distinct from the general public." Compl. ¶ 98. With no specific allegations, and no special injury, the public nuisance claim must fail.

F. The Trespass Claim Fails as to Plaintiff Samuel Robert Winery

Plaintiff Samuel Robert Winery's trespass claim must be dismissed because it did not plead a sufficient interest in land. To state a claim for trespass, plaintiffs must allege an invasion of their interest in the exclusive possession of land. *See Carvalho v. Wolfe*, 207 Or App 175, 178, 140 P3d 1161 (2006) (defining trespass as "an actionable invasion of a possessor's interest in the exclusive possession of land).

Here, Plaintiff Samuel Robert Winery does not plead the right to exclusive possession of any land. Samuel Robert Winery pleads that its "affiliate" Perrydale Hills Vineyard LLC owns an estate vineyard called Perrydale Hills Vineyard and that Samuel Robert Winery owns only "the sole right to grow grapes" on that vineyard. (Compl. ¶ 13.) Plaintiffs do not plead that Samuel Robert Winery has exclusive possession of that vineyard or any details on this "affiliate" relationship. Without such, Plaintiff Robert Winery has not pled the exclusive possession of land required for a trespass claim and the claim must be dismissed.

G. Plaintiffs' Injunction Claim Is Barred as a Matter of Law

The Court should dismiss Plaintiffs' final claim for relief for "injunction" because an injunction is not an independent cause of action, the PUC has primary jurisdiction over the claim, and, even if it were a cognizable claim, Plaintiffs have not pled the elements necessary for the issuance of an injunction.

1. An Injunction Is a Remedy, Not an Independent Cause of Action

The Court must dismiss Plaintiffs' Eighth Claim for Relief for "Injunction" because an injunction is a remedy not an independent cause of action. *See Chief Aircraft, Inc. v. Grill*, 288 Or App 729, 731 n. 1, 407 P3d 909 (2017) (reciting acknowledgment by party that injunction "is a remedy, not a claim, under Oregon law"); *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiffs' purported fifth claim for relief, labeled "Injunction,"

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is a remedy and not an independent cause of action."); *Harney v. Associated Materials, LLC*, 3:16-CV-1587-SI, 2018 WL 468303, at *8 (D Or Jan 18, 2018) ("The Court agrees, however, that Plaintiffs' requests for declaratory and injunctive relief are remedies for the Court to determine, and not independent claims. They should be pleaded as such in any future amended pleading."). Because "injunction" is not a cognizable claim, this claim for relief should be dismissed with prejudice.

2. The PUC Has Primary Jurisdiction over the Claim

The Court should go further and dismiss Plaintiffs' request for injunctive relief, whether styled as a claim or as simply prayed-for relief. Plaintiffs' proposed injunction purporting to dictate how PacifiCorp operates Oregon's second-largest utility is barred because the Oregon PUC has primary jurisdiction over how utilities operate. *See Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 285, 142 P3d 1010, 1022 (2006).

Three criteria determine whether an agency has primary jurisdiction: "(1) the extent to which the agency's expertise makes it the preferable forum; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse effect on the agency's responsibilities." *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 279, 986 P2d 35, 44 (1999). All three are easily satisfied here. Plaintiffs ask this Court to compel PacifiCorp to undertake actions in five broad categories. Those actions include compelling PacifiCorp to:

- "trim and remove trees that are within its right of way and capable of contacting or falling into its powerlines,"
- "inspect and replace its broken, obsolete, and defective electrical equipment where it has reason to know that such equipment has previously been associated with fire ignitions or may be associated with fire ignitions"

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- "refrain from re-energizing powerlines on red flag warning days during fire season until all sections of line to be re-energized have been inspected to be clear of hazards"
- "evaluate actual real-time evidence for the purpose of turning off the power in territory subject to a red flag warning during fire season if government officials, including the Oregon Department of Forestry's Fire Protection Chief, warn the utility of the risk of starting fires without such a power turn off, like what happened on Labor Day 2020"
- "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws pertaining to its powerlines and has completed deferred maintenance pertaining to wildfire mitigation, including but not limited to inspecting wedge connectors, on its powerlines."

(Compl. ¶ 117.)

Each of these broad proscriptions require utility expertise to administer and are already governed by existing PUC regulations. *See* OAR 860-024-0011 (requiring detailed inspections of overhead facilities with special rules for High Fire Risk Zones); OAR 860-024-0016 (setting standards for conductor clearances from vegetation); OAR 860-024-0020 (mandating utilities to implement Wildfire Mitigation Plans and protocols for the de-energization of power lines). Even something so apparently simple as tree trimming requires specialized knowledge, outside of a court's expertise, to know what is "capable of contacting or falling into [] powerlines." The PUC's expertise makes it a preferable forum. The "PUC's primary role is to regulate the conduct of utilities." *Portland Gen. Elec. Co.*, 162 Or App at 280 (denying the PUC's primary jurisdiction when "the underlying issue in th[e] case [was] not utility regulation"); *see also Dreyer*, 341 Or at 285 ("PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies

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contemplated"). Since all of the requested relief concerns utility regulation, the agency is best situated to decide what should be required. The PUC is the proper body to make uniform decisions and avoid conflict and confusion between agency requirements and court decisions.

H. Plaintiffs' Requests for Treble Damages under ORS 756.185 and 105.810 Fail as a Matter of Law and Must Be Dismissed

Plaintiffs seek three forms of multiple damages in the Complaint: double damages under ORS 477.089 (which PacifiCorp does not challenge in this motion, but reserves the right to challenge later), treble damages under ORS 756.185, and treble damages under ORS 105.810. Because the two forms of treble damages Plaintiffs seek do not apply to this case as a matter of law, the Court should dismiss them.

1. ORS 756.185 Does Not Apply to Plaintiffs' Claims for Property Damage

ORS 756.185 provides that a plaintiff make recover "treble the amount of damages" if a public utility[6] violated any of "ORS chapter 756, 757 or 758" and the "wrong or omission was the result of gross negligence or willful misconduct." ORS 756.185(1). But ORS 756.185 explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). Instead, the statute permits recovery in non-personal injury, non-property damage cases such as when a utility charges an impermissible rate. *See, e.g.*, *Dreyer v. Portland Gen'l Elec. Co.*, 300 Or App 414, 417, 453 P3d 580 (2019) (affirming dismissal of claim on other grounds, but noting use of ORS 756.185).

Plaintiffs seek compensation for property damage. (*See, e.g.*, Compl. ¶ 10 ("*All of [Plaintiffs'] claims* arise from PacifiCorp's willful, reckless, grossly negligent, and negligent conduct, igniting the Santiam, Echo Mountain, Archie Creek Complex, 242 and South

[6] ORS 768.185(4) bars Plaintiffs' claims for treble damages whether or not the Court agrees PacifiCorp is not a governmental entity subject to inverse condemnation, because the statutory term "public utility" explicitly encompasses "any corporation" responsible for furnishing heat, light, water, or power regardless of whether it is publicly or privately owned. *See* ORS 757.005.

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Obenchain Fires, whose smoke and soot each *damaged plaintiff's property*.") (emphasis added); Compl. ¶ 11 (same).) Every category of damages that Plaintiffs seek stems from the underlying damage to Plaintiffs' property. (Compl. ¶ 43, 106.) Plaintiffs' claims for special, incidental, and/or consequential damages are resulting losses due to the alleged damage to the grapes. (*Id.*) As a result, ORS 756.185 is inapplicable and cannot serve as a basis for treble damages.

2. ORS 105.810 Does Not Apply to the Alleged Fires because the Allegations Support that the Fires Were Statutory Wildfires

Oregon's produce and timber trespass statue, ORS 105.810, also does not apply. In certain circumstances, ORS 105.810, allows for treble damages "whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof." ORS 105.810(1). ORS 105.810 does not apply for at least three reasons.

First, claims under ORS 105.810 do not apply to statutory wildfires governed by Oregon's wildfire statutes, ORS 477.089 and 477.092. As a matter of law, all of the wildfires at issue here are covered. ORS 477.089 provides for recovery for property damage caused by wildfire and does not allow for treble damages. The statute defines a wildfire as a fire that "[o]riginated on land used or capable of being used for growing forest tree species regardless of the existing use of the land." ORS 477.089(1)(e)(B). The legislative history supports that ORS 477.089(1)(e)(B) covers fires that start on most land besides urban areas. Heath Curtiss of the Oregon Forest Industries Council in answer to senator questions before the Senate Committee on the Judiciary testified that the bill was to "deal[] only with forest fires" and not address downtown areas. Transcript, Senate Committee on Judiciary, Public Hearing on S.B. 709, Mar. 21, 2013, at 8-9.

To avoid being subject to Oregon's comprehensive wildfire liability scheme, Plaintiffs conclusorily allege—without factual basis—that one fire ignition, the "Gates School Fire," was not a statutory wildfire. Plaintiffs completely fail to plead any facts about

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the "Gates School Fire" that suggest that it did not originate on land capable of being used for growing forest tree species.

Second, ORS 105.810 does not apply because some Plaintiffs have not alleged a sufficient interest in the grapes. Plaintiff Samuel Robert Winery produces its wine from grapes "purchase[d] from other vineyards" or grown on the land of a separate LLC, "Perrydale Hills Vineyard LLC." (Compl. ¶ 13.) Plaintiff Retraite makes wine out of grapes "purchased from other vineyards" "or" grown in its vineyards. (Compl. ¶ 12.) Plaintiffs do not state when these grapes were purchased and make no allegations about what percent of their grapes they purchased or grew. The statute does not require that the plaintiff holds a possessory interest in the land, but plaintiffs must hold a right to the produce. *Pedro v. January*, 261 Or 582, 601, 494 P2d 868, 878 (1972). Plaintiffs have pled no interest in at least some of the allegedly injured grapes. Presumably, their interest in these grapes developed only when Plaintiffs purchased them, which was after the fires and alleged damage. Because Plaintiffs' allegations lack sufficient specificity, ORS 105.810 is inapplicable.

Third, ORS 105.810 does not apply because smoke damage to produce is not the kind of damage encompassed by the statute. In a pair of seminal cases, the Oregon Supreme Court limited ORS 105.810 in cases involving chemical spray that drifted onto a plaintiff's land, damaging crops. *See Meyer v. Harvey Aluminum*, 263 Or. 487, 501 P.2d 795 (1972); *Chase v. Henderson*, 265 Or. 431, 509 P.2d 1188 (1973). The Supreme Court concluded that ORS 105.810 does not "apply to the kind of damages assessed" in cases involving substances that drift onto produce, damaging them. As the Oregon Court of Appeals recently summarized, *Meyer* and *Chase* "stand for the proposition that damages for injuries to fruit crops and trees resulting from chemical drift are not the type of damages that are trebled under ORS 105.810." *Worman*, 223 Or App at 240. In contrast, the plaintiff in *Worman* could recover because the defendant engaged in "direct spraying of herbicide on trees and shrubs—conduct

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that is a 'deliberate trespass such as involved in cutting standing timber.'" *Id*. (citation omitted). Plaintiffs' attempts to use ORS 105.810 is directly foreclosed by *Worman*, *Meyer*, and *Chase*.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss each of Plaintiffs' claims.

DATED: August 21, 2023

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/s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS the following named person(s) or party(ies) on the date and by the method(s) indicated below.

☒ mailing with postage prepaid.	☒ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.
☐ facsimile transmission.	☐ email, for which a confirmation of receipt of the email, sent with this document attached, by the following named person(s) or party(ies) has been received by the undersigned via the method of _____.
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If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

Please see attached Service List.

DATED: August 21, 2023.

/s/ Reilley D. Keating
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

WILLAMETTE VALLEY VINEYARDS, INC, a domestic business corporation, Plaintiff, v. PACIFICORP, an Oregon Corporation; PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50, Defendants.	No. 23CV29519 DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS Fee Authority: ORS 21.160(1)(d) Assigned to: Judge Amy Queen

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 40 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Under ORCP 21 A(1)(h), PacifiCorp moves to dismiss Plaintiff's claims for inverse condemnation, negligence, gross negligence, nuisance, "spoliation of evidence," and injunction, as well as Plaintiff's requests for treble damages. This Motion is supported by the following points and authorities and Declaration of Reilley D. Keating in Support of Defendant PacifiCorp's Motion to Dismiss ("Keating Decl."), filed contemporaneously herewith.

/ / /

POINTS AND AUTHORITIES

I. INTRODUCTION

The 2020 Labor Day windstorm caused at least 17 separate wildfires across Oregon and burned more than 1 million acres.[1] Nearly three years later, one wine producer brings this lawsuit claiming that PacifiCorp ignited five fires that caused smoke particles to travel across the state to damage Plaintiff's vineyard and grapes it purchased from other vineyards. (Compl. ¶¶ 37-41.) Plaintiff takes a scattershot approach to pleading, alleging eight claims for negligence, gross negligence, inverse condemnation, private nuisance, public nuisance, trespass, "spoliation of evidence," and injunction.

Even setting aside the obvious factual problem of proving that any smoke damage to Plaintiff's grapes resulted from PacifiCorp equipment dozens or even hundreds of miles away rather than from any of the other dozen or more wildfires burning over Labor Day weekend 2020—a problem that pervades every claim in this case—Plaintiff's claims fail, as pleaded, as a matter of law. Plaintiff is or should be well aware of these fatal flaws. Over the course of the last three years, similar claims have been dismissed with prejudice or voluntarily withdrawn by parties represented by Plaintiff's counsel in parallel suits in Douglas County Circuit Court, where only the negligence claims are proceeding to trial. There is no reason why these same claims can withstand dismissal here, just because they are filed by a different client in this count. The Court should reject that tactic and dismiss each of Plaintiff's claims.

First, Plaintiff's claim for inverse condemnation fails on every element. To state a claim for inverse condemnation, Plaintiff must allege that (1) "the government" (2) "intentionally" acted "in a manner that necessarily caused" the injury to Plaintiff's property (3) for a "public use," in the case of claims under Article I, Section 18, or by a corporation

[1] See Oregon Forest Resources Institute, "The 2020 Labor Day Fires," available online at https://oregonforests.org/2020-labor-day-fires (last visited August 21, 2023).

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acting under authority of law in the case of claims under Article XI, Section 4. *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P3d 1261, 1272 (2014). PacifiCorp is not the government, and there is no allegation anywhere in the complaint that PacifiCorp acted "under authority of law" in any relevant way. Nor does Plaintiff allege ultimate facts sufficient to show that any of PacifiCorp's "intentional" acts were inevitable or "substantially certain" to cause smoke damage to Plaintiff's vineyards. Just as occurred in the Douglas County case arising from one of the same fires at issue here, the Court should dismiss the inverse condemnation claim with prejudice.

Second, Plaintiff's other claims should be dismissed based on similar flaws. For example, take only the requirement that Plaintiff alleges that the harm it suffered was a "foreseeable risk" of negligent conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Plaintiff offers no factual allegations—whatsoever—to show that smoke damage to vineyards dozens or hundreds of miles away was a foreseeable risk of Plaintiff's allegation that PacifiCorp was negligent in not installing "insulated[] distribution line conductors" months or years prior to Labor Day 2020 or any of Plaintiff's other allegations of negligent conduct. (Compl. ¶ 33.) As described more below, each of Plaintiff's other claims suffers from similar legal flaws.

Third, Plaintiff's requested multiple damages are unavailable as a matter of law. As just one example, Plaintiff relies on ORS 756.185, which permits treble damages if a utility violates Oregon utility law in a grossly negligent or willful way. ORS 756.185(1). But the statute explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). That clause forecloses trebling damages here, among other issues discussed below.

Fourth, Plaintiff's claim for "spoliation of evidence" fails. Even if Oregon law recognized a freestanding claim for spoliation—and it does not—the Oregon Court of Appeals has expressly rejected bringing claims for spoliation unless a party "first br[ings] the

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underlying claim and los[es] or suffer[s] diminution in its value." *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012). Though Plaintiff ultimately will lose, that will not be the result of any purported spoliation. And in any event, it has not happened yet—a prerequisite for a spoliation claim.

Fifth, Plaintiff seeks a facially absurd injunction requiring, among other things, PacifiCorp to "refrain from re-energizing powerlines on red flag warning days" and to "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws." (Compl. ¶ 109.) Oregon law does not recognize a freestanding claim for an injunction. *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiff's purported fifth claim for relief, labeled 'Injunction,' is a remedy and not an independent cause of action."). Even if it did, an injunction that effectively would permit Plaintiff's counsel to run Oregon's second-largest utility, substituting their own judgment for that of the Oregon Public Utility Commission ("PUC"), usurps the PUC's statutory and regulatory authority, and is barred by the doctrines of exclusive and primary jurisdiction.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers, including around 596,000 customers in Oregon under the Pacific Power brand. (*See* Compl. ¶ 13.) PacifiCorp is regulated by the PUC, which has established comprehensive regulations regarding vegetation management practices, public safety power shutoffs ("PSPS"), and many other aspects of running an electric utility in Oregon.

Plaintiff produces wine from grapes grown on its vineyards within the Willamette Valley and from grapes it purchases from other vineyards and wineries. (*See* Compl. ¶¶ 11.) Plaintiff sells its bottled wine at wineries and via a wholesale and retail wine distribution system. (*Id.*)

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Plaintiff alleges damages in Willamette Valley from smoke and soot that allegedly traveled there specifically from the Santiam Fire (located in the Santiam Canyon), the Echo Mountain Fire (located near Otis and Lincoln City), the Archie Creek Complex Fire (located near Glide), the 242 Fire (located near Chiloquin), and the South Obenchain Fire (located near Eagle Point). (*See* Compl. ¶¶ 1, 6.) Plaintiff alleges that after Labor Day, it harvested and purchased grapes and turned those grapes into wine. (Compl. ¶¶ 37-39.) Plaintiff sold its wine into the marketplace but alleges its wine sales were "reduced or damaged." (Compl. ¶ 38-41.)

Plaintiff filed this eight-count Complaint on July 24, 2023 and served PacifiCorp on July 31, 2023. In addition to this case (*Willamette Valley Vineyards, Inc. v. PacifiCorp, et al.*, No. 23CV29519), multiple other groups of winery plaintiffs have filed suits against PacifiCorp alleging smoke damage from the same fires. Each winery case is brought by the same counsel currently litigating a negligence-only case in Douglas County Circuit Court.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations or legal conclusions are insufficient. *See, e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997), *rev den,* 325 Or 438 (1997) (citations omitted). When a pleaded claim is legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

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IV. ARGUMENT

A. Plaintiff's Inverse Condemnation Claim Fails as a Matter of Law

Multiple trial courts in Oregon have dismissed similar inverse condemnation claims, including some brought by Plaintiff's attorneys, in cases arising out of the Labor Day fires. (*See* Keating Decl., Exs. A-G.) Here too, Plaintiff's Third Claim for Relief for inverse condemnation is subject to dismissal for multiple reasons.

Typically, a taking begins with a formal eminent domain proceeding. However, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Dunn v. City of Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014). In those cases, a property owner may recover under the doctrine of inverse condemnation. In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

The Oregon Constitution has two takings clauses. Article I, section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." Here, Plaintiff does not state under which clause it asserts its Third Claim for Relief for inverse condemnation.

Plaintiff cannot satisfy the elements of either clause as a matter of law. *First*, Plaintiff cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. *Second*, Plaintiff cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public use" as required by Article I, section 18. *Third*, Plaintiff cannot show

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that PacifiCorp acted "under authority of law" as required by Article XI, section 4 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiff's inverse condemnation claim should be dismissed with prejudice.

1. Plaintiff Fails to Allege that PacifiCorp Intentionally Undertook to Act in a Manner that Necessarily Caused Plaintiff's Injuries

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation by proving that the government "intentionally undertook * * * actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the * * * inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas Cnty.*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If Plaintiff's evidence shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("[A] takings claim cannot be based on * * * 'negligent government conduct.'" (citation omitted)).

Dunn illustrates the high standard Plaintiff must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. *Dunn*, 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "'natural and ordinary consequence[]'" of that improvement, and so was liable for inverse

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condemnation. *Id*. at 345-46 (citation omitted). The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id.* at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiff must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id.* (emphasis added).

Under *Dunn*, Plaintiff cannot allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiff's property. Instead, Plaintiff must allege that the invasion "into [Plaintiffs'] [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiff's damages must have been "'substantially certain'" to occur. *Dunn*, 355 Or at 360-61.

In *Worman v. Columbia Cnty.*, 223 Or App 223, 236, 195 P3d 414 (2008), a plaintiff sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiff failed to state an inverse condemnation claim because the plaintiff had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to [p]laintiff's property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id.* (emphasis omitted). The court rejected the plaintiff's inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, [p]laintiff's property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiff's property as a natural and ordinary consequence of the project. *Id.*

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Courts have rejected recent attempts to use an inverse condemnation claim against utility companies for wildfire damages, including in cases brought by Plaintiff's attorneys. In rejecting inverse condemnation claims against a utility for wildfire damages, Judge Johnson of the Douglas County Circuit Court recognized that *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Keating Decl., Ex. E at 4.)

Judge Conover of Lane County dismissed inverse condemnation claims against the Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the Plaintiff's properties." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the Plaintiff in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims with prejudice. (Keating Decl., Ex. B.)

In another case, Judge Johnson of Douglas County recently dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case, Douglas County Circuit Court Case No. 22CV09346. (Keating Decl., Ex. A.) Judge Johnson dismissed the original complaint, granting leave to replead if the Plaintiff could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id*.) Plaintiff repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (Keating Decl., Ex. G.) In reaching that conclusion, Judge Johnson found that the Plaintiff's allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites"

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were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id*.)[2]

Plaintiff here cannot allege that any of the necessary causal steps from PacifiCorp's actions to Plaintiff's damaged grapes were "substantially certain" to occur. Plaintiff conclusorily alleges that "the damages caused to Plaintiff's lands and grapes, by each of the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires' harmful smoke was the inevitable result of PacifiCorp's actions," but Plaintiff has pled no facts to support this. (Compl. ¶ 76.) Plaintiff alleges PacifiCorp was negligent in nine potential ways, including: trimming vegetation adjacent to electrical lines, replacing electrical equipment with "strong and safe parts," including the Santiam Canyon, North Umpqua Canyon, and Echo Mountain in areas "designated for a power shutoff program," turning off power in "the service area adjacent to the Willamette Valley," and ensuring "operations personnel understood and knew how and when to de-energize power lines during high-wind, high-fire conditions. (Compl. ¶ 33.) But this generalized list of actions does not support the conclusions that fires would inevitably start, those fires would inevitably grow large enough to create harmful smoke, that smoke would inevitably travel many miles to Plaintiff's grapes, and that those grapes would inevitably no longer be viable for wine making after the smoke

[2] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order denying PacifiCorp's motion to dismiss inverse condemnation claim brought pursuant to Article XI, section 4 arising out of a different 2020 Labor Day fire (the Pike Road wildfire in Tillamook County). *See Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 22CV29695. Based on the facts alleged in that complaint, Judge Allen concluded that the requirements of *Dunn* were sufficiently pled and that there was a sufficient nexus between PacifiCorp's eminent domain authority and the fire damages under Article XI, section 4. Although PacifiCorp does not concede that the *Stroh* allegations were legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case. As the court recounted, the plaintiff in *Stroh* alleged that wildfire damage to the plaintiff's property was substantially certain because it had specifically alleged that PacifiCorp maintained a utility line easement across the plaintiff's property (i.e., the plaintiff's property was right under a powerline), that the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (Keating Decl., Ex. F at 7-8.)

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exposure. Plaintiff's allegations amount to a "conclusion[] of law," and do not suffice to state "ultimate facts" entitling Plaintiff to relief. *Huang*, 147 Or App at 332.

Plaintiff has not alleged any other specific facts supporting a finding of "substantial certainty." Rather, Plaintiff centers its factual allegations on fire "risk" because Plaintiff cannot allege that there was a substantial certainty of Plaintiff's specific smoke damage. The Complaint refers to "risk" or "fire risk" more than ten times. (*See, e.g.*, Complaint ¶¶ 8, 18, 21, 23, 24, 25, 32, 42, 45.) The reason Plaintiff focuses on "risk" is that it is the best it can do; it is implausible (at best) to suggest that PacifiCorp's alleged actions were *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, dry weather, wind direction and strength to carry the smoke, etc.) are necessary for Plaintiff's alleged damages to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), the plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id.* at 1377. The court rejected the plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "direct, natural, or probable'" result of government conduct to state a claim. *Id.* at 1378 (citation omitted). As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id.* For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation.

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Thune v. United States, 41 Fed Cl 49, 53 (1998); *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiff could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and it cannot), Plaintiff makes no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. At best, Plaintiff alleges that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of fires that were the but-for cause of smoke, that was the but-for cause of Plaintiff's damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id.* at 361 (emphasis added). Plaintiff has not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiff's properties in particular, and it cannot do so.

Plaintiff's allegations about computer modeling and analysis do not save Plaintiff's inverse condemnation claim from dismissal. (*See* Compl. ¶ 17 ("Responsible electric utilities use computer modeling and analysis on a regular basis as part of their de-energization programs to predict how a weather pattern will evolve, and how a fire would be spread amidst such winds, heat, and lack of humidity").) Plaintiff does not allege that computer modeling and analysis would have predicted fires igniting at any particular point, let alone the particular points of ignition alleged in the Complaint. Nor does Plaintiff allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in sufficient proximity to Plaintiff such that any computer modeling would have predicted the fire would invade Plaintiff's land. *Id.* at 351.

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Fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors. *See City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). Even with an "intentionally set fire[]" that "escape[d] because of intervening winds" or other causes, liability for fire damage "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiff does not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiff in particular "for purposes of a takings claim," Plaintiff fails to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

2. Any Alleged Article I, Section 18 Inverse Condemnation Claim Fails because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use

a. PacifiCorp Is Not a Public Entity

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." 335 Or at 27-29 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiff's invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, Judge Alexander in Multnomah County recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, section 18 against a private entity like PacifiCorp. (*See supra* at n 1.) Similarly, Judge Conover in Lane County, in dismissing the inverse condemnation claims against Lane Electric, specifically found that

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"Lane Electric is not a government actor." (Keating Decl., Ex. C at 30 (transcript pp. 70-71); *see also* Ex. D at 1.)

Plaintiff may cite cases showing that private entities may be involved in *direct* condemnation actions, as plaintiffs have done in other cases. *See, e.g.*, *Grande Ronde Elec. Co. v. Drake*, 46 Or 243, 78 P 1031 (1905). But the fact that corporations may have a *statutory* right to condemnation (*see* ORS 35.245) says nothing about whether corporations may be liable for *constitutional* inverse condemnation claims. *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432, 60 P3d 557 (2002) ("[I]t does not necessarily follow that, because the [defendant] may have violated the [condemnation] statutes, the proper remedy is an action for damages in inverse condemnation.").

Dismissing any Article I, section 18 claim also makes sense from a policy perspective, because PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the PUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). PacifiCorp would also not qualify as a "[g]overnment body" under Oregon's tort claim statute. ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiff's Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiff's Article I, section 18 claim. *Vokoun*, 335 Or at 28.

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b. Plaintiff Does Not Allege that PacifiCorp Took Property for "Public Use"

Any Article I, section 18 inverse condemnation claim also fails for the independent reason that Plaintiff cannot demonstrate that its property was taken "for a public use." *Vokoun*, 335 Or at 23; *see also Worman*, 223 Or App at 236 (Plaintiff could not state an inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Oregon*, 240 Or App 490, 500-01, 247 P3d 331 (2011), *rev den,* 351 Or 216 (2011) (internal quotation marks and citation omitted). In other words, Plaintiff must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. Judge Conover of Lane County recently dismissed inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * further, there was no intent to put the Plaintiff's property to public use." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.)

Plaintiff's only allegation here is that "PacifiCorp has the statutory power to condemn property in the State of Oregon and utilizes such property in the operation of its utility for a public use." (Compl. ¶ 74.) Plaintiff has not alleged that any supposed taking was for public use or that PacifiCorp used the property in the operation of its utility. Plaintiff must meet the test for public use set forth in *Mossberg*: it must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiff

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cannot make that showing and makes no effort to do so, it fails to state an inverse condemnation claim under Article I, section 18 of the Oregon Constitution.

3. Plaintiff's Inverse Condemnation Claim under Article XI, Section 4 Fails Because Plaintiffs Do Not and Cannot Allege that PacifiCorp Acted under Authority of Law

Any Article XI, section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiff cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiff contend damaged them. By its own terms, the takings clause in Article XI, section 4 only applies to a "corporation under authority of law." Plaintiff attempts to meet this requirement by alleging that PacifiCorp has a general power of condemnation, (Compl. ¶ 74), or that it operates as a public utility, (Compl. ¶ 73). (*See* Compl. ¶ 77 (alleging PacifiCorp "took the Plaintiff's property via color of its State law monopoly and utility rights").) But Plaintiff fails to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because it cannot do so, the inverse condemnation claim under Article XI, section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiff cannot state an Article XI, section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the Plaintiff's Article XI, section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the Plaintiff's property." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Similarly, Douglas County Circuit Court Judge Johnson dismissed Plaintiff's Article XI, section 4 claim, stating that the Court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (Keating Decl., Ex. G.)

Nor can Plaintiff cite any binding authority to the contrary. Article XI, section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting

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its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiff allege).[3] *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 443 n5, 60 P3d 557 (2002), *rev den,* 336 Or 60 (2003) (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4"). The only Oregon cases permitting Article XI, section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co.*, 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from

[3] A handful of other modern cases have addressed Article XI, section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, section 18 or Article XI, section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006), *rev den,* 341 Or 80 (2006) (rejecting Article XI, section 4 claim in passing, and collecting cases doing the same thing).

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the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

"Under authority of law" must require a direct connection between a corporation's legal authority and the alleged taking because unlike Article I, section 18's takings clause, Article XI, section 4 contains no textual "public use" requirement. The "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiff were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. State*, 196 Or 120, 147, 248 P2d 703 (1952)).[4]

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In Jackson, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Jackson v. Metro. Edison Co.*, 419 US 345, 350, 346, 95 S Ct 449, 42 L Ed 2d 477 (1974). The Supreme Court rejected this argument and found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id.* at 353 (emphasis added).

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[4] If the Court interprets Article XI, section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, section 4—and Plaintiff's claim would then fail for the same reason that their Article I, section 18 claim fails, as described above. *See, e.g., Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980), *aff'd*, 701 F2d 99 (9th Cir 1983) (Article XI, section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1928)).

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Although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g., Lincoln Loan Co. v. State Hwy. Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

Plaintiff cannot claim that PacifiCorp acted "under authority of law" in allegedly igniting the fires at issue here, nor does Plaintiff even attempt to do so. Plaintiff does not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires. In fact, Plaintiff specifically alleges that PacifiCorp was "not authorized under any state law or regulation to take the actions that it took causing ignition of each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and/or South Obenchain Fires and Plaintiff's resulting damages." (Compl. ¶ 77.) Plaintiff similarly does not allege that PacifiCorp used the power of eminent domain to take its property, nor to take any relevant land at issue in this case. The most Plaintiff alleges is that PacifiCorp generally has the "power of eminent domain"—not that PacifiCorp used that power in any relevant way vis-à-vis their takings claim. (Compl. ¶ 74.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other Oregon cases, Plaintiff's inverse condemnation claim under Article XI, section 4 claim fails as a matter of law.

4. Plaintiff Does Not Allege Any Facts Concerning the Extent of the Alleged Damage

Finally, Plaintiff's claim for inverse condemnation should be dismissed because it fails to allege any facts concerning the extent to which Plaintiff's property was damaged. Indeed, a fair reading of the Complaint is that even read in the light most favorable to Plaintiff, Plaintiff has alleged only an inactionable "damaging" and not an actionable "taking."

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Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Moeller v. Multnomah Cnty.*, 218 Or 413, 425-27, 345 P2d 813 (1959). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (citing *Lincoln Loan v. State Hwy Comm.*, 274 Or 49, 57, 545 P2d 105 (1976)). Plaintiff conclusorily alleges that PacifiCorp "took the Plaintiff's property" (Compl. ¶ 77), but it pleads no facts about the extent of the damage to Plaintiff's grapes—and indeed, the Complaint explicitly pleads that Plaintiff did not even believe many of the grapes were damaged *at all* until after making wine and bottling it (*see, e.g.*, Compl. ¶ 38). Whether or not Plaintiff can prove that smoke taint resulting from PacifiCorp's alleged conduct damaged their grapes, damage—even damage that amounts to monetary harm—is not sufficient; Oregon law only permits inverse condemnation claims for takings.

B. Plaintiff's Negligence and Gross Negligence Claims Fail as a Matter of Law

Plaintiff has failed to state a claim for negligence or gross negligence. In particular, Plaintiff has not pled its alleged harm was a foreseeable result of PacifiCorp's alleged actions. It is also not clear whether Plaintiff intends to plead a claim for negligence *per se* or otherwise claim that PacifiCorp violated ORS 757.020 in relation to its claims. If Plaintiff does so, that claim fails for independent reasons.

1. Plaintiff Has Not Stated a Claim for Negligence or Gross Negligence Because It Has Not Pled Injury to Its Wine Was Reasonably Foreseeable

Plaintiff cannot plead a claim for negligence or gross negligence because it has not suffered a foreseeable harm. When a defendant's duty is not defined by a special relationship, as here,[5] a plaintiff must plead that the harm it suffered was a foreseeable risk of defendant's

[5] Plaintiff pleads that "statutes and regulations regulating utilities" create a "special relationship" between Plaintiff and PacifiCorp. (Compl. ¶ 61.) Such conclusory allegations must be dismissed because they fail to state from which "statutes and regulations" this "special relationship" arises and what duty it entails. However, even if the Court were to find that PacifiCorp has a special statutory or regulatory duty, it could not be a duty to these

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conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987) ("the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff"). This means a plaintiff must plead "harms that a reasonable factfinder, applying community standards, could consider within the range of foreseeable possibilities." 303 Or at 13. "To gauge the reasonable foreseeability of the harm that occurred to plaintiffs, [courts] must consider whether 'the person harmed is one of the general class threatened' by defendants' conduct and whether the harm resulting from the conduct is 'of the general kind to be anticipated from the conduct.'" *McPherson v. State ex rel. Dep't of Corr.*, 210 Or App 602, 614, 152 P3d 918, 924 (2007) (quoting *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 609, 469 P2d 783 (1970)). A claim for gross negligence also must consider the probability of the harm. *WSB Investments, LLC v. Pronghorn Development Co., LLC*, 269 Or App 342, 360, 344 P3d 548, 560 (2015) ("Gross negligence' generally means negligence characterized by near total disregard or indifference to the rights of others or the probable consequences of a course of conduct."). Where no reasonable juror could find that the kind of harm that befell the plaintiff was the foreseeable result of the defendant's alleged negligent act, the harm is unforeseeable as a matter of law. *Buchler v. State By & Through Oregon Corr. Div.*, 316 Or 499, 509, 853 P2d 798 (1993).

Here, wineries are not of the general class threatened by PacifiCorp's alleged conduct and the unmarketability of Plaintiff's wine is not the general kind of harm a reasonable factfinder would anticipate. In *Chapman v. Mayfield*, 358 Or 196, 218 P3d 566 (2015), for example, the Oregon Supreme Court rejected allegations that bad acts were the foreseeable result of serving alcohol to a visibly intoxicated person. The court explained that even though

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Plaintiff entirely or largely outside of PacifiCorp's service territory for unforeseeable harm. *See Allstate Ins. Co. v. Tenant Screening Servs., Inc.*, 140 Or App 41, 50, 914 P2d 16, 21 (1996) ("where the special relationship does not prescribe the scope of the duty, common law principles of reasonable care.") (internal quotation marks and citation omitted).

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it may be "common knowledge that intoxicated people often have impaired judgment and may, therefore, act improperly," such acts are not foreseeable without more specific allegations. *Id.* at 361. Similarly, while it may be common knowledge that smoke results from fire, that is all Plaintiff can allege. Without more, it is not reasonably foreseeable that smoke would travel dozens or hundreds of miles to damage grape harvests months or years after a wildfire. "Hindsight . . . is not foreseeability." *Id.*

Plaintiff has not pled that the fires were on adjacent property or even that PacifiCorp operates within the Willamette Valley or on Plaintiff's land—and indeed, they were not; the furthest fires were more than 200 miles away. (Compl. ¶ 1.)

The tainting of wine made from grapes grown miles away from a fire is not a general way in which injuries occur and is not reasonably foreseeable. Even Plaintiff itself, and its winemaking professionals, apparently did not foresee the harm to its wines. Despite knowing of the Labor Day fires, Plaintiff proceeded to harvest and cleanse grapes and, thinking the grapes were untainted, turn them into wine. (Compl. ¶¶ 37-39.) What is more, Plaintiff purchased some of the allegedly damaged grapes only after the fires. (Compl. ¶ 37.) Plaintiff sold the wine into the marketplace. (Compl. ¶¶ 37-39.) If Plaintiff, and its professional grape growers and wine makers, did not know the risk the fires posed to its grapes, the alleged damage cannot be reasonably foreseeable by a reasonable person, a non-expert in wine making.

2. To the Extent Plaintiff Alleges Negligence *Per Se* or Otherwise Pursues a Claim Based on Violations of ORS 757.020, Oregon Law Forecloses Relying on General Safety Statutes like ORS 757.020

It is not clear whether Plaintiff intends to pursue a negligence *per se* claim. There is no separately labeled count. But Plaintiff cites and relies on ORS 757.020 several times throughout the complaint, including to support its request for multiple damages. (*See, e.g.*, Compl. ¶ 71.) Because ORS 757.020 cannot support a negligence *per se* claim and does not

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set out a standard of care that can be violated, Plaintiff's claims (if any) based on ORS 757.020 should be dismissed.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout By & Through Shahtout v. Emco Garbage Co., Inc.*, 298 Or 598, 601, 695 P2d 897 (1985). In *Kim v. Multnomah Cnty. ex rel. Multnomah Cnty. Cmty. Dep't of Cmty. Corr.*, 328 Or 140, 153, 970 P2d 631 (1998), the plaintiff sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Oregon Court of Appeals affirmed, the Oregon Supreme Court noted that even if the plaintiff had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id.* at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id.* And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for Plaintiff's negligence *per se* claim" as a matter of law. *Id.*

The same problem exists here: Plaintiff relies on ORS 757.020, which does not fix the standard of care in any meaningful way. (Compl. ¶ 61.) The statute offers only general guidance that PacifiCorp must operate "safely" and requires only that public utilities "furnish adequate and safe service, equipment, and facilities." ORS 757.020. Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, the direction in ORS 757.020 to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601. As a matter of law, the statute does not support a negligence *per se* claim under Oregon law. The

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Court should dismiss any references to ORS 757.020 in Plaintiff's Complaint and the negligence claim.

For the reasons explained above, Plaintiff cannot remedy the deficiencies in its claim through repleading because the claim fails as a matter of law. But to the extent Plaintiff contends that it should be granted leave to replead its claim and the Court is inclined to allow it to do so, Plaintiff must do so with specificity. PacifiCorp cannot marshal a defense without knowing what statutes, regulations, and special relationship Plaintiff alleges.

C. Plaintiff Cannot Plead a "Spoliation of Evidence" Claim as a Matter of Law

Plaintiff also cannot maintain its Seventh Claim for Relief, titled "Spoliation of Evidence." Oregon courts repeatedly have refused to state whether a freestanding claim for spoliation even exists under Oregon law. *See Marcum v. Adventist Health Sys./W.*, 215 Or App 166, 191, 168 P3d 1214, 1228 (2007), *rev'd,* 345 Or 237 (2008) (noting that the parties "vehemently dispute" whether a spoliation claim is cognizable, but not deciding the issue); *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012) (same). This Court should reject Plaintiff's invitation to be the first.

But whether or not an independent claim for "spoliation of evidence" exists under Oregon law, Plaintiff has not pled it. As the Oregon Court of Appeals explained in *Classen*, whether or not a claim for spoliation even exists, the bare minimum is that Plaintiff must "first br[ing] the underlying claim and los[e] or suffer[] diminution in its value." *Classen*, 254 Or App 216. Showing actual diminution in a claim's value from "actually los[ing]" is necessary because without such a showing any claim is "purely speculative and uncertain." *Id.* (citations omitted). Plaintiff has not (yet) lost its claims as a result of any spoliation. Its claim is directly foreclosed by *Classen*.

D. Plaintiff Cannot State a Private Nuisance Claim as a Matter of Law

Oregon law is clear: smoke is cognizable only as trespass, not as nuisance. A private nuisance "is an unreasonable *non-trespassory* interference with another's private use and

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enjoyment of land." *Mark v. State Dep't of Fish & Wildlife*, 158 Or App 355, 360, 974 P2d 716 (1999), *rev den,* 329 Or 479 (1999) (emphasis added); *see also State ex rel. Rudd v. Ringold*, 102 Or 401, 404-05, 202 P 734 (1921) ("A private nuisance is anything done to the hurt, annoyance, or detriment of the lands or hereditaments of another, and *not amounting to a trespass*." (emphasis added)). But, in Oregon, smoke is considered a trespassory intrusion. *See Ream v. Keen*, 112 Or App 197, 200, 828 P2d 1038, 1040 (1992), *aff'd,* 314 Or 370 (1992) (concluding that smoke is a trespass as a matter of law). That makes sense. Plaintiff's theory of the case is that smoke caused by wildfires entered its land and damaged its grapes. Because Plaintiff alleges only the trespassory invasion of smoke and soot, it has failed to allege a non-trespassory interference and the private nuisance claim must fail as a matter of law.

E. The Public Nuisance Claim Fails as a Matter of Law

To state a claim for public nuisance, Plaintiff must show (1) that PacifiCorp's conduct unreasonably interfered with a right that is common to all members of the public, (2) PacifiCorp's conduct was negligent, reckless, or intentional, and (3) the conduct caused an injury to plaintiff of a special character distinct and different from that suffered by the public generally. *See Raymond v. S. Pac. Co.*, 259 Or 629, 634, 488 P2d 460 (1971). "Public nuisances must be vindicated by the state unless an individual can show that he has suffered a special damage over and above the ordinary damage caused to the public at large." *Raymond*, 259 Or at 634. It is "not enough that [a plaintiff] suffers the same" injury as "everyone else." *Id.* Plaintiff plead no specific damages and no injury that is distinct and different from that suffered by the public generally. Plaintiff pleads only the legal conclusion that it has "suffer[ed] a special injury distinct from the general public." (Compl. ¶ 90.) With no specific allegations, and no special injury, the public nuisance claim must fail.

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F. Plaintiff's Injunction Claim Is Barred as a Matter of Law

The Court should dismiss Plaintiff's final claim for relief for "injunction" because an injunction is not an independent cause of action and the PUC has primary jurisdiction over the claim.

1. An Injunction Is a Remedy, Not an Independent Cause of Action

The Court must dismiss Plaintiff's Eighth Claim for Relief for "Injunction" because an injunction is a remedy not an independent cause of action. *See Chief Aircraft, Inc. v. Grill*, 288 Or App 729, 731 n. 1, 407 P3d 909 (2017) (reciting acknowledgment by party that injunction "is a remedy, not a claim, under Oregon law"); *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiff's purported fifth claim for relief, labeled "Injunction," is a remedy and not an independent cause of action."); *Harney v. Associated Materials, LLC*, 3:16-CV-1587-SI, 2018 WL 468303, at *8 (D Or Jan 18, 2018) ("The Court agrees, however, that Plaintiff's requests for declaratory and injunctive relief are remedies for the Court to determine, and not independent claims. They should be pleaded as such in any future amended pleading."). Because "injunction" is not a cognizable claim, this claim for relief should be dismissed with prejudice.

2. The PUC Has Primary Jurisdiction over the Claim

The Court should go further and dismiss Plaintiff's request for injunctive relief, whether styled as a claim or as simply prayed-for relief. Plaintiff's proposed injunction purporting to dictate how PacifiCorp operates Oregon's second-largest utility is barred because the Oregon PUC has primary jurisdiction over how utilities operate. *See Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 285, 142 P3d 1010, 1022 (2006).

Three criteria determine whether an agency has primary jurisdiction: "(1) the extent to which the agency's expertise makes it the preferable forum; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse effect on the agency's responsibilities." *Portland Gen. Elec. Co. v. Duncan,*

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Weinberg, Miller & Pembroke, P.C., 162 Or App 265, 279, 986 P2d 35, 44 (1999). All three are easily satisfied here. Plaintiff asks this Court to compel PacifiCorp to undertake actions in five broad categories. Those actions include compelling PacifiCorp to:

- "trim and remove trees that are within its right of way and capable of contacting or falling into its powerlines,"
- "inspect and replace its broken, obsolete, and defective electrical equipment where it has reason to know that such equipment has previously been associated with fire ignitions or may be associated with fire ignitions"
- "refrain from re-energizing powerlines on red flag warning days during fire season until all sections of line to be re-energized have been inspected to be clear of hazards"
- "evaluate actual real-time evidence for the purpose of turning off the power in territory subject to a red flag warning during fire season if government officials, including the Oregon Department of Forestry's Fire Protection Chief, warn the utility of the risk of starting fires without such a power turn off, like what happened on Labor Day 2020"
- "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws pertaining to its powerlines and has completed deferred maintenance pertaining to wildfire mitigation, including but not limited to inspecting wedge connectors, on its powerlines."

(Compl. ¶ 109.)

Each of these broad proscriptions require utility expertise to administer, and are already governed by existing PUC regulations. *See* OAR 860-024-0011 (requiring detailed inspections of overhead facilities with special rules for High Fire Risk Zones); OAR 860-024-0016 (setting standards for conductor clearances from vegetation); OAR 860-024-0020 (mandating utilities to implement Wildfire Mitigation Plans and protocols for the de-

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energization of power lines). Even something so apparently simple as tree trimming requires specialized knowledge, outside of a court's expertise, to know what is "capable of contacting or falling into [] powerlines." The PUC's expertise makes it a preferable forum. The "PUC's primary role is to regulate the conduct of utilities." *Portland Gen. Elec. Co.*, 162 Or App at 280 (denying the PUC's primary jurisdiction when "the underlying issue in th[e] case [was] not utility regulation"); *see also Dreyer*, 341 Or at 285 ("PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated"). Since all of the requested relief concerns utility regulation, the agency is best situated to decide what should be required. The PUC is the proper body to make uniform decisions and avoid conflict and confusion between agency requirements and court decisions.

G. Plaintiff's Requests for Treble Damages under ORS 756.185 and 105.810 Fail as a Matter of Law and Must Be Dismissed

Plaintiff seeks three forms of multiple damages in the complaint: double damages under ORS 477.089 (which PacifiCorp does not challenge in this motion, but reserves the right to challenge later), treble damages under ORS 756.185, and treble damages under ORS 105.810. Because the two forms of treble damages Plaintiff seeks do not apply to this case as a matter of law, the Court should dismiss them.

1. ORS 756.185 Does Not Apply to Plaintiff's Claims for Property Damage

ORS 756.185 provides that a plaintiff may recover "treble the amount of damages" if a public utility[6] violated any of "ORS chapter 756, 757 or 758" and the "wrong or omission was the result of gross negligence or willful misconduct." ORS 756.185(1). But ORS 756.185 explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). Instead, the statute permits recovery

[6] ORS 768.185(4) bars Plaintiff's claims for treble damages whether or not the Court agrees PacifiCorp is not a governmental entity subject to inverse condemnation, because the statutory term "public utility" explicitly encompasses "any corporation" responsible for furnishing heat, light, water, or power regardless of whether it is publicly or privately owned. *See* ORS 757.005.

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in non-personal injury, non-property damage cases such as when a utility charges an impermissible rate. *See, e.g.*, *Dreyer v. Portland Gen'l Elec. Co.*, 300 Or App 414, 417, 453 P3d 580 (2019) (affirming dismissal of claim on other grounds, but noting use of ORS 756.185).

Plaintiff seeks compensation for property damage. (*See, e.g.*, Compl. ¶ 10 ("*All of [Plaintiff's] claims* arise from defendants' willful, reckless, grossly negligent, and negligent conduct, igniting the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires, whose smoke and soot each *damaged plaintiff's property*.") (emphasis added).) Every category of damages that Plaintiff seeks stems from the underlying damage to Plaintiff's property. (Compl. ¶ 41, 90.) Plaintiff's claims for special, incidental, and/or consequential damages are resulting losses due to the alleged damage to the grapes. (*Id.*) As a result, ORS 756.185 is inapplicable and cannot serve as a basis for treble damages.

2. ORS 105.810 Does Not Apply to the Alleged Fires because the Allegations Support that the Fires Were Statutory Wildfires

Oregon's produce and timber trespass statue, ORS 105.810, also does not apply. In certain circumstances, ORS 105.810, allows for treble damages "whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof." ORS 105.810(1). ORS 105.810 does not apply for at least three reasons.

First, claims under ORS 105.810 do not apply to statutory wildfires governed by Oregon's wildfire statutes, ORS 477.089 and 477.092. As a matter of law, all of the wildfires at issue here are covered. ORS 477.089 provides for recovery for property damage caused by wildfire and does not allow for treble damages. The statute defines a wildfire as a fire that "[o]riginated on land used or capable of being used for growing forest tree species regardless of the existing use of the land." ORS 477.089(1)(e)(B). The legislative history supports that ORS 477.089(1)(e)(B) covers fires that start on most land besides urban areas. Heath Curtiss of the Oregon Forest Industries Council in answer to senator questions before the Senate

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Committee on the Judiciary testified that the bill was to "deal[] only with forest fires" and not address downtown areas. Transcript, Senate Committee on Judiciary, Public Hearing on S.B. 709, Mar. 21, 2013, at 8-9.

To avoid being subject to Oregon's comprehensive wildfire liability scheme, Plaintiff conclusorily alleges—without factual basis—that one fire ignition, the "Gates School Fire," was not a statutory wildfire. Plaintiff completely fails to plead any facts about the "Gates School Fire" that suggest that it did not originate on land capable of being used for growing forest tree species.

Second, ORS 105.810 does not apply because Plaintiff has not alleged a sufficient interest in the grapes. Plaintiff produces its wine in part from grapes "purchase[d] from other vineyards and wineries located in the Willamette Valley and elsewhere." (Compl. ¶ 11.) Plaintiff purchased these grapes after the Labor Day fires and makes no allegations about what percent of grapes it purchased or grew. (*See* Compl. ¶ 37.) The statute does not require that the plaintiff holds a possessory interest in the land, but Plaintiff must hold a right to the produce. *Pedro v. January*, 261 Or 582, 601, 494 P2d 868, 878 (1972). Plaintiff has pled no interest in at least some of the allegedly injured grapes. Its interest in these grapes developed only when Plaintiff purchased them, which was after the fires and alleged damage. Because Plaintiff's allegations lack sufficient specificity, ORS 105.810 is inapplicable.

Third, ORS 105.810 does not apply because smoke damage to produce is not the kind of damage encompassed by the statute. In a pair of seminal cases, the Oregon Supreme Court limited ORS 105.810 in cases involving chemical spray that drifted onto a plaintiff's land, damaging crops. *See Meyer v. Harvey Aluminum*, 263 Or. 487, 501 P.2d 795 (1972); *Chase v. Henderson*, 265 Or. 431, 509 P.2d 1188 (1973). The Supreme Court concluded that ORS 105.810 does not "apply to the kind of damages assessed" in cases involving substances that drift onto produce, damaging them. As the Oregon Court of Appeals recently summarized, *Meyer* and *Chase* "stand for the proposition that damages for injuries to fruit crops and trees

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resulting from chemical drift are not the type of damages that are trebled under ORS 105.810." *Worman*, 223 Or App at 240. In contrast, the plaintiff in *Worman* could recover because the defendant engaged in "direct spraying of herbicide on trees and shrubs—conduct that is a 'deliberate trespass such as involved in cutting standing timber.'" *Id*. (citation omitted). Plaintiff's attempts to use ORS 105.810 are directly foreclosed by *Worman*, *Meyer*, and *Chase*.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiff's claims.

DATED: August 30, 2023

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/s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS** on the following named person(s) on the date indicated below by:

☒ mailing with postage prepaid.	☒ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.
☐ facsimile transmission.	☐ email, for which a confirmation of receipt of the email and the attachment by the following named person(s) has been received by the undersigned via the method of _____.
☐ overnight delivery.	☒ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

Please see attached Service List.

DATED: August 30, 2023.

/s/ Reilley D. Keating
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR DOUGLAS COUNTY

ROSEBURG RESOURCES CO., FIA TIMBER GROWTH MASTER, LLC, ILLINOIS MUNICIPAL RETIREMENT FUND, JUNIPER PROPERTIES LLC, LONE ROCK LOGGING COMPANY, INC., LONE ROCK TIMBERLAND CO, LONE ROCK TT LANDCO LLC, MOUNT SCOTT HOLDING CO. LLC, and WEYERHAEUSER TIMBER HOLDINGS, INC., Plaintiffs, vs. PACIFICORP, an Oregon corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50, Defendants.	Case No. 22CV09346 **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO THIRD AMENDED COMPLAINT**

Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") hereby submit their answer to Plaintiffs' Third Amended Complaint ("TAC") as follow:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the TAC. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in said TAC, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the TAC. To the extent paragraphs in the TAC are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and deny each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

1.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 1. PacifiCorp denies the remaining allegations in Paragraph 1.

2.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 2, and on that basis denies them.

3.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 3, and on that basis denies them.

4.

Paragraph 4 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 4.

5.

Paragraph 5 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 5.

6.

Paragraph 6 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 6.

7.

PacifiCorp admits that it operates electrical lines in Northern California. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 7, and on that basis denies them.

8.

PacifiCorp admits that it has prepared a Public Safety Power Shutoff plan for its operations in California. The remaining allegations of Paragraph 8 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 8.

9.

Paragraph 9 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 9.

10.

PacifiCorp denies the allegations of Paragraph 10.

11.

Paragraph 11 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 11.

12.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 12, and on that basis denies them.

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13.

PacifiCorp admits that it is an Oregon corporation authorized to do business in Oregon; that its headquarters are located in Portland, Oregon; and that Pacific Power's website previously stated that Pacific Power serves 773,000 customers, of which 596,000 reside in Oregon. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13 as to Doe Defendants and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 13, including that Pacific Power is a "corporation" or that Pacific Power is a "subsidiary" of PacifiCorp; Pacific Power is an assumed business name of PacifiCorp, not a separate entity.

14.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 14, and on that basis denies them.

15.

PacifiCorp admits that it supplies electricity to members of the public. The remaining allegations of Paragraph 15 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 15.

16.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 16, and on that basis denies them.

17.

Paragraph 17 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 17.

18.

Paragraph 18 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 18.

19.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 19, and on that basis denies them.

20.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 20, and on that basis denies them.

21.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 21, and on that basis denies them.

22.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 22, and on that basis denies them.

23.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 23, and on that basis denies them.

24.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 24, and on that basis denies them.

25.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 25, and on that basis denies them.

26.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 26, and on that basis denies them.

27.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 27, and on that basis denies them.

28.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations of Paragraph 28, and on that basis denies them.

29.

PacifiCorp admits that it operates under its Pacific Power assumed business named as an investor-owned utility, which is authorized to do business and does business in Oregon with its principal place of business in Portland, Oregon. PacifiCorp admits that its website previously listed that PacifiCorp provides electricity to 773,000 customers in California, Washington, and Oregon, and that it provides electricity to customers in Douglas County, Oregon. PacifiCorp denies the remaining allegations in Paragraph 29, including that Pacific Power is a "company"; Pacific Power is an assumed business name of PacifiCorp, not a separate entity.

30.

PacifiCorp admits that it operates in Oregon under the Pacific Power business name and that it is a subsidiary of Berkshire Hathaway Energy. PacifiCorp denies the remaining allegations of Paragraph 30, including that it is the "parent company" of Pacific Power; Pacific Power is an assumed business name of PacifiCorp, not a separate entity.

31.

Paragraph 31 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 31.

32.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 32 and therefore denies the same.

33.

PacifiCorp admits that, on September 5, 2020, the National Weather Service issued a fire weather message regarding fire weather conditions along the West Coast. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 33 and on that basis denies them.

34.

PacifiCorp admits that, on September 6, 2020, the National Weather Service issued a fire

weather outlook and that that outlook is accurately quoted in Paragraph 34.[1]

35.

PacifiCorp admits that on September 7, 2020, the National Weather Service issued a fire weather outlook and that that outlook is accurately quoted in Paragraph 35. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 35 and on that basis denies them.

36.

PacifiCorp admits that on September 7, 2020, the Douglas County Sheriff's Office issued a statement and that that statement is accurately quoted in Paragraph 36. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 36 and on that basis denies them.

37.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37 and on that basis denies them.

38.

PacifiCorp admits that it utilizes weather information in deciding whether to de-energize power lines. PacifiCorp denies the remaining allegations of Paragraph 38.

39.

PacifiCorp denies the allegations of Paragraph 39.

40.

PacifiCorp denies the allegations of Paragraph 40.

41.

PacifiCorp denies the allegations of Paragraph 41.

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[1] To avoid any ambiguity, where PacifiCorp admits that any statement is accurately quoted in the complaint, that admission specifically does not admit (1) that such statement is substantively accurate or that the matters referred to therein are true, (2) that the underlying document is authentic, or (3) that such statement or the underlying document is relevant or admissible to prove Plaintiffs' alleged claims for relief. PacifiCorp reserves all rights to object to use of the underlying document at trial, on summary judgment, or at any other stage, and specifically objects to presentation of isolated quotations through the complaint or answer in lieu of admitting the full document into evidence.

42.

PacifiCorp denies the allegations of Paragraph 42.

43.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 43 and therefore denies the same.

44.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 44 and therefore denies the same.

45.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 45 and therefore denies the same. PacifiCorp denies the remaining allegations of Paragraph 45.

46.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 46 and therefore denies the same.

47.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 47 and therefore denies the same.

48.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 48 and therefore denies the same.

49.

Paragraph 49 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 49.

50.

Paragraph 50 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 50.

51.

Paragraph 51 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 51.

52.

Paragraph 52 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 52.

53.

Paragraph 53 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the last sentence of Paragraph 53 and denies the remaining allegations of Paragraph 53.

54.

PacifiCorp admits that, on September 26, 2019, the State of Oregon issued a document titled "Utility Preparedness for Wildfires." PacifiCorp admits that the document contains the language quoted in the first block quotation, but denies that the document contains the language quoted in the second block quotation. PacifiCorp denies the remaining allegations of Paragraph 54.

55.

PacifiCorp admits that it published a May 21, 2020, report, and that Paragraph 55 accurately quotes from that document. PacifiCorp denies the remaining allegations of Paragraph 55.

56.

PacifiCorp admits that, as of September 2020, approximately 2,679 overhead line miles (or roughly 17%) of PacifiCorp's power lines were designated as being in Fire High Consequence Areas. PacifiCorp otherwise denies the remaining allegations of Paragraph 56.

57.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 57 and on that basis denies them.

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58.

PacifiCorp admits that it published a May 21, 2020, report, and that Paragraph 58 accurately quotes from that document. PacifiCorp admits that, in some circumstances, PacifiCorp can (and does) use safety features to reduce fire risk, such as using non-expulsion fuses, conducting inspections and vegetation management, and implementing a Public Safety Power Shutoff program, among other things. PacifiCorp denies the remaining allegations of Paragraph 58.

59.

PacifiCorp lacks knowledge or information sufficient to form a belief about what other "utilities and fire suppression agencies" have used to forecast the risks of a potential wildfire; whether this is a "field of science that has been developing for decades, driven more recently by increasingly accurate algorithms and stronger computer power"; whether such models "help land managers, fire suppression agencies, and electrical utilities, understand the threats of wildfire in real time"; and whether "laypeople received" such information, and on that basis denies such allegations. PacifiCorp denies the remaining allegations of Paragraph 59.

60.

PacifiCorp admits that, in some circumstances, PacifiCorp can (and does) use safety features to reduce fire risk, such as implementing a Public Safety Power Shutoff program, among other things. PacifiCorp lacks knowledge or information sufficient to form a belief as to whether other utilities "de-energized their power lines during this time period." PacifiCorp denies the remaining allegations of Paragraph 60.

61.

PacifiCorp admits that, in some circumstances, PacifiCorp can (and does) use safety features to reduce fire risk, such as implementing a Public Safety Power Shutoff program, among other things. PacifiCorp admits that its 2019 Wildfire Mitigation Plan included a Public Safety Power Shutoff program. PacifiCorp denies the remaining allegations of Paragraph 61.

62.

Paragraph 62 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63.

PacifiCorp admits that it modified its Wildfire Mitigation Plan in 2020. PacifiCorp denies the remaining allegations of Paragraph 63.

64.

Paragraph 64 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65.

PacifiCorp admits the allegations of Paragraph 65.

66.

PacifiCorp admits that it has prepared a Public Safety Power Shutoff plan for its operations in California. The remaining allegations of Paragraph 66 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 66.

67.

Paragraph 67 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

68.

PacifiCorp admits its 2020 California Wildfire Mitigation Plan contains the language quoted in Paragraph 68. PacifiCorp denies the remaining allegations of Paragraph 68.

69.

Paragraph 69 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 69.

70.

Paragraph 70 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 70.

71.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 71 and therefore denies the same.

72.

PacifiCorp admits that its Pacific Power Facebook account posted on September 7, 2020, regarding a forecast by the National Weather Service, and that both Pacific Power's Facebook post and one of the comments to that post are accurately quoted in Paragraph 72. PacifiCorp denies the remaining allegations of Paragraph 72.

73.

PacifiCorp admits that its @PacificPower_OR Twitter account quote-retweeted a September 7, 2020, tweet by the National Weather Service Portland's @NWSPortland Twitter account and that both the @NWSPortland's tweet and the @PacificPower_OR's quote tweet are accurately quoted in Paragraph 73. PacifiCorp denies the remaining allegations of Paragraph 73.

74.

PacifiCorp admits that its @PacificPower_OR Twitter account tweeted regarding outages on September 7, 2020, and that those tweets are accurately quoted in Paragraph 74. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 74 and therefore denies the same.

75.

PacifiCorp admits that it issued a press release on September 8, 2020, and that the press release is accurately quoted in Paragraph 75. PacifiCorp denies the remaining allegations of Paragraph 75.

76.

Paragraph 76 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 76.

77.

Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78.

Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 78.

79.

Paragraph 79 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 79.

80.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 80 and therefore denies the same.

81.

Paragraph 81 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82.

Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83.

Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84.

Paragraph 84 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

85.

PacifiCorp admits that the Federal Energy Regulatory Commission issued an Order to Show Cause and Notice of Proposed Penalty on April 15, 2021. PacifiCorp denies the remaining allegations of Paragraph 85.

86.

Paragraph 86 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 86.

87.

Paragraph 87 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 87.

88.

Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

89.

Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90.

Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91.

Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92.

Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93.

Paragraph 93 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 93.

94.

PacifiCorp admits that it has hired, retained, contracted, allowed, and/or otherwise collaborated with third-party contractors for vegetation maintenance and other operational functions. The remaining allegations of Paragraph 87 consist of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 87.

95.

Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

96.

Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

97.

Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98.

Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 98.

99.

Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100.

Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 100.

101.

Paragraph 101 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 101.

102.

Paragraph 102 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 102.

103.

Paragraph 103 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 103.

104.

The first sentence of Paragraph 104 states the nature of Plaintiffs' claims and does not require a response. The second sentence of Paragraph 104 consists of conclusions of law to which no

response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 104.

105.

In response to Paragraph 105, PacifiCorp incorporates its responses to Paragraphs 1 to 104.

106.

Paragraph 106 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 106.

107.

Paragraph 107 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 107.

108.

Paragraph 108 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 108.

109.

Paragraph 109 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 109.

110.

Paragraph 110 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 110 and therefore denies the same.

111.

Paragraph 111 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 111 and therefore denies the same.

112.

Paragraph 112 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 112 and therefore denies the same.

113.

Paragraph 113 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 113.

114.

In response to Paragraph 114, PacifiCorp incorporates its responses to Paragraphs 1 to 113.

115.

Paragraph 115 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 115.

116.

Paragraph 116 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 116.

117.

Paragraph 117 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 117.

118.

Paragraph 118 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 118.

119.

Paragraph 119 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 119.

120.

Paragraph 120 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 120.

GENERAL DENIAL

121.

PacifiCorp expressly denies each and every allegation in the TAC that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

PacifiCorp expressly incorporates all allegations of its Answer as if fully set forth in each of the following Affirmative Defenses.

Without admitting any wrongful conduct on the part of PacifiCorp, and without admitting that Plaintiffs have suffered any loss, damage, or injury, PacifiCorp alleges the following Affirmative Defenses to the TAC. By designating the following as Affirmative Defenses, PacifiCorp does not in any way waive or limit any defenses which are or may be raised by the denial, allegations, and averments set forth herein. Certain Affirmative Defenses are asserted for completeness and refer to facts and proof which also negate required elements of Plaintiffs' claims, and by raising such Affirmative Defenses PacifiCorp does not admit that Plaintiffs lack the burden of proof and/or the burden of persuasion for any or all facts underlying any of those Affirmative Defenses or suggest that Plaintiffs are not required to carry the burden as to such elements.

The Affirmative Defenses are pleaded in the alternative, are raised to preserve the rights of PacifiCorp to assert such Affirmative Defenses, and are without prejudice to PacifiCorp's ability to raise other and further Affirmative Defenses.

Investigations into the events alleged in the TAC are currently being undertaken by the parties as well as by third parties. In addition to the Affirmative Defenses set forth below, PacifiCorp reserves the right to allege additional Affirmative Defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

122.

Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged in the TAC by reason of their failure to mitigate such alleged damages. On information and belief, Plaintiffs and/or their agents failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages, such as (but not limited to) by failing to take steps to salvage harvestable timber on Plaintiffs' properties.

SECOND AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

123.

Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the unforeseeable intervening or superseding acts or omissions of others over whom PacifiCorp had no control and for whose conduct PacifiCorp is not responsible, or other unforeseeable, independent, intervening, or superseding event(s) or circumstance(s) beyond the control of PacifiCorp. On information and belief, negligent forestry practices, negligent firefighting, Plaintiffs' and/or their agents' lack of compliance with Oregon's Defensible Space Law, or another currently unknown superseding event caused or contributed to Plaintiffs' damages.

THIRD AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

124.

Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties who PacifiCorp had neither the right, duty or opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. On information and belief, negligent forestry practices, negligent firefighting, Plaintiffs' and/or their agents' lack of compliance with Oregon's Defensible Space Law, or another currently unknown superseding event caused or contributed to Plaintiffs' damages.

FOURTH AFFIRMATIVE DEFENSE

(Unavoidable Accident / Act of God)

125.

Plaintiffs' damages, if any, were caused by an unavoidable accident or Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the plaintiffs. On information and belief, one or more of the alleged ignitions in this case was caused by an unavoidable Act of God, such as a lightning strike.

FIFTH AFFIRMATIVE DEFENSE

(Compliance with Duty of Care)

126.

Plaintiffs' claims are barred because PacifiCorp complied with the law and acted reasonably with the intent to obey the law and such compliance demonstrates that PacifiCorp exercised due care and reasonable prudence. Among other things, PacifiCorp alleges that its deenergization policies and practices complied with the Oregon Public Utility Commission's requirements and Oregon law.

SIXTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

127.

Plaintiffs' claims are barred because PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the TAC. Among other things, PacifiCorp alleges that its deenergization policies and practices met or exceeded industry standards for utility operation in Oregon.

SEVENTH AFFIRMATIVE DEFENSE

(Justification/Necessity)

128.

In connection with the acts and omissions alleged by Plaintiffs, PacifiCorp was justified in its actions or acting out of necessity; therefore Plaintiffs may not recover against PacifiCorp. Among other things, PacifiCorp acted reasonably in the face of urgent requirements to restore power during a historic wind storm in its inspection and reenergization actions.

EIGHTH AFFIRMATIVE DEFENSE

(Contributory/Comparative Negligence)

129.

At all times mentioned herein Plaintiffs were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to their alleged injuries and damages, if any. The fault of Plaintiffs bars, in whole or in part, the damages which Plaintiffs seek to recover herein. Among other things, on information and belief, Plaintiffs failed to

comply with the requirements of Oregon's Defensible Space Law and/or otherwise failed to maintain their properties in a fire safe condition.

NINTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

130.

Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

TENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

131.

Plaintiffs may not recover on claims of damages or losses paid by any other sources.

ELEVENTH AFFIRMATIVE DEFENSE

(Statutory Limit on Damages)

132.

Plaintiffs may not recover damages, in whole or part, to the extent that ORS 477.089 prohibits such recovery.

TWELFTH AFFIRMATIVE DEFENSE

(Requirement to Show Negligence)

133.

To the extent Plaintiffs seek to recover without showing that PacifiCorp was negligent or acted with a higher degree of fault, Plaintiffs' claims are barred, in whole or in part, by ORS 477.092.

THIRTEENTH AFFIRMATIVE DEFENSE

(No Duty to De-Energize)

134.

To the extent Plaintiffs' claims rest on PacifiCorp's alleged failure to de-energize its power lines, Plaintiffs' claims fail because Oregon law does not impose an affirmative duty in tort to proactively de-energize power lines distinct from PacifiCorp's general obligation under ORS 757.020 to furnish adequate and safe service and under ORS 757.035(1) to construct, maintain, and

operate its electrical facilities to protect and safeguard the health and safety of all employees, customers and the public.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorization by Statute or Regulation)

135.

Plaintiffs' claims are barred, in whole or in part, because the actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, because PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Compliance with Statutes and Regulations)

136.

Plaintiffs' claims for negligence per se and negligence (to the extent based on purported statutory or regulatory violations) are barred, in whole or in part, because PacifiCorp neither acted nor failed to, act in a manner that violated any statute, ordinance, or regulation including, but not limited to, because (1) PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements and vegetation management program and recordkeeping requirements set forth in OAR 860-024-0016, (2) PacifiCorp constructed, operated, and maintained its electrical facilities in compliance with the 2017 NESC code requirements pursuant to OAR 860-024-0010, (3) PacifiCorp complied with the requirements of OAR 860-024-0011(1)(a)-(b) by conducting detailed inspections at least every ten years and filing reports with the PUC, (4) PacifiCorp maintained adequate written records of policies, plans and schedules to demonstrate its compliance with the OAR, and (5) PacifiCorp performed routine safety patrols of overhead electrical supply lines and accessible facilities in compliance with OAR 860-024-0011(2).

SIXTEENTH AFFIRMATIVE DEFENSE

(Negligence Per Se)

137.

Plaintiffs' claim for negligence per se is barred because none of the relevant statutes or regulations, including ORS 757.020 or applicable rules, regulations or orders by the Oregon Public Utilities Commission, fix the standard of conduct applicable to PacifiCorp or were implemented to prevent the harm Plaintiffs allege or to protect the class of persons including Plaintiffs. Among other things, liability exists under a negligence per se theory only when a "governmental rule * * * though it was not itself meant to create a civil claim, nevertheless so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout ex rel. Shahtout v. Emco Garbage Co.*, 298 Or 598, 602, 695 P2d 897 (1985). Many, if not all, of the statutes and regulations cited by Plaintiffs do not fix the legal standard, such as OAR 757.035(1), which requires PacifiCorp to "construct, maintain and operate every line, plant, system, equipment or apparatus in such a manner as to protect and safeguard the health and safety of all employees, customers and the public."

SEVENTEENTH AFFIRMATIVE DEFENSE

(No Punitive Damages—Unconstitutionality)

138.

To the extent Plaintiffs reserve the right to assert a claim for punitive damages, PacifiCorp alleges that such claim for punitive damages is barred, in whole or in part, because it violates PacifiCorp's state and federal constitutional rights including, but not limited to, due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and that any claim for punitive damages is limited by state and federal law, including but not limited to the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

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EIGHTEENTH AFFIRMATIVE DEFENSE

(Offset)

139.

Plaintiffs may not recover damages, in whole or in part, to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiffs and/or their insurers. PacifiCorp alleges that such compensation may constitute an offset.

NINETEENTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

140.

The Court lacks jurisdiction to adjudicate Plaintiffs' claims because the Oregon Public Utilities Commission has exclusive and/or primary jurisdiction over the facts and/or theories alleged in Plaintiffs' TAC as a basis for liability, including on the grounds of tariff immunity, Public Utility Power Shutoffs, and other questions of public health and safety arising from utility operations.

TWENTIETH AFFIRMATIVE DEFENSE

(Preemption)

141.

Plaintiffs' claims are preempted by the Oregon Public Utilities Commission's rules, regulations, and oversight of utility operations, including but not limited to under ORS 756.610 and ORS 183.480.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Reservation of Right to Amend to Add Further Affirmative Defenses)

142.

PacifiCorp presently has insufficient knowledge or information to form a belief as to whether it may have additional, as yet unstated, defenses available and therefore reserves the right to assert such additional defenses that are proper based on discovery, investigation or further analysis.

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PRAYER FOR RELIEF

WHEREFORE, having fully answered the TAC, PacifiCorp requests that the Court enter judgment in its favor on all claims asserted by Plaintiffs in their TAC, award PacifiCorp its costs in this action, and grant such other relief as the Court deems just and equitable.

DATED: October 12, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I served the **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO THIRD AMENDED COMPLAINT** upon:

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☐ by mailing to said attorney a copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address and deposited in the post office at Medford, Oregon, on the date set forth below.

☒ by **electronic service** via the Oregon Judicial Department's electronic filing system pursuant to UTCR 21.100 to all attorneys listed above.

☒ by **email** as a courtesy copy.

☐ by faxing to said attorney a copy thereof, certified by me as such, during normal office hours, addressed to said attorney at said attorney's last known facsimile number as indicated above. Proof of such transmission is attached hereto.

☐ by sending a full, true, and correct copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney as shown above, at the last known office address of the attorney on the date set forth below.

DATED this 12th day of October, 2023.

Bernard S. Moore, OSB# 843051
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

BRIGADOON VINEYARDS, LLC, a domestic business corporation, Plaintiff, vs. PACIFICORP, an Oregon corporation; PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50, Defendants.	No. 23CV28149 DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (collectively, "PacifiCorp") request telephonic oral argument and estimate that 40 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Under ORCP 21 A(1)(h), PacifiCorp moves to dismiss Plaintiff's claims for inverse condemnation, negligence, gross negligence, nuisance, "spoliation of evidence," and injunction, as well as Plaintiff's requests for treble damages. This Motion is supported by the following points and authorities and Declaration of Reilley D. Keating in Support of Defendant PacifiCorp's Motion to Dismiss ("Keating Decl."), filed contemporaneously herewith.

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POINTS AND AUTHORITIES

I. INTRODUCTION

The 2020 Labor Day windstorm caused at least 17 separate wildfires across Oregon and burned more than 1 million acres.[1] Nearly three years later, one wine producer brings this lawsuit claiming that PacifiCorp ignited five fires that caused smoke particles to travel across the state to damage Plaintiff's vineyard and grapes it purchased from other vineyards. (Compl. ¶¶ 37-41.) Plaintiff takes a scattershot approach to pleading, alleging eight claims for negligence, gross negligence, inverse condemnation, private nuisance, public nuisance, trespass, "spoliation of evidence," and injunction.

Even setting aside the obvious factual problem of proving that any smoke damage to Plaintiff's grapes resulted from PacifiCorp equipment dozens or even hundreds of miles away rather than from any of the other dozen or more wildfires burning over Labor Day weekend 2020—a problem that pervades every claim in this case—Plaintiff's claims fail, as pleaded, as a matter of law. Plaintiff is or should be well aware of these fatal flaws. Over the course of the last three years, similar claims have been dismissed with prejudice or voluntarily withdrawn by parties represented by Plaintiff's counsel in parallel suits in Douglas County Circuit Court, where only the negligence claims are proceeding to trial. There is no reason why these same claims can withstand dismissal here, just because they are filed by a different client in this count. The Court should reject that tactic and dismiss each of Plaintiff's claims.

First, Plaintiff's claim for inverse condemnation fails on every element. To state a claim for inverse condemnation, Plaintiff must allege that (1) "the government" (2) "intentionally" acted "in a manner that necessarily caused" the injury to Plaintiff's property (3) for a "public use," in the case of claims under Article I, Section 18, or by a corporation

[1] See Oregon Forest Resources Institute, "The 2020 Labor Day Fires," available online at https://oregonforests.org/2020-labor-day-fires (last visited August 21, 2023).

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acting under authority of law in the case of claims under Article XI, Section 4. *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P3d 1261, 1272 (2014). PacifiCorp is not the government, and there is no allegation anywhere in the complaint that PacifiCorp acted "under authority of law" in any relevant way. Nor does Plaintiff allege ultimate facts sufficient to show that any of PacifiCorp's "intentional" acts were inevitable or "substantially certain" to cause smoke damage to Plaintiff's vineyards. Just as occurred in the Douglas County case arising from one of the same fires at issue here, the Court should dismiss the inverse condemnation claim with prejudice.

Second, Plaintiff's other claims should be dismissed based on similar flaws. For example, take only the requirement that Plaintiff alleges that the harm it suffered was a "foreseeable risk" of negligent conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Plaintiff offer no factual allegations—whatsoever—to show that smoke damage to vineyards dozens or hundreds of miles away was a foreseeable risk of Plaintiff's allegation that PacifiCorp was negligent in not installing "insulated[] distribution line conductors" months or years prior to Labor Day 2020 or any of Plaintiff's other allegations of negligent conduct. (Compl. ¶ 33.) As described more below, each of Plaintiff's other claims suffers from similar legal flaws.

Third, Plaintiff's requested multiple damages are unavailable as a matter of law. As just one example, Plaintiff relies on ORS 756.185, which permits treble damages if a utility violates Oregon utility law in a grossly negligent or willful way. ORS 756.185(1). But the statute explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). That clause forecloses trebling damages here, among other issues discussed below.

Fourth, Plaintiff's claim for "spoliation of evidence" fails. Even if Oregon law recognized a freestanding claim for spoliation—and it does not—the Oregon Court of Appeals has expressly rejected bringing claims for spoliation unless a party "first br[ings] the

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underlying claim and los[es] or suffer[s] diminution in its value." *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012). Though Plaintiff ultimately will lose, that will not be the result of any purported spoliation. And in any event, it has not happened yet—a prerequisite for a spoliation claim.

Fifth, Plaintiff seek a facially absurd injunction requiring, among other things, PacifiCorp to "refrain from re-energizing powerlines on red flag warning days" and to "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws." (Compl. ¶ 109.) Oregon law does not recognize a freestanding claim for an injunction. *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiff's purported fifth claim for relief, labeled 'Injunction,' is a remedy and not an independent cause of action."). Even if it did, an injunction that effectively would permit Plaintiff's counsel to run Oregon's second-largest utility, substituting their own judgment for that of the Oregon Public Utility Commission ("PUC"), usurps the PUC's statutory and regulatory authority, and is barred by the doctrines of exclusive and primary jurisdiction.

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers, including around 596,000 customers in Oregon under the Pacific Power brand. (*See* Compl. ¶ 13.) PacifiCorp is regulated by the PUC, which has established comprehensive regulations regarding vegetation management practices, public safety power shutoffs ("PSPS"), and many other aspects of running an electric utility in Oregon.

Plaintiff produces wine from grapes grown within the Willamette Valley and from grapes grown elsewhere. (*See* Compl. ¶¶ 11.) Plaintiff sells its bottled wine at wineries and via wholesale and retail wine distribution systems. (*Id.*)

Plaintiff alleges damages in Willamette Valley from smoke and soot that allegedly traveled there specifically from the Santiam Fire (located in the Santiam Canyon), the Echo

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Mountain Fire (located near Otis and Lincoln City), the Archie Creek Complex Fire (located near Glide), the 242 Fire (located near Chiloquin), and the South Obenchain Fire (located near Eagle Point). (*See* Compl. ¶¶ 1, 6.) Plaintiff alleges that after Labor Day, it harvested and purchased grapes and turned those grapes into wine. (Compl. ¶¶ 37-39.) Plaintiff sold its wine into the marketplace but alleges its wine sales were "reduced or damaged." (Compl. ¶ 38-41.)

Plaintiff filed this eight-count Complaint on July 14, 2023 and served PacifiCorp on July 21, 2023. In addition to this case (*Brigadoon Vineyards, LLC v. PacifiCorp, et al.*, No. 23CV28149), multiple other groups of winery Plaintiffs have filed suits against PacifiCorp alleging smoke damage from the same fires. Each winery case is brought by the same counsel currently litigating a negligence-only case in Douglas County Circuit Court.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations or legal conclusions are insufficient. *See, e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997), *rev den,* 325 Or 438 (1997) (citations omitted). When a pleaded claim is legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. Plaintiffs' Inverse Condemnation Claim Fails as a Matter of Law

Multiple trial courts in Oregon have dismissed similar inverse condemnation claims, including some brought by Plaintiff's attorneys, in cases arising out of the Labor Day fires.

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(*See* Keating Decl., Exs. A-G.) Here too, Plaintiff's Third Claim for Relief for inverse condemnation is subject to dismissal for multiple reasons.

Typically, a taking begins with a formal eminent domain proceeding. However, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Dunn v. City of Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014). In those cases, a property owner may recover under the doctrine of inverse condemnation. In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

The Oregon Constitution has two takings clauses. Article I, section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." Here, Plaintiff does not state under which clause it asserts its Third Claim for Relief for inverse condemnation.

Plaintiff cannot satisfy the elements of either clause as a matter of law. *First*, Plaintiff cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. *Second*, Plaintiff cannot show either that PacifiCorp is a "governmental defendant" or that it took their property "for a public use" as required by Article I, section 18. *Third*, Plaintiff cannot show that PacifiCorp acted "under authority of law" as required by Article XI, section 4 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiff's inverse condemnation claim should be dismissed with prejudice.

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1. Plaintiffs Fail to Allege that PacifiCorp Intentionally Undertook to Act in a Manner that Necessarily Caused Plaintiffs' Injuries

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation by proving that the government "intentionally undertook * * * actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the * * * inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas Cnty.*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If Plaintiff's evidence shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("[A] takings claim cannot be based on * * * 'negligent government conduct.'" (citation omitted)).

Dunn illustrates the high standard Plaintiff must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. *Dunn*, 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "'natural and ordinary consequence[]'" of that improvement, and so was liable for inverse condemnation. *Id*. at 345-46 (citation omitted). The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the

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requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id.* at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiff must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id.* (emphasis added).

Under *Dunn*, Plaintiff cannot allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiff's property. Instead, Plaintiff must allege that the invasion "into [Plaintiffs'] [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiff's damages must have been "'substantially certain'" to occur. *Dunn*, 355 Or at 360-61.

In *Worman v. Columbia Cnty.*, 223 Or App 223, 236, 195 P3d 414 (2008), a plaintiff sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the Plaintiff failed to state an inverse condemnation claim because the Plaintiff had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to Plaintiff's property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id.* (emphasis omitted). The court rejected the plaintiff's inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, Plaintiff's property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiff's property as a natural and ordinary consequence of the project. *Id.*

Courts have rejected recent attempts to use an inverse condemnation claim against utility companies for wildfire damages, including in cases brought by Plaintiff's attorneys. In

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rejecting inverse condemnation claims against a utility for wildfire damages, Judge Johnson of the Douglas County Circuit Court recognized that *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Keating Decl., Ex. E at 4.)

Judge Conover of Lane County dismissed inverse condemnation claims against the Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the Plaintiff's properties." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Although Judge Conover allowed the Plaintiff in that case a chance to amend their complaint, Judge Conover recently dismissed the amended inverse condemnation claims with prejudice. (Keating Decl., Ex. B.)

In another case, Judge Johnson of Douglas County recently dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case, Douglas County Circuit Court Case No. 22CV09346. (Keating Decl., Ex. A.) Judge Johnson dismissed the original complaint, granting leave to replead if the Plaintiff could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id*.) Plaintiff repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (Keating Decl., Ex. G.) In reaching that conclusion, Judge Johnson found that the Plaintiff's allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites" were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id*.)[2]

[2] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order denying PacifiCorp's motion to dismiss inverse condemnation claim brought pursuant

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Plaintiff here cannot allege that any of the necessary causal steps from PacifiCorp's actions to Plaintiff's damaged grapes were "substantially certain" to occur. Plaintiff conclusorily alleges that "the damages caused to Plaintiff's lands and grapes, by each of the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires' harmful smoke was the inevitable result of PacifiCorp's actions," but Plaintiff have pled no facts to support this. (Compl. ¶ 76.) Plaintiff alleges PacifiCorp was negligent in nine potential ways, including: trimming vegetation adjacent to electrical lines, replacing electrical equipment with "strong and safe parts," including the Santiam Canyon, North Umpqua Canyon, and Echo Mountain in areas "designated for a power shutoff program," turning off power in "the service area adjacent to the Willamette Valley," and ensuring "operations personnel understood and knew how and when to de-energize power lines during high-wind, high-fire conditions. (Compl. ¶ 33.) But this generalized list of actions does not support the conclusions that fires would inevitably start, those fires would inevitably grow large enough to create harmful smoke, that smoke would inevitably travel many miles to Plaintiff's grapes, and that those grapes would inevitably no longer be viable for wine making after the smoke exposure. Plaintiff's allegations amount to a "conclusion[] of law," and do not suffice to state "ultimate facts" entitling Plaintiff to relief. *Huang*, 147 Or App at 332.

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to Article XI, section 4 arising out of a different 2020 Labor Day fire (the Pike Road wildfire in Tillamook County). *See Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 22CV29695. Based on the facts alleged in that complaint, Judge Allen concluded that the requirements of *Dunn* were sufficiently pled and that there was a sufficient nexus between PacifiCorp's eminent domain authority and the fire damages under Article XI, section 4. Although PacifiCorp does not concede that the *Stroh* allegations were legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case. As the court recounted, the plaintiff in *Stroh* alleged that wildfire damage to the plaintiff's property was substantially certain because it had specifically alleged that PacifiCorp maintained a utility line easement across the plaintiff's property (i.e., the plaintiff's property was right under a powerline), that the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (Keating Decl., Ex. F at 7-8.)

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Plaintiff has not alleged any other specific facts supporting a finding of "substantial certainty." Rather, Plaintiff centers its factual allegations on fire "risk" because Plaintiff cannot allege that there was a substantial certainty of Plaintiff's specific smoke damage. The Complaint refers to "risk" or "fire risk" more than ten times. (*See, e.g.*, Complaint ¶¶ 8, 18, 21, 23, 24, 25, 32, 42, 45.) The reason Plaintiff focuses on "risk" is that it is the best it can do; it is implausible (at best) to suggest that PacifiCorp's alleged actions were *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, dry weather, wind direction and strength to carry the smoke, etc.) are necessary for Plaintiff's alleged damages to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), Plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id.* at 1377. The court rejected Plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "'direct, natural, or probable'" result of government conduct to state a claim. *Id.* at 1378 (citation omitted). As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id.* For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998); *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

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Even if Plaintiff could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and it cannot), Plaintiff makes no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. At best, Plaintiff alleges that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of fires that were the but-for cause of smoke, that was the but-for cause of Plaintiff's damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id.* at 361 (emphasis added). Plaintiff has not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiff's properties in particular, and it cannot do so.

Plaintiff's allegations about computer modeling and analysis do not save their inverse condemnation claim from dismissal. (*See* Compl. ¶ 17 ("Responsible electric utilities use computer modeling and analysis on a regular basis as part of their de-energization programs to predict how a weather pattern will evolve, and how a fire would be spread amidst such winds, heat, and lack of humidity").) Plaintiff does not allege that computer modeling and analysis would have predicted fires igniting at any particular point, let alone the particular points of ignition alleged in the Complaint. Nor does Plaintiff allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in sufficient proximity to Plaintiff such that any computer modeling would have predicted the fire would invade Plaintiff's land. *Id.* at 351.

Fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors. *See City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a

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utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). Even with an "intentionally set fire[]" that "escape[d] because of intervening winds" or other causes, liability for fire damage "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiff does not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiff in particular "for purposes of a takings claim," Plaintiff fails to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

2. Any Alleged Article I, Section 18 Inverse Condemnation Claim Fails because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use

a. PacifiCorp Is Not a Public Entity

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." 335 Or at 27-29 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiff's invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, Judge Alexander in Multnomah County recognized that as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, section 18 against a private entity like PacifiCorp. (*See supra* at n 1.) Similarly, Judge Conover in Lane County, in dismissing the inverse condemnation claims against Lane Electric, specifically found that "Lane Electric is not a government actor." (Keating Decl., Ex. C at 30 (transcript pp. 70-71); *see also* Ex. D at 1.)

Plaintiff may cite cases showing that private entities may be involved in *direct* condemnation actions, as plaintiffs have done in other cases. *See, e.g.*, *Grande Ronde Elec.*

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Co. v. Drake, 46 Or 243, 78 P 1031 (1905). But the fact that corporations may have a *statutory* right to condemnation (*see* ORS 35.245) says nothing about whether corporations may be liable for *constitutional* inverse condemnation claims. *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432, 60 P3d 557 (2002) ("[I]t does not necessarily follow that, because the [defendant] may have violated the [condemnation] statutes, the proper remedy is an action for damages in inverse condemnation.").

Dismissing any Article I, section 18 claim also makes sense from a policy perspective, because PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the PUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). PacifiCorp would also not qualify as a "[g]overnment body" under Oregon's tort claim statute. ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiff's Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiff's Article I, section 18 claim. *Vokoun*, 335 Or at 28.

b. Plaintiffs Do Not Allege that PacifiCorp Took Property for "Public Use"

Any Article I, section 18 inverse condemnation claim also fails for the independent reason that Plaintiff cannot demonstrate that its property was taken "for a public use." *Vokoun*, 335 Or at 23; *see also Worman*, 223 Or App at 236 (Plaintiff could not state an inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting

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'for a public use'"). As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Oregon*, 240 Or App 490, 500-01, 247 P3d 331 (2011), *rev den,* 351 Or 216 (2011) (internal quotation marks and citation omitted). In other words, Plaintiff must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. Judge Conover of Lane County recently dismissed inverse condemnation claims against Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of similar Labor Day wildfires, noting: "I find that there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose. * * * further, there was no intent to put the Plaintiff's property to public use." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.)

Plaintiff's only allegation here is that "PacifiCorp has the statutory power to condemn property in the State of Oregon and utilizes such property in the operation of its utility for a public use." (Compl. ¶ 74.) Plaintiff has not alleged that any supposed taking was for public use or that PacifiCorp used the property in the operation of its utility. Plaintiff must meet the test for public use set forth in *Mossberg*: it must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiff cannot make that showing and makes no effort to do so, it fails to state an inverse condemnation claim under Article I, section 18 of the Oregon Constitution.

3. Plaintiffs' Inverse Condemnation Claim under Article XI, Section 4 Fails Because Plaintiffs Do Not and Cannot Allege that PacifiCorp Acted under Authority of Law

Any Article XI, section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiff cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiff contend damaged them. By its own terms, the takings clause in Article XI, section 4 only applies to a "corporation under authority of law." Plaintiff attempts to meet

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this requirement by alleging that PacifiCorp has a general power of condemnation, (Compl. ¶ 74), or that it operates as a public utility, (Compl. ¶ 73). (*See* Compl. ¶ 77 (alleging PacifiCorp "took the Plaintiff's property via color of its State law monopoly and utility rights").) But Plaintiff fails to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because it cannot do so, the inverse condemnation claim under Article XI, section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiff cannot state an Article XI, section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the Plaintiff's Article XI, section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the Plaintiff's property." (Keating Decl., Ex. C at 30 (p. 71 of the transcript); *see also* Ex. D at 1.) Similarly, Douglas County Circuit Court Judge Johnson dismissed Plaintiff's Article XI, section 4 claim, stating that the Court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (Keating Decl., Ex. G.)

Nor can Plaintiff cite any binding authority to the contrary. Article XI, section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiff allege).[3] *City of Keizer v. Lake Labish Water*

[3] A handful of other modern cases have addressed Article XI, section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, section 18 or Article XI, section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805

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Control Dist., 185 Or App 425, 443 n5, 60 P3d 557 (2002), *rev den,* 336 Or 60 (2003) (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4").

The only Oregon cases permitting Article XI, section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co.*, 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

"Under authority of law" must require a direct connection between a corporation's legal authority and the alleged taking because unlike Article I, section 18's takings clause, Article XI, section 4 contains no textual "public use" requirement. The "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from

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(2006), *rev den,* 341 Or 80 (2006) (rejecting Article XI, section 4 claim in passing, and collecting cases doing the same thing).

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compensable takings. If the theory advanced by Plaintiff were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. State*, 196 Or 120, 147, 248 P2d 703 (1952)).[4]

The Court also may look to the analogous federal state action doctrine, which leads to the same result. In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Jackson v. Metro. Edison Co.*, 419 US 345, 350, 346, 95 S Ct 449, 42 L Ed 2d 477 (1974). The Supreme Court rejected this argument and found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id.* at 353 (emphasis added). Although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

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[4] If the Court interprets Article XI, section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, section 4—and Plaintiff's claim would then fail for the same reason that their Article I, section 18 claim fails, as described above. *See, e.g.*, *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980), *aff'd,* 701 F2d 99 (9th Cir 1983) (Article XI, section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1928)).

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Plaintiff cannot claim that PacifiCorp acted "under authority of law" in allegedly igniting the fires at issue here, nor does Plaintiff even attempt to do so. Plaintiff does not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires. In fact, Plaintiff specifically alleges that PacifiCorp was "not authorized under any state law or regulation to take the actions that it took causing ignition of each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and/or South Obenchain Fires and Plaintiff's resulting damages." (Compl. ¶ 77.) Plaintiff similarly does not allege that PacifiCorp used the power of eminent domain to take its property, nor to take any relevant land at issue in this case. The most Plaintiff alleges is that PacifiCorp generally has the "power of eminent domain"—not that PacifiCorp used that power in any relevant way vis-à-vis their takings claim. (Compl. ¶ 74.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other Oregon cases, Plaintiff's inverse condemnation claim under Article XI, section 4 claim fails as a matter of law.

4. Plaintiffs Do Not Allege Any Facts Concerning the Extent of the Alleged Damage

Finally, Plaintiff's claim for inverse condemnation should be dismissed because it fails to allege any facts concerning the extent to which Plaintiff's property was damaged. Indeed, a fair reading of the Complaint is that even read in the light most favorable to Plaintiff, Plaintiff has alleged only an inactionable "damaging" and not an actionable "taking."

Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Moeller v. Multnomah Cnty.*, 218 Or 413, 425-27, 345 P2d 813 (1959). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (citing *Lincoln Loan v. State Hwy Comm.*, 274 Or 49, 57, 545 P2d 105 (1976)). Plaintiff conclusorily alleges that PacifiCorp "took the Plaintiff's property" (Compl. ¶ 77), but it pleads no facts about the extent of the damage to

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Plaintiff's grapes—and indeed, the Complaint explicitly pleads that Plaintiff did not even believe many of the grapes were damaged *at all* until after making wine and bottling it (*see, e.g.*, Compl. ¶ 38). Whether or not Plaintiff can prove that smoke taint resulting from PacifiCorp's alleged conduct damaged their grapes, damage—even damage that amounts to monetary harm—is not sufficient; Oregon law only permits inverse condemnation claims for takings.

B. Plaintiffs' Negligence and Gross Negligence Claims Fail as a Matter of Law

Plaintiffs has failed to state a claim for negligence or gross negligence. In particular, Plaintiff has not pled its alleged harm was a foreseeable result of PacifiCorp's alleged actions. It is also not clear whether Plaintiff intends to plead a claim for negligence *per se* or otherwise claim that PacifiCorp violated ORS 757.020 in relation to its claims. If Plaintiff does so, that claim fails for independent reasons.

1. Plaintiffs Have Not Stated a Claim for Negligence or Gross Negligence Because They Have Not Pled Injury to their Wine Was Reasonably Foreseeable

Plaintiffs cannot plead a claim for negligence or gross negligence because it has not suffered a foreseeable harm. When a defendant's duty is not defined by a special relationship, as here,[5] a plaintiff must plead that the harm it suffered was a foreseeable risk of defendant's conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987) ("the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a

[5] Plaintiff pleads that "statutes and regulations regulating utilities" create a "special relationship" between Plaintiff and PacifiCorp. (Compl. ¶ 61.) Such conclusory allegations must be dismissed because they fail to state from which "statutes and regulations" this "special relationship" arises and what duty it entails. However, even if the Court were to find that PacifiCorp has a special statutory or regulatory duty, it could not be a duty to these Plaintiff entirely or largely outside of PacifiCorp's service territory for unforeseeable harm. *See Allstate Ins. Co. v. Tenant Screening Servs., Inc.*, 140 Or App 41, 50, 914 P2d 16, 21 (1996) ("where the special relationship does not prescribe the scope of the duty, common law principles of reasonable care and foreseeability of harm are relevant.") (internal quotation marks and citation omitted).

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protected interest of the kind of harm that befell the plaintiff"). This means a plaintiff must plead "harms that a reasonable factfinder, applying community standards, could consider within the range of foreseeable possibilities." 303 Or at 13.

"To gauge the reasonable foreseeability of the harm that occurred to plaintiffs, [courts] must consider whether 'the person harmed is one of the general class threatened' by defendants' conduct and whether the harm resulting from the conduct is 'of the general kind to be anticipated from the conduct.'" *McPherson v. State ex rel. Dep't of Corr.*, 210 Or App 602, 614, 152 P3d 918, 924 (2007) (quoting *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 609, 469 P2d 783 (1970)). A claim for gross negligence also must consider the probability of the harm. *WSB Investments, LLC v. Pronghorn Development Co., LLC*, 269 Or App 342, 360, 344 P3d 548, 560 (2015) ("Gross negligence' generally means negligence characterized by near total disregard or indifference to the rights of others or the probable consequences of a course of conduct."). Where no reasonable juror could find that the kind of harm that befell the plaintiff was the foreseeable result of the defendant's alleged negligent act, the harm is unforeseeable as a matter of law. *Buchler v. State By & Through Oregon Corr. Div.*, 316 Or 499, 509, 853 P2d 798 (1993).

Here, wineries are not of the general class threatened by PacifiCorp's alleged conduct and the unmarketability of Plaintiff's wine is not the general kind of harm a reasonable factfinder would anticipate. In *Chapman v. Mayfield*, 358 Or 196, 218 P3d 566 (2015), for example, the Oregon Supreme Court rejected allegations that bad acts were the foreseeable result of serving alcohol to a visibly intoxicated person. The court explained that even though it may be "common knowledge that intoxicated people often have impaired judgment and may, therefore, act improperly," such acts are not foreseeable without more specific allegations. *Id.* at 361. Similarly, while it may be common knowledge that smoke results from fire, that is all Plaintiff can allege. Without more, it is not reasonably foreseeable that

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smoke would travel dozens or hundreds of miles to damage grape harvests months or years after a wildfire. "Hindsight . . . is not foreseeability." *Id.*

Plaintiff has not pled that the fires were on adjacent property or even that PacifiCorp operates within the Willamette Valley or on Plaintiff's land—and indeed, they were not; the furthest fires were more than 200 miles away. (Compl. ¶ 1.)

The tainting of wine made from grapes grown miles away from a fire is not a general way in which injuries occur and is not reasonably foreseeable. Even Plaintiff itself, and its winemaking professionals, apparently did not foresee the harm to its wines. Despite knowing of the Labor Day fires, Plaintiff proceeded to harvest and cleanse grapes and, thinking the grapes were untainted, turn them into wine. (Compl. ¶¶ 37-39.) What is more, Plaintiff purchased some of the allegedly damaged grapes only after the fires. (Compl. ¶ 37.) Plaintiff sold the wine into the marketplace. (Compl. ¶¶ 37-39.) If Plaintiff, and its professional grape growers and wine makers, did not know the risk the fires posed to its grapes, the alleged damage cannot be reasonably foreseeable by a reasonable person, a non-expert in wine making.

2. To the Extent Plaintiffs Allege Negligence *Per Se* or Otherwise Pursue a Claim Based on Violations of ORS 757.020, Oregon Law Forecloses Relying on General Safety Statutes like ORS 757.020

It is not clear whether Plaintiff intends to pursue a negligence *per se* claim. There is no separately labeled count. But Plaintiff cites and relies on ORS 757.020 several times throughout the complaint, including to support its request for multiple damages. (*See, e.g.*, Compl. ¶ 71.) Because ORS 757.020 cannot support a negligence *per se* claim and does not set out a standard of care that can be violated, Plaintiff's claims (if any) based on ORS 757.020 should be dismissed.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout By & Through Shahtout v. Emco Garbage Co., Inc.*, 298 Or 598, 601, 695

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P2d 897 (1985). In *Kim v. Multnomah Cnty. ex rel. Multnomah Cnty. Cmty. Dep't of Cmty. Corr.*, 328 Or 140, 153, 970 P2d 631 (1998), the Plaintiff sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Oregon Court of Appeals affirmed, the Oregon Supreme Court noted that even if Plaintiff had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a standard of care." *Id.* at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id.* And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for Plaintiff's negligence *per se* claim" as a matter of law. *Id.*

The same problem exists here: Plaintiff relies on ORS 757.020, which does not fix the standard of care in any meaningful way. (Compl. ¶ 61.) The statute offers only general guidance that PacifiCorp must operate "safely" and requires only that public utilities "furnish adequate and safe service, equipment, and facilities." ORS 757.020. Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, the direction in ORS 757.020 to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601. As a matter of law, the statute does not support a negligence *per se* claim under Oregon law. The Court should dismiss any references to ORS 757.020 in Plaintiff's Complaint and the negligence claim.

For the reasons explained above, Plaintiff cannot remedy the deficiencies in its claim through repleading because the claim fails as a matter of law. But to the extent Plaintiff contends that it should be granted leave to replead its claim and the Court is inclined to allow

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it to do so, Plaintiff must do so with specificity. PacifiCorp cannot marshal a defense without knowing what statutes, regulations, and special relationship Plaintiff alleges.

C. Plaintiffs Cannot Plead a "Spoliation of Evidence" Claim as a Matter of Law

Plaintiff also cannot maintain its Seventh Claim for Relief, titled "Spoliation of Evidence." Oregon courts repeatedly have refused to state whether a freestanding claim for spoliation even exists under Oregon law. *See Marcum v. Adventist Health Sys./W.*, 215 Or App 166, 191, 168 P3d 1214, 1228 (2007), *rev'd,* 345 Or 237 (2008) (noting that the parties "vehemently dispute" whether a spoliation claim is cognizable, but not deciding the issue); *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012) (same). This Court should reject Plaintiff's invitation to be the first.

But whether or not an independent claim for "spoliation of evidence" exists under Oregon law, Plaintiff has not pled it. As the Oregon Court of Appeals explained in *Classen*, whether or not a claim for spoliation even exists, the bare minimum is that Plaintiff must "first br[ing] the underlying claim and los[e] or suffer[] diminution in its value." *Classen*, 254 Or App 216. Showing actual diminution in a claim's value from "actually los[ing]" is necessary because without such a showing any claim is "purely speculative and uncertain." *Id.* (citations omitted). Plaintiff has not (yet) lost its claims as a result of any spoliation. Its claim is directly foreclosed by *Classen*.

D. Plaintiffs Cannot State a Private Nuisance Claim as a Matter of Law

Oregon law is clear: smoke is cognizable only as trespass, not as nuisance. A private nuisance "is an unreasonable *non-trespassory* interference with another's private use and enjoyment of land." *Mark v. State Dep't of Fish & Wildlife*, 158 Or App 355, 360, 974 P2d 716 (1999), *rev den,* 329 Or 479 (1999) (emphasis added); *see also State ex rel. Rudd v. Ringold*, 102 Or 401, 404-05, 202 P 734 (1921) ("A private nuisance is anything done to the hurt, annoyance, or detriment of the lands or hereditaments of another, and *not amounting to a trespass*." (emphasis added)). But, in Oregon, smoke is considered a trespassory intrusion.

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See Ream v. Keen, 112 Or App 197, 200, 828 P2d 1038, 1040 (1992), *aff'd,* 314 Or 370 (1992) (concluding that smoke is a trespass as a matter of law). That makes sense. Plaintiff's theory of the case is that smoke caused by wildfires entered its land and damaged its grapes. Because Plaintiff alleges only the trespassory invasion of smoke and soot, it has failed to allege a non-trespassory interference and the private nuisance claim must fail as a matter of law.

E. The Public Nuisance Claim Fails as a Matter of Law

To state a claim for public nuisance, Plaintiff must show (1) that PacifiCorp's conduct unreasonably interfered with a right that is common to all members of the public, (2) PacifiCorp's conduct was negligent, reckless, or intentional, and (3) the conduct caused an injury to plaintiff of a special character distinct and different from that suffered by the public generally. *See Raymond v. S. Pac. Co.*, 259 Or 629, 634, 488 P2d 460 (1971). "Public nuisances must be vindicated by the state unless an individual can show that he has suffered a special damage over and above the ordinary damage caused to the public at large." *Raymond*, 259 Or at 634. It is "not enough that [a plaintiff] suffers the same" injury as "everyone else." *Id.* Plaintiff plead no specific damages and no injury that is distinct and different from that suffered by the public generally. Plaintiff plead only the legal conclusion that it has "suffer[ed] a special injury distinct from the general public." (Compl. ¶ 90.) With no specific allegations, and no special injury, the public nuisance claim must fail.

F. Plaintiffs' Injunction Claim Is Barred as a Matter of Law

The Court should dismiss Plaintiff's final claim for relief for "injunction" because an injunction is not an independent cause of action and the PUC has primary jurisdiction over the claim.

1. An Injunction Is a Remedy, Not an Independent Cause of Action

The Court must dismiss Plaintiff's Eighth Claim for Relief for "Injunction" because an injunction is a remedy not an independent cause of action. *See Chief Aircraft, Inc. v. Grill*,

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288 Or App 729, 731 n. 1, 407 P3d 909 (2017) (reciting acknowledgment by party that injunction "is a remedy, not a claim, under Oregon law"); *Johnson v. Brown*, 567 F Supp 3d 1230, 1236 n2 (D Or 2021) ("Plaintiff's purported fifth claim for relief, labeled "Injunction," is a remedy and not an independent cause of action."); *Harney v. Associated Materials, LLC*, 3:16-CV-1587-SI, 2018 WL 468303, at *8 (D Or Jan 18, 2018) ("The Court agrees, however, that Plaintiff's requests for declaratory and injunctive relief are remedies for the Court to determine, and not independent claims. They should be pleaded as such in any future amended pleading."). Because "injunction" is not a cognizable claim, this claim for relief should be dismissed with prejudice.

2. The PUC Has Primary Jurisdiction over the Claim

The Court should go further and dismiss Plaintiff's request for injunctive relief, whether styled as a claim or as simply prayed-for relief. Plaintiff's proposed injunction purporting to dictate how PacifiCorp operates Oregon's second-largest utility is barred because the Oregon PUC has primary jurisdiction over how utilities operate. *See Dreyer v. Portland Gen. Elec. Co.*, 341 Or 262, 285, 142 P3d 1010, 1022 (2006).

Three criteria determine whether an agency has primary jurisdiction: "(1) the extent to which the agency's expertise makes it the preferable forum; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse effect on the agency's responsibilities." *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 279, 986 P2d 35, 44 (1999). All three are easily satisfied here. Plaintiff asks this Court to compel PacifiCorp to undertake actions in five broad categories. Those actions include compelling PacifiCorp to:

- "trim and remove trees that are within its right of way and capable of contacting or falling into its powerlines,"

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- "inspect and replace its broken, obsolete, and defective electrical equipment where it has reason to know that such equipment has previously been associated with fire ignitions or may be associated with fire ignitions"
- "refrain from re-energizing powerlines on red flag warning days during fire season until all sections of line to be re-energized have been inspected to be clear of hazards"
- "evaluate actual real-time evidence for the purpose of turning off the power in territory subject to a red flag warning during fire season if government officials, including the Oregon Department of Forestry's Fire Protection Chief, warn the utility of the risk of starting fires without such a power turn off, like what happened on Labor Day 2020"
- "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws pertaining to its powerlines and has completed deferred maintenance pertaining to wildfire mitigation, including but not limited to inspecting wedge connectors, on its powerlines."

(Compl. ¶ 109.)

Each of these broad proscriptions require utility expertise to administer, and are already governed by existing PUC regulations. *See* OAR 860-024-0011 (requiring detailed inspections of overhead facilities with special rules for High Fire Risk Zones); OAR 860-024-0016 (setting standards for conductor clearances from vegetation); OAR 860-024-0020 (mandating utilities to implement Wildfire Mitigation Plans and protocols for the de-energization of power lines). Even something so apparently simple as tree trimming requires specialized knowledge, outside of a court's expertise, to know what is "capable of contacting or falling into [] powerlines." The PUC's expertise makes it a preferable forum. The "PUC's primary role is to regulate the conduct of utilities." *Portland Gen. Elec. Co.*, 162 Or App at

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280 (denying the PUC's primary jurisdiction when "the underlying issue in th[e] case [was] not utility regulation"); *see also Dreyer*, 341 Or at 285 ("PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated"). Since all of the requested relief concerns utility regulation, the agency is best situated to decide what should be required. The PUC is the proper body to make uniform decisions and avoid conflict and confusion between agency requirements and court decisions.

G. Plaintiffs' Requests for Treble Damages under ORS 756.185 and 105.810 Fail as a Matter of Law and Must Be Dismissed

Plaintiffs seeks three forms of multiple damages in the complaint: double damages under ORS 477.089 (which PacifiCorp does not challenge in this motion, but reserves the right to challenge later), treble damages under ORS 756.185, and treble damages under ORS 105.810. Because the two forms of treble damages Plaintiff seeks do not apply to this case as a matter of law, the Court should dismiss them.

1. ORS 756.185 Does Not Apply to Plaintiffs' Claims for Property Damage

ORS 756.185 provides that a plaintiff may recover "treble the amount of damages" if a public utility[6] violated any of "ORS chapter 756, 757 or 758" and the "wrong or omission was the result of gross negligence or willful misconduct." ORS 756.185(1). But ORS 756.185 explicitly "does not apply with respect to the liability of any public utility for personal injury or property damage." ORS 756.185(4). Instead, the statute permits recovery in non-personal injury, non-property damage cases such as when a utility charges an impermissible rate. *See, e.g.*, *Dreyer v. Portland Gen'l Elec. Co.*, 300 Or App 414, 417, 453 P3d 580 (2019) (affirming dismissal of claim on other grounds, but noting use of ORS 756.185).

[6] ORS 768.185(4) bars Plaintiff's claims for treble damages whether or not the Court agrees PacifiCorp is not a governmental entity subject to inverse condemnation, because the statutory term "public utility" explicitly encompasses "any corporation" responsible for furnishing heat, light, water, or power regardless of whether it is publicly or privately owned. *See* ORS 757.005.

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Plaintiff seeks compensation for property damage. (*See, e.g.*, Compl. ¶ 10 ("*All of [Plaintiff's] claims* arise from defendants' willful, reckless, grossly negligent, and negligent conduct, igniting the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires, whose smoke and soot each *damaged plaintiff's property*.") (emphasis added).) Every category of damages that Plaintiff seeks stems from the underlying damage to Plaintiff's property. (Compl. ¶ 41, 90.) Plaintiff's claims for special, incidental, and/or consequential damages are resulting losses due to the alleged damage to the grapes. (*Id.*) As a result, ORS 756.185 is inapplicable and cannot serve as a basis for treble damages.

2. ORS 105.810 Does Not Apply to the Alleged Fires because the Allegations Support that the Fires Were Statutory Wildfires

Oregon's produce and timber trespass statue, ORS 105.810, also does not apply. In certain circumstances, ORS 105.810, allows for treble damages "whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof." ORS 105.810(1). ORS 105.810 does not apply for at least three reasons.

First, claims under ORS 105.810 do not apply to statutory wildfires governed by Oregon's wildfire statutes, ORS 477.089 and 477.092. As a matter of law, all of the wildfires at issue here are covered. ORS 477.089 provides for recovery for property damage caused by wildfire and does not allow for treble damages. The statute defines a wildfire as a fire that "[o]riginated on land used or capable of being used for growing forest tree species regardless of the existing use of the land." ORS 477.089(1)(e)(B). The legislative history supports that ORS 477.089(1)(e)(B) covers fires that start on most land besides urban areas. Heath Curtiss of the Oregon Forest Industries Council in answer to senator questions before the Senate Committee on the Judiciary testified that the bill was to "deal[] only with forest fires" and not address downtown areas. Transcript, Senate Committee on Judiciary, Public Hearing on S.B. 709, Mar. 21, 2013, at 8-9.

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To avoid being subject to Oregon's comprehensive wildfire liability scheme, Plaintiff conclusorily alleges—without factual basis—that one fire ignition, the "Gates School Fire," was not a statutory wildfire. Plaintiff completely fails to plead any facts about the "Gates School Fire" that suggest that it did not originate on land capable of being used for growing forest tree species.

Second, ORS 105.810 does not apply because Plaintiff has not alleged a sufficient interest in the grapes. Plaintiff produces its wine in part from grapes "purchase[d] from other vineyards and wineries located in the Willamette Valley and elsewhere." (Compl. ¶ 11.) Plaintiff purchased these grapes after the Labor Day fires and makes no allegations about what percent of grapes it purchased or grew. (*See* Compl. ¶ 37.) The statute does not require that the plaintiff holds a possessory interest in the land, but Plaintiff must hold a right to the produce. *Pedro v. January*, 261 Or 582, 601, 494 P2d 868, 878 (1972). Plaintiff has pled no interest in at least some of the allegedly injured grapes. Its interest in these grapes developed only when Plaintiff purchased them, which was after the fires and alleged damage. Because Plaintiff's allegations lack sufficient specificity, ORS 105.810 is inapplicable.

Third, ORS 105.810 does not apply because smoke damage to produce is not the kind of damage encompassed by the statute. In a pair of seminal cases, the Oregon Supreme Court limited ORS 105.810 in cases involving chemical spray that drifted onto a plaintiff's land, damaging crops. *See Meyer v. Harvey Aluminum*, 263 Or. 487, 501 P.2d 795 (1972); *Chase v. Henderson*, 265 Or. 431, 509 P.2d 1188 (1973). The Supreme Court concluded that ORS 105.810 does not "apply to the kind of damages assessed" in cases involving substances that drift onto produce, damaging them. As the Oregon Court of Appeals recently summarized, *Meyer* and *Chase* "stand for the proposition that damages for injuries to fruit crops and trees resulting from chemical drift are not the type of damages that are trebled under ORS 105.810." *Worman*, 223 Or App at 240. In contrast, the plaintiff in *Worman* could recover because the defendant engaged in "direct spraying of herbicide on trees and shrubs—conduct

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that is a 'deliberate trespass such as involved in cutting standing timber.'" *Id*. (citation omitted). Plaintiff's attempts to use ORS 105.810 are directly foreclosed by *Worman*, *Meyer*, and *Chase*.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiff's claims.

DATED: August 21, 2023

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/s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS on the following named person(s) or party(ies) on the date and by the method(s) indicated below.

☒ mailing with postage prepaid.	☒ email (courtesy copy only).
☐ hand delivery.	☐ email pursuant to agreement among parties/counsel dated _____, consenting to service via email.
☐ facsimile transmission.	☐ email, for which a confirmation of receipt of the email, sent with this document attached, by the following named person(s) or party(ies) has been received by the undersigned via the method of _____.
☐ overnight delivery.	☐ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person(s) or party(ies) at their last-known address(es) indicated below.

Please see attached Service List.

DATED: August 21, 2023.

/s/ Reilley D. Keating
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

WILLAMETTE VALLEY VINEYARDS, INC, a domestic business corporation,

Plaintiff,

v.

PACIFICORP, an Oregon Corporation; PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50,

Defendants.

No. 23CV29519

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT

Assigned to: Hon. Channing Bennett

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Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") hereby submit their answer to Plaintiff's First Amended Complaint ("Complaint" or "FAC") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent

paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1. PacifiCorp denies the allegations in Paragraph 1.

2. PacifiCorp denies the allegations in Paragraph 2.

3. PacifiCorp denies the allegations in Paragraph 3.

4. PacifiCorp denies the allegations in Paragraph 4.

5. PacifiCorp denies the allegations in Paragraph 5.

6. PacifiCorp denies the allegations in Paragraph 6.

7. PacifiCorp denies the allegations in Paragraph 7.

8. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 8, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 8.

9. PacifiCorp denies the allegations in Paragraph 9.

10. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 10.

11. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

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12. PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiffs mean by PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 12.

13. PacifiCorp admits the allegations of Paragraph 13.

14. Paragraph 14 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 14.

15. PacifiCorp denies the allegations of Paragraph 15.

16. PacifiCorp lacks knowledge of other entities' practices and on that basis denies the same. PacifiCorp denies the remaining allegations of Paragraph 16.

17. PacifiCorp denies the allegations of Paragraph 17.

18. PacifiCorp admits that there was a September 7 phone call between three utilities and various members of the Oregon state government. PacifiCorp denies the alleged "purpose" of that call, which multiple witnesses have testified, under oath, that Plaintiffs are presenting inaccurately. Compare Paragraph 18 (the "purpose" of the call was to "requesting the utilities to turn off the power") with the July 25, 2023 Deposition of Portland General Electric's Dave Robertson, 37:1-4 ("It would be misleading to suggest to the jury that Mr. Grafe made a request to the utilities that to de-energize the power, right?" "There was no specific request made.") PacifiCorp denies the remaining allegations of Paragraph 18.

19. PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 19.

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20. PacifiCorp admits that Scott Bolton attended an 8 p.m. call by the Governor's Office on September 7, 2020. PacifiCorp denies the remainder of the allegations in Paragraph 20.

21. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 21, and on that basis denies them.

22. PacifiCorp denies that people in the utility industry (who are not Plaintiffs' lawyers) use the term "Kincade Fire weather event," let alone use the term to mean an event that "would break old equipment lines and thereby spark fires" "producing harmful smoke" that "could have been avoided by turning off the power on the ridges." PacifiCorp denies the remaining allegations in Paragraph 22.

23. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 23, and on that basis denies them.

24. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 24, and on that basis denies them.

25. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis denies them.

26. PacifiCorp denies that there was any "request to turn off its power," which multiple witnesses have testified, under oath, never occurred. PacifiCorp denies the remaining allegations of Paragraph 26.

27. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 27, and on that basis denies them.

28. PacifiCorp denies the allegations in Paragraph 28.

29. PacifiCorp denies the allegations in Paragraph 29.

30. PacifiCorp denies the allegations in Paragraph 30.

31. PacifiCorp denies the allegations in Paragraph 31.

32. PacifiCorp denies the allegations in Paragraph 32.

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33. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 33, and on that basis denies them.

34. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 34, and on that basis denies them.

35. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis denies them.

36. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36, and on that basis denies them.

37. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis denies them.

38. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 38, and on that basis denies them.

39. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis denies them.

40. PacifiCorp denies the allegations of Paragraph 40.

41. PacifiCorp denies the allegations of Paragraph 41.

42. The allegations of Paragraph 42 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 42.

43. PacifiCorp denies the allegations in Paragraph 43.

44. Paragraph 44 takes a quotation out of context, and PacifiCorp denies the implication created by Paragraph 44. PacifiCorp denies the remaining allegations of Paragraph 44.

45. PacifiCorp denies the allegations of Paragraph 45.

46. PacifiCorp denies the allegations of Paragraph 46.

47. PacifiCorp denies the allegations of Paragraph 47.

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48. PacifiCorp denies the allegations of Paragraph 48.

49. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 49, and on that basis denies them.

50. PacifiCorp denies the allegations in Paragraph 50.

51. PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 51.

52. PacifiCorp denies the allegations in Paragraph 52.

53. PacifiCorp denies the allegations in Paragraph 53.

54. PacifiCorp denies the allegations in Paragraph 54.

55. PacifiCorp denies the allegations in Paragraph 55.

56. Paragraph 56 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 56.

57. Paragraph 57 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 57.

58. Paragraph 58 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 58.

59. In response to Paragraph 59, PacifiCorp incorporates its responses to Paragraphs 1 to 58. PacifiCorp assumes that Plaintiffs' realleging of only Paragraphs 1 to 57 is a typo.

60. Paragraph 60 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 60.

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61. Paragraph 61 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 61.

62. Paragraph 62 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63. Paragraph 63 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64. Paragraph 64 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65. Paragraph 65 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 65.

66. Paragraph 66 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 66.

67. Paragraph 67 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

68. Paragraph 68 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 68.

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69. Paragraph 69 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 69.

70. In response to Paragraph 70, PacifiCorp incorporates its responses to Paragraphs 1 to 69.

71. Paragraph 71 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72. Paragraph 72 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 72.

73. In response to Paragraph 73, PacifiCorp incorporates its responses to Paragraphs 1 to 72.

74. PacifiCorp admits the allegations in Paragraph 74.

75. Paragraph 75 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76. Paragraph 76 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 76.

77. Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78. Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 78.

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79. Paragraph 79 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 9.

80. In response to Paragraph 80, PacifiCorp incorporates its responses to Paragraphs 1 to 79.

81. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 81, and on that basis denies them.

82. Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83. Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84. Paragraph 84 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

85. Paragraph 85 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 85.

86. Paragraph 86 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 86.

87. In response to Paragraph 87, PacifiCorp incorporates its responses to Paragraphs 1 to 86.

/ / /

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88. Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

89. Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90. Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91. Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92. Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 92, and on that basis denies them.

93. Paragraph 93 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 93

94. Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 94.

95. Paragraph 95 states the nature of Plaintiff's claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 95.

/ / /

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GENERAL DENIAL

96. PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

97. As a first and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

98. As a second and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

99. As a third and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs lack standing to bring their claims.

FOURTH AFFIRMATIVE DEFENSE

100. As a fourth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such

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alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

FIFTH AFFIRMATIVE DEFENSE

101. As a fifth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the allegations in the FAC are barred, in whole or in part, for lack of jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

102. As a sixth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

103. As a seventh and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other beach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

104. As an eighth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that it complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the FAC are barred, in whole or in

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part, because matters alleged and complained about in the FAC were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

NINTH AFFIRMATIVE DEFENSE

105. As a ninth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiffs, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

106. As a tenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damages awards to Plaintiffs, if any, shall be diminished in proportion to the amount attributed to said third parties.

ELEVENTH AFFIRMATIVE DEFENSE

107. As an eleventh and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the FAC is defective for non-joinder of parties who are necessary and/or indispensable.

TWELFTH AFFIRMATIVE DEFENSE

108. As a twelfth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that discovery will determine whether various individual Plaintiffs and their agents, who have yet to be determined, may have acted

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negligently, recklessly, or intentionally in and about the matters alleged in the FAC; and to the extent Plaintiffs seek recovery for the alleged negligent, reckless, and/or intentional acts and/or omissions of PacifiCorp, recovery should be offset to the extent of Plaintiffs' and their agents' own negligent, reckless, and/or intentional actions and/or omissions.

THIRTEENTH AFFIRMATIVE DEFENSE

109. As a thirteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

110. As a fourteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, because PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

111. As a fifteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, and the relevant public entities including their agencies, and pursuant to the law.

SIXTEENTH AFFIRMATIVE DEFENSE

112. As a sixteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs are not entitled to recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

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SEVENTEENTH AFFIRMATIVE DEFENSE

113. As a seventeenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs are not entitled to double recovery on claims of damages or losses.

EIGHTEENTH AFFIRMATIVE DEFENSE

114. As an eighteenth and separate affirmative defense to each and every cause of action stated in the FAC, at all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the FAC and therefore, Plaintiffs are barred from any recovery in this action.

NINETEENTH AFFIRMATIVE DEFENSE

115. As a nineteenth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the FAC is barred from recovery based on waiver.

TWENTIETH AFFIRMATIVE DEFENSE

116. As a twentieth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the FAC is barred from recovery based on laches.

TWENTY-FIRST AFFIRMATIVE DEFENSE

117. As a twenty-first and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the FAC is barred from recovery based on estoppel.

TWENTY-SECOND AFFIRMATIVE DEFENSE

118. As a twenty-second and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that if responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is

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completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-THIRD AFFIRMATIVE DEFENSE

119. As a twenty-third and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

120. As a twenty-fourth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that in relation to the subject fire(s), it neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

121. As a twenty-fifth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the claims in the FAC are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

122. As a twenty-sixth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

123. As a twenty-seventh and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that to the extent that PacifiCorp has

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provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

124. As a twenty-eighth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the FAC fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

TWENTY-NINTH AFFIRMATIVE DEFENSE

125. As a twenty-ninth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the claims in the FAC for punitive damages are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process, equal protection, and ex post facto provisions; the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments; and the right not to be subjected to excessive awards and multiple punishments; and any claim for punitive damages is limited by state and federal law, including but not limited to the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell,* 123 S Ct 1513 (2003).

THIRTIETH AFFIRMATIVE DEFENSE

126. As a thirtieth and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs' claims are preempted, in whole or in part, by federal law.

THIRTY-FIRST AFFIRMATIVE DEFENSE

127. As a thirty-first and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that Plaintiffs, the person(s) insured by Plaintiffs, or the underlying insureds from which Plaintiffs' claims arise, knew about the risk, and voluntarily undertook the risk that led to the accident or injuries complained of in this case.

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THIRTY-SECOND AFFIRMATIVE DEFENSE

128. As a thirty-second separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that the Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

THIRTY-THIRD AFFIRMATIVE DEFENSE

129. As a thirty-third and separate affirmative defense to each and every cause of action stated in the FAC, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiff takes nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: January 4, 2024

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/s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT** on the following named person(s) on the date indicated below by:

☐ mailing with postage prepaid.

☒ email (*courtesy copy only*).
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☐ facsimile transmission.

☐ email, for which a confirmation of receipt of the email and the attachment by the following named person(s) has been received by the undersigned via the method of _____.

☐ overnight delivery.

☒ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

Please see attached Service List.

DATED: January 4, 2024

/s/ Reilley D. Keating
Reilley D. Keating, OSB No. 073762

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR YAMHILL COUNTY

ELK COVE VINEYARDS, INC., a domestic business corporation, Plaintiff, vs. PACIFICORP, an Oregon corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50, Defendants.	Case No. 23CV28258 **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT** Prayer Amount: $7,500,000 Fee Authority: ORS 21.160(1)(d) **Claim Not Subject to Mandatory Arbitration**

Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") hereby submit their answer to Plaintiff's Complaint ("Complaint") as follow:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1.

PacifiCorp denies the allegations in Paragraph 1.

2.

PacifiCorp denies the allegations in Paragraph 2.

3.

PacifiCorp denies the allegations in Paragraph 3.

4.

PacifiCorp denies the allegations in Paragraph 4.

5.

PacifiCorp denies the allegations in Paragraph 5.

6.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 6, and on that basis denies them.

7.

PacifiCorp denies the allegations in Paragraph 7.

8.

PacifiCorp denies the allegations in Paragraph 8.

9.

PacifiCorp denies the allegations in Paragraph 9.

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10.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 10.

11.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12.

PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiff means by PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 12.

13.

PacifiCorp admits the allegations of Paragraph 13.

14.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis denies them.

15.

Paragraph 15 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 15.

16.

PacifiCorp denies the allegations in Paragraph 16.

17.

PacifiCorp lacks knowledge of information sufficient to form a belief about what is "well-known" or "not mysteries" to various other third parties, and on that basis denies such allegations. PacifiCorp denies the remaining allegations of Paragraph 17.

18.

PacifiCorp denies the allegations in Paragraph 18.

19.

PacifiCorp admits that there was a September 7 phone call between three utilities and various members of the Oregon state government. PacifiCorp denies the remaining allegations of Paragraph 19.

20.

PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 20

21.

PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 21.

22.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 22, and on that basis denies them.

23.

PacifiCorp denies the allegations in Paragraph 23.

24.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 24, and on that basis denies them.

25.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis denies them.

26.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 26, and on that basis denies them.

27.

PacifiCorp denies that there was any "request to turn off its power,". PacifiCorp denies the remaining allegations of Paragraph 27.

/ / /

28.

PacifiCorp denies the allegations in Paragraph 28.

29.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis denies them.

30.

PacifiCorp denies the allegations in Paragraph 30.

31.

PacifiCorp denies the allegations in Paragraph 31.

32.

PacifiCorp denies the allegations in Paragraph 32.

33.

PacifiCorp denies the allegations in Paragraph 33.

34.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 34, and on that basis denies them.

35.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis denies them.

36.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36, and on that basis denies them.

37.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis denies them.

38.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 38, and on that basis denies them.

39.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis denies them.

40.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 40, and on that basis denies them.

41.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 41, and on that basis denies them.

42.

PacifiCorp denies the allegations in Paragraph 42.

43.

PacifiCorp denies the allegations in Paragraph 43.

44.

PacifiCorp denies the allegations in Paragraph 44.

45.

Paragraph 45 takes a quotation out of context, and PacifiCorp denies the implication created by Paragraph 45. PacifiCorp denies the remaining allegations of Paragraph 45.

46.

PacifiCorp denies the allegations in Paragraph 46.

47.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 47, and on that basis denies them.

48.

PacifiCorp denies the allegations in Paragraph 48.

49.

PacifiCorp denies the allegations in Paragraph 49.

/ / /

50.

PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 50.

51.

PacifiCorp denies the allegations in Paragraph 51.

52.

PacifiCorp denies the allegations in Paragraph 52.

53.

PacifiCorp denies the allegations in Paragraph 53.

54.

PacifiCorp denies the allegations in Paragraph 54.

55.

PacifiCorp denies the allegations in Paragraph 55.

56.

Paragraph 56 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 56.

57.

Paragraph 57 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 57.

58.

In response to Paragraph 58, PacifiCorp incorporates its responses to Paragraphs 1 to 57.

59.

Paragraph 59 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 59.

60.

Paragraph 60 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 60.

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61.

Paragraph 61 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 61.

62.

Paragraph 62 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63.

Paragraph 63 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64.

Paragraph 64 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65.

Paragraph 65 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 65.

66.

Paragraph 66 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 66.

67.

Paragraph 67 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

68.

Paragraph 68 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 68.

69.

In response to Paragraph 69, PacifiCorp incorporates its responses to Paragraphs 1 to 68.

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70.

Paragraph 70 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 70.

71.

Paragraph 71 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72.

In response to Paragraph 72, PacifiCorp incorporates its responses to Paragraphs 1 to 71.

73.

PacifiCorp admits the allegations in Paragraph 73.

74.

Paragraph 74 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 74.

75.

Paragraph 75 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76.

Paragraph 76 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 76.

77.

Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78.

Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 78.

79.

In response to Paragraph 79, PacifiCorp incorporates its responses to Paragraphs 1 to 78.

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80.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 80, and on that basis denies them.

81.

Paragraph 81 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82.

Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83.

Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84.

Paragraph 84 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

85.

In response to Paragraph 85, PacifiCorp incorporates its responses to Paragraphs 1 to 84.

86.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 86, and on that basis denies them.

87.

Paragraph 87 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 87.

88.

Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

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89.

Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90.

Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 90, and on that basis denies them.

91.

Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92.

In response to Paragraph 92, PacifiCorp incorporates its responses to Paragraphs 1 to 91.

93.

Paragraph 93 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 93.

94.

Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 94.

95.

Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 95, and on that basis denies them.

96.

Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

97.

Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98.

Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 98, and on that basis denies them.

99.

Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100.

In response to Paragraph 100, PacifiCorp incorporates its responses to Paragraphs 1 to 99.

101.

Paragraph 101 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 101.

102.

PacifiCorp admits it initiated an investigation of the fire. PacifiCorp denies the rest of allegations in Paragraph 102.

103.

Paragraph 103 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 103.

104.

Paragraph 104 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 104.

105.

PacifiCorp denies the allegations of Paragraph 105.

106.

Paragraph 106 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 106.

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107.

Paragraph 107 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 107.

108.

In response to Paragraph 108, PacifiCorp incorporates its responses to Paragraphs 1 to 107.

109.

Paragraph 109 states the nature of Plaintiff's claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 109.

110.

Paragraph 110 states the nature of Plaintiff's claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 110.

GENERAL DENIAL

111.

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

112.

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly. Some of the defenses below are included for completeness or preservation; by including any defense stated below, PacifiCorp does not concede that it bears the burden of proof on that issue at trial or otherwise.

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FIRST AFFIRMATIVE DEFENSE

113.

As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

115.

As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiff and Plaintiff's agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had Plaintiff or Plaintiff's agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

THIRD AFFIRMATIVE DEFENSE

116.

As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

118.

As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiff, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiff's recovery, if any, against PacifiCorp.

FIFTH AFFIRMATIVE DEFENSE

119.

As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damages awards to Plaintiff, if any, shall be diminished in proportion to the amount attributed to said third parties.

SXITH AFFIRMATIVE DEFENSE

120.

As an sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

SEVENTH AFFIRMATIVE DEFENSE

121.

As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are contributorily negligent and that any fault or damage for losses in this case, if any, should be apportioned or attributed to Plaintiff pursuant to ORS 31.600. As this case has just begun, discovery will determine whether Plaintiff and their agents may have acted negligently, recklessly, or intentionally.

EIGHTH AFFIRMATIVE DEFENSE

122.

As a eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

NINTH AFFIRMATIVE DEFENSE

123.

As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiff are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, because PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

TENTH AFFIRMATIVE DEFENSE

125.

As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent Plaintiff seeks recovery of damages or losses for which Plaintiff received insurance benefits, or has granted some other party an interest in their claims, Plaintiff is not the real party in interest.

ELEVENTH AFFIRMATIVE DEFENSE

126.

As a eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to double recovery on claims of damages or losses.

TWELFTH AFFIRMATIVE DEFENSE

127.

As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, at all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiff is barred from any recovery in this action.

THIRTEENTH AFFIRMATIVE DEFENSE

128.

As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on laches.

FOURTEENTH AFFIRMATIVE DEFENSE

129.

As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on estoppel.

FIFTEENTH AFFIRMATIVE DEFENSE

131.

As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff has failed to exhaust their administrative remedies.

SIXTEENTH AFFIRMATIVE DEFENSE

134.

As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to Plaintiff and/or their insurers, such compensation may constitute an offset.

SEVENTEENTH AFFIRMATIVE DEFENSE

135.

As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

EIGHTEENTH AFFIRMATIVE DEFENSE

136.

As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's claims are preempted, in whole or in part, by federal law.

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NINETEENTH AFFIRMATIVE DEFENSE

137.

As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff knew about the risk of wildfires in the region and voluntarily undertook activities within the region that allegedly give rise to their claims.

TWENTIETH AFFIRMATIVE DEFENSE

138.

As a twentieth separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Court lacks subject matter jurisdiction over Plaintiff's allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive or primary jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

TWENTY-FIRST AFFIRMATIVE DEFENSE

139.

As a twenty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

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WHEREFORE, PacifiCorp prays judgment as follows:

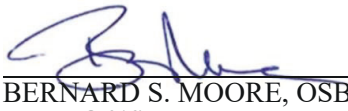
1. That Plaintiff takes nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: January 18, 2024

FROHNMAYER DEATHERAGE



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Attorneys for Defendants Pacific Power and PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT** upon:

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☐ by mailing to said attorney a copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address and deposited in the post office at Medford, Oregon, on the date set forth below.

☐ by personally delivering said attorney a copy thereof, certified by me as such, on the date set forth below.

☒ by **electronic service** via the Oregon Judicial Department's electronic filing system pursuant to UTCR 21.100 to all attorneys listed above.

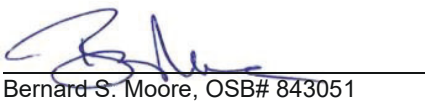
☒ by **email** as a courtesy copy.

☐ by personally handing said attorney a copy thereof, certified by me as such, on the date set forth below.

☐ by faxing to said attorney a copy thereof, certified by me as such, during normal office hours, addressed to said attorney at said attorney's last known facsimile number as indicated above.

☐ by sending a full, true, and correct copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney as shown above, at the last known office address of the attorney on the date set forth below.

DATED this 18th day of January, 2024.



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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

COOPER MOUNTAIN WINERY LLC, a domestic business corporation, Plaintiff, v. PACIFICORP, an Oregon corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, Defendants.	No. 23CV47202 **DEFENDANTS PACIFICORP AND PACIFIC POWER'S PARTIAL MOTION TO DISMISS** ORAL ARGUMENT REQUESTED Fee Amount: $884 Fee Authority: ORS 21.160(1)(d)

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (together, "PacifiCorp") request telephonic oral argument and estimate that 60 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Pursuant to ORCP 21 A(1)(h), PacifiCorp moves to dismiss Plaintiff's claims for inverse condemnation, negligence, gross negligence, public nuisance, and "spoliation of evidence."[1] This Motion is supported by the following points and authorities and Declaration

[1] Plaintiffs have filed identical lawsuits on behalf of other wineries across five Oregon counties. PacifiCorp has filed similar motions to dismiss in each case. *See Brigadoon Vineyards, LLC v. PacifiCorp*, Lane County Circuit Court Case No. 23CV28149; *Willamette Valley Vineyards, Inc v. PacifiCorp*, Marion County Circuit Court Case No. 23CV29519; *Elk Cove Vineyards, Inc. v. PacifiCorp*, Yamhill County Circuit Court Case No. 23CV28258; *Retraite, LLC et al., v. PacifiCorp*, Polk County Circuit Court Case No. 23CV28213. In *Brigadoon*, the Court granted several of PacifiCorp's motions and dismissed claims with prejudice. In *Willamette Valley Vineyards*, the Court granted the motion in part and denied it

of Reilley D. Keating in Support of Defendant' Partial Motion to Dismiss ("Keating Decl."), filed contemporaneously herewith.

POINTS AND AUTHORITIES

I. INTRODUCTION

The 2020 Labor Day windstorm caused at least 17 separate wildfires across Oregon and burned more than 1 million acres. Nearly three years later, one wine producer brings this lawsuit claiming that PacifiCorp ignited five fires that caused smoke particles to travel across the state to damage Plaintiff's vineyards. (Compl. ¶¶ 32, 34, 36-37.) Plaintiff alleges six claims: negligence, gross negligence, inverse condemnation, public nuisance, trespass, and "spoliation of evidence."

Setting aside the factual problem of proving that any smoke damage to Plaintiff's grapes resulted from PacifiCorp equipment located dozens or even hundreds of miles away, rather than from any of the other dozen or more wildfires burning over Labor Day weekend 2020, most of Plaintiff's claims fail as a matter of law. Over the course of the last three years, similar claims in other circuit courts throughout Oregon have been dismissed with prejudice or voluntarily withdrawn, including claims brought by Plaintiff's counsel in more than eighteen parallel suits in Douglas County Circuit Court, where only the negligence claims were proceeding to trial (before the parties' recent settlement of those claims). The claims should be dismissed here too.

First, Plaintiff's claim for inverse condemnation fails on every element. To state a claim for inverse condemnation, Plaintiff must allege that (1) "the government" (2) "intentionally" acted "in a manner that necessarily caused" the injury to Plaintiff's property (3) for a "public use," in the case of claims under Article I, Section 18, or by a corporation acting under authority of law in the case of claims under Article XI, Section 4. *Dunn v. City*

in part, granting leave to replead. In *Elk Cove*, the Court denied the motion. The Court has not yet ruled in *Retraite*. PacifiCorp attaches the orders from these cases as Exhibits 8-10 to the Keating Declaration.

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of Milwaukie, 355 Or 339, 358, 328 P3d 1261, 1272 (2014). PacifiCorp is not the government, and (for the alternative claim under Article XI, Section 4) there is no allegation anywhere in the Complaint that PacifiCorp acted "under authority of law" in any relevant way. Nor does Plaintiff allege ultimate facts sufficient to show that any of PacifiCorp's "intentional" acts were inevitable or "substantially certain" to cause smoke damage to Plaintiff's vineyards. The Court therefore should dismiss the inverse condemnation claim with prejudice.

Second, Plaintiff's other claims should be dismissed based on similar flaws. For example, take only the requirement that Plaintiff allege that the harm it suffered was a "foreseeable risk" of negligent conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Plaintiff offers no factual allegations to show that smoke damage to vineyards dozens or hundreds of miles away was a foreseeable risk of Plaintiff's allegation that PacifiCorp was negligent in not installing "insulated[] distribution line conductors" months or years prior to Labor Day 2020 or any of Plaintiff's other allegations of negligent conduct. (Compl. ¶ 32.) As described more below, each of Plaintiff's other claims suffers from similar legal flaws.

Third, Plaintiff's claim for "spoliation of evidence" fails. Even if Oregon law recognized a freestanding claim for spoliation—and it does not—the Oregon Court of Appeals has expressly rejected bringing claims for spoliation unless a party "first br[ings] the underlying claim and los[es] or suffer[s] diminution in its value." *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012). Though Plaintiff ultimately will lose, that will not be the result of any purported spoliation. And in any event, it has not happened yet—a prerequisite for a spoliation claim.

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Finally, the Court also should dismiss Plaintiff's claim for public nuisance because Plaintiff has not met, and cannot meet, the requisite pleading standard.[2]

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers, including around 596,000 customers in Oregon under the Pacific Power brand. (*See* Compl. ¶ 13.) PacifiCorp is regulated by the Oregon Public Utilities Commission ("PUC"), which has established comprehensive regulations regarding vegetation management practices, public safety power shutoffs ("PSPS"), and many other aspects of running an electric utility in Oregon.

Plaintiff produces wine from grapes they grow within the Willamette Valley and from grapes purchased from other Willamette Valley vineyards. (*See* Compl. ¶¶ 11.) Plaintiff sells their bottled wine at wineries and via wholesale and retail wine distribution systems. *Id.*

Plaintiff alleges damages in Willamette Valley from smoke and soot that allegedly traveled there specifically from the Santiam Fire (located in the Santiam Canyon), the Echo Mountain Fire (located near Otis and Lincoln City), the Archie Creek Complex Fire (located near Glide), the 242 Fire (located near Chiloquin), and the South Obenchain Fire (located near Eagle Point). (*See* Compl. ¶¶ 6, 36-37.) It alleges that after Labor Day, they harvested their grapes and turned the grapes into wine. (Compl. ¶¶ 36-38.) Plaintiff sold its wine into the marketplace but alleges its wine sales were "reduced or damaged." (Compl. ¶¶ 37-40.)

Plaintiff filed this six-count Complaint on November 17, 2023, and served PacifiCorp on November 20, 2023. In addition to this case (*Cooper Mountain Winery LLC v. PacifiCorp, et al.*, No. 23CV47202), multiple other groups of winery plaintiffs have filed suit against PacifiCorp alleging smoke damage from the same fires. Each winery case is brought

[2] In response to several of PacifiCorp's specific challenges in other pending cases filed by the Plaintiff's counsel on behalf of other wineries, the wineries have dropped or clarified certain arguments. For example, the winery plaintiffs have clarified that their inverse condemnation claim is brought only pursuant to Article XI, section 4 (not Article I, section 18) and that they are not asserting a claim for negligence *per se*. Plaintiff may take a similar approach here, but in all events, such claims cannot be stated for the reasons discussed herein.

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by the same counsel who previously litigated several negligence-only cases in Douglas County Circuit Court.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations or legal conclusions are insufficient. *See, e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394 (1997), *rev den,* 325 Or 438 (1997) (citations omitted). When a pleaded claim is legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441-42, 760 P2d 874 (1988).

IV. ARGUMENT

A. Plaintiff's Inverse Condemnation Claim Fails as a Matter of Law.

Multiple trial courts in Oregon have dismissed similar inverse condemnation claims, including some brought by Plaintiff's attorneys, in cases arising out of the Labor Day fires. (*See* Keating Decl., Exs. 1-7.) Although none of those decisions is binding on this Court, the Court may find them instructive or helpful in evaluating the claims in this case. As explained below, Plaintiff's Third Claim for Relief for inverse condemnation is subject to dismissal for multiple reasons.

Typically, a taking begins with a formal eminent domain proceeding. However, governments and corporations acting under authority of law also may "take[] property interests through [their] actions without first initiating condemnation proceedings." *Dunn v. City of Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014). In those cases, a property owner may recover under the doctrine of inverse condemnation. In short, when the government or a

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corporation acting under authority of law "takes property, it must pay for it." *Dunn*, 355 Or at 347.

The Oregon Constitution has two takings clauses. Article I, section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." Here, Plaintiff does not state under which clause it asserts its Third Claim for Relief for inverse condemnation.

Plaintiff cannot satisfy the elements of either clause as a matter of law. *First*, Plaintiff cannot meet the intent requirement applicable to all Oregon takings claims: that the defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358–59. *Second*, Plaintiff cannot show either that PacifiCorp is a "governmental defendant," or that it took Plaintiff's property "for a public use" as required by Article I, section 18. *Third*, Plaintiff cannot show that PacifiCorp acted "under authority of law" as required by Article XI, section 4 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiff's inverse condemnation claim should be dismissed with prejudice.

1. Plaintiff Fails to Allege that PacifiCorp Intentionally Undertook to Act in a Manner that Necessarily Caused Plaintiff's Injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation by proving that the government "intentionally undertook * * * actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the * * * inverse condemnation claim." *Dunn*, 355 Or at 358-59; *see also Morrison v. Clackamas Cnty.*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary

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consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If the plaintiff's evidence shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("[A] takings claim cannot be based on * * * 'negligent government conduct.'" (citation omitted)).

Dunn illustrates the high standard Plaintiff must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to backflow" if lateral sewer lines are kept at too low a pressure. *Dunn*, 355 Or at 341-42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "'natural and ordinary consequence[]'" of that improvement, and so was liable for inverse condemnation. *Id*. at 345-46 (citation omitted). The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id.* at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiff must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id.* (emphasis added).

Under *Dunn*, Plaintiff cannot allege that it was inevitable that a fire might ignite "somewhere," or could spread to Plaintiff's property. Instead, Plaintiff must allege that the

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invasion "into [Plaintiff's] [property] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiff's damages must have been "'substantially certain'" to occur. *Dunn*, 355 Or at 360-61.

In *Worman v. Columbia Cnty.*, 223 Or App 223, 236, 195 P3d 414 (2008), the plaintiffs sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiffs failed to state an inverse condemnation claim because they had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to the plaintiffs' property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily cause damage to any property." *Id.* (emphasis omitted). The court rejected the plaintiffs' inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, plaintiffs' property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiffs' property as a natural and ordinary consequence of the project. *Id.*

Various Oregon circuit courts have rejected recent attempts to use an inverse condemnation claims against utility companies for wildfire damages, including in cases brought by Plaintiff's attorneys. Judge Johnson of the Douglas County Circuit Court recognized in rejecting inverse condemnation claims against a utility for wildfire damages that *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Keating Decl., Ex. 5 at 4.)

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Judge Conover of Lane County dismissed inverse condemnation claims against the Eugene Water & Electric Board and Lane Electric Cooperative, Inc., arising out of Labor Day 2020 wildfires, specifically finding "that there was no intent by either defendant to damage the plaintiffs' properties." (Keating Decl., Ex. 3 at 30 (p. 71 of the transcript); *see also* Ex. 4 at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover subsequently dismissed the amended inverse condemnation claims with prejudice. (Keating Decl., Ex. 2.)

In another case, Judge Johnson of Douglas County dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case, Douglas County Circuit Court Case No. 22CV09346. (Keating Decl., Ex. 1.) Judge Johnson dismissed the original complaint, granting leave to replead if the plaintiffs could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id*.) The plaintiffs repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (Keating Decl., Ex. 7.) In reaching that conclusion, Judge Johnson found that the plaintiffs' allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites" were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id*.)[3] And in

[3] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order denying PacifiCorp's motion to dismiss inverse condemnation claim brought pursuant to Article XI, section 4 arising out of a different 2020 Labor Day fire (the Pike Road wildfire in Tillamook County). *See Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 22CV29695. Based on the facts alleged in that complaint, Judge Allen concluded that the requirements of *Dunn* were sufficiently pled, and that there was a sufficient nexus between PacifiCorp's eminent domain authority and the fire damages under Article XI, section 4. Although PacifiCorp does not concede that the *Stroh* allegations were legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case. As the court recounted, the plaintiff in *Stroh* alleged that wildfire damage to the plaintiff's property was substantially certain because it had specifically alleged that PacifiCorp maintained a utility line easement across the plaintiff's property (i.e., the plaintiff's property was right under a powerline), that the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and

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November 2023, Multnomah County Circuit Court Judge Baggio dismissed Article I, section 18 and Article XI, section 4 claims against PacifiCorp because the allegations did not satisfy *Dunn*. (Keating Decl., Ex. 13.)

Plaintiff, here, cannot allege that any of the necessary causal steps from PacifiCorp's actions to Plaintiff's damaged grapes were "substantially certain" to occur. Plaintiff conclusorily alleges that "the damages caused to Plaintiff's lands and grapes, by each of the Santiam, Echo Mountain, Archie Creek Complex, 242 and South Obenchain Fires' harmful smoke was the inevitable result of PacifiCorp's actions," but Plaintiff has pled no facts to support this. (Compl. ¶ 79.) Plaintiff alleges PacifiCorp was negligent in nine potential ways, including: trimming vegetation adjacent to electrical lines, replacing electrical equipment with "strong, safe parts," designating the Santiam Canyon, North Umpqua Canyon, and Echo Mountain as areas "designed for a power shutoff program," turning off power in "the service area adjacent to the Willamette Valley," and ensuring "operations personnel understood and knew how and when to de-energize power lines during high-wind, high-fire conditions. (Compl. ¶ 32.) But this generalized list of actions does not support the conclusions that fires would inevitably start, those fires would inevitably grow large enough to create harmful smoke, that smoke would inevitably travel many miles to Plaintiff's grapes, and that those grapes would inevitably no longer be viable for wine making after the smoke exposure. Plaintiff's allegations amount to a "conclusion[] of law," and do not suffice to state "ultimate facts" entitling Plaintiff to relief. *Huang*, 147 Or App at 332.

Plaintiff has not alleged any other specific facts supporting a finding of "substantial certainty." Indeed, Plaintiff's factual allegations center on fire "risk" because there was no substantial certainty of Plaintiff's specific smoke damage. The Complaint refers to "risk" or "fire risk" over ten times. (*See, e.g.*, Compl. ¶¶ 8, 17, 20, 22-26, 31, 42, 46, 49.) The reason

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that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (Ex. 6 at 7-8.)

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Plaintiff focuses on "risk" is that it is the best they can do; it is implausible (at best) to suggest that PacifiCorp's alleged actions were *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, dry weather, wind direction and strength to carry the smoke, etc.) are necessary for Plaintiff's alleged damages to occur.

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), the plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id.* at 1377. The court rejected the plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "'direct, natural, or probable'" result of government conduct to state a claim. *Id.* at 1378 (citation omitted). As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id.* For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998); *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiff could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and it cannot), Plaintiff makes no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358-59. At best, Plaintiff alleges that PacifiCorp's actions were

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substantially certain to cause ignitions that were the but-for cause of fires that were the but-for cause of smoke, that was the but-for cause of Plaintiff's damages. But as the Oregon Supreme Court explained in *Dunn*, "[u]nder the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id.* at 361 (emphasis added). Plaintiff has not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiff's property, and it cannot do so.

Plaintiff's allegations about computer modeling and analysis do not save its inverse condemnation claim from dismissal. (*See* Compl. ¶ 16 ("Responsible electric utilities use computer modeling and analysis on a regular basis as part of their de-energization programs to predict how a weather pattern will evolve and how a fire would be spread amidst such winds, heat, and lack of humidity").) Plaintiff does not allege that computer modeling and analysis would have predicted fires igniting at any particular point, let alone the particular points of ignition alleged in the Complaint. Nor does Plaintiff allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in sufficient proximity to Plaintiff such that any computer modeling would have predicted the fire would invade Plaintiff's land. *Id.* at 351.

Fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors. *See City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825-26 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). Even with an "intentionally set fire[]" that "escape[d] because of intervening winds" or other causes, liability for fire damage "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiff does not and cannot allege that any alleged fire caused "certain and

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inevitable" damage to Plaintiff in particular "for purposes of a takings claim," Plaintiff fails to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

2. Any Alleged Article I, Section 18 Inverse Condemnation Claim Fails because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use.

a. PacifiCorp Is Not a Public Entity.

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." 335 Or at 27-29 (emphasis added); *see also Dunn*, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiff's invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, multiple Oregon trial courts have recognized that, as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, section 18 against a private entity like PacifiCorp. (*See, e.g.*, Keating Decl., Ex. 3 at 29-30 (transcript pp. 70-71); Ex. 4 at 1; Ex. 11.)

Plaintiff may cite cases showing that private entities may be involved in *direct* condemnation actions, as plaintiffs have done in other cases. *See, e.g.*, *Grande Ronde Elec. Co. v. Drake*, 46 Or 243, 78 P 1031 (1905). But the fact that corporations may have a *statutory* right to condemnation (*see* ORS 35.245) says nothing about whether corporations may be liable for *constitutional* inverse condemnation claims. *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432, 60 P3d 557 (2002) ("[I]t does not necessarily follow that, because the [defendant] may have violated the [condemnation] statutes, the proper remedy is an action for damages in inverse condemnation.").

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Dismissing any Article I, section 18 claim also makes sense from a policy perspective because PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the Oregon Public Utilities Commission ("PUC") finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). PacifiCorp would also not qualify as a "[g]overnment body" under Oregon's tort claim statute. ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiff's Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiff's Article I, section 18 claim. *Vokoun*, 335 Or at 28.

b. Plaintiff Does Not Allege that PacifiCorp Took Property for "Public Use."

Any Article I, section 18 inverse condemnation claim also fails for the independent reason that Plaintiff cannot demonstrate that its property was taken "for a public use." *Vokoun*, 335 Or at 23; *see also Worman*, 223 Or App at 236 (plaintiffs could not state an inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Oregon*, 240 Or App 490, 500-01, 247 P3d 331 (2011), *rev den,* 351 Or 216 (2011) (internal quotation marks and citation omitted). In other words, Plaintiff must allege that PacifiCorp took its property "intending to put that property" *itself* "to public use." *Id*. (*See*

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Keating Decl., Ex. 3 (p. 71 of the transcript) (dismissing inverse condemnation claim against utilities because "there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose[, and] there was no intent to put the plaintiffs' property to public use."); *see also* Ex. 4 at 1.)

Plaintiff's only allegation here is that "PacifiCorp has the statutory power to condemn property in the State of Oregon and utilizes such property in the operation of its utility for a public use." (Compl. ¶ 77.) Plaintiff has not alleged that any supposed taking was for the public use or that PacifiCorp even used the property in the operation of its utility. Plaintiff must meet the test for public use set forth in *Mossberg*: it must allege that "the government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiff cannot make that showing and makes no effort to do so, it fails to state an inverse condemnation claim under Article I, section 18 of the Oregon Constitution.

3. Plaintiff's Inverse Condemnation Claim under Article XI, Section 4 Fails Because Plaintiff Does Not and Cannot Allege that PacifiCorp Acted under Authority of Law.

Any Article XI, section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiff cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiff contends damaged it. By its own terms, the takings clause in Article XI, section 4 only applies to a "corporation under authority of law." Plaintiff attempts to meet this requirement by alleging that PacifiCorp has a general power of condemnation, (Compl. ¶ 77), or that it operates as a public utility, (Compl. ¶ 76). (*See* Compl. ¶ 80 (alleging PacifiCorp "took the Plaintiff's property via color of its state law monopoly and utility rights").) But Plaintiff fails to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because it cannot do so, their inverse condemnation claim under Article XI, section 4 fails.

Judge Conover's ruling in Lane County similarly reinforces that Plaintiff cannot state an Article XI, section 4 claim. In that case, Lane Electric Cooperative moved to dismiss the

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plaintiffs' Article XI, section 4 inverse condemnation claim on precisely this point and the court specifically agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs properties." (Keating Decl., Ex. 3 at 30 (p. 71 of the transcript); *see also* Ex. 4 at 1.) Similarly, Douglas County Circuit Court Judge Johnson dismissed the plaintiffs' Article XI, section 4 claim, stating that the Court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (Keating Decl., Ex. 7.)

Nor can Plaintiff cite any binding authority to the contrary. Article XI, section 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiff alleges).[4] *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 443 n5, 60 P3d 557 (2002), *rev den,* 336 Or 60 (2003) (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4").

The only Oregon cases permitting Article XI, section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, section 4 were decided in the late

[4] A handful of other modern cases have addressed Article XI, section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312-13, 711 P2d 119 (1985) (no liability under either Article I, section 18 or Article XI, section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006), *rev den,* 341 Or 80 (2006) (rejecting Article XI, section 4 claim in passing, and collecting cases doing the same thing).

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19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co.*, 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East Portland"). PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

"Under authority of law" must require a direct connection between a corporation's legal authority and the alleged taking because unlike Article I, section 18's takings clause, Article XI, section 4 contains no textual "public use" requirement. The "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiff's Complaint were correct, a broad scope of conduct by corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain would support a takings claim, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. State*, 196 Or 120, 147, 248 P2d 703 (1952)).[5]

[5] If the Court interprets Article XI, section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, section 4—and Plaintiff's claim would then fail for the same reason that their Article I, section 18 claim

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The Court may also look to the analogous federal state action doctrine, which leads to the same result. In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Jackson v. Metro. Edison Co.*, 419 US 345, 350, 346, 95 S Ct 449, 42 L Ed 2d 477 (1974). The Supreme Court rejected this argument and found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id.* at 353 (emphasis added). Although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State Hwy. Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

Plaintiff cannot claim that PacifiCorp acted "under authority of law" in allegedly igniting the fires at issue here, nor does Plaintiff even attempt to do so. Plaintiff does not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires. In fact, Plaintiff specifically alleges that PacifiCorp was "not authorized under any state law or regulation to take the actions that it took causing ignition and spread of each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and/or South Obenchain Fires as alleged herein and Plaintiff's resulting damages." (Coml. ¶ 80.) Plaintiff similarly does not allege that PacifiCorp used the power of eminent domain to take its property, nor to take any relevant land at issue in this case. The most Plaintiff alleges is that PacifiCorp generally has the

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fails, as described above. *See, e.g.*, *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980), *aff'd,* 701 F2d 99 (9th Cir 1983) (Article XI, section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1928)).

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"power of eminent domain"—not that PacifiCorp used that power in any relevant way vis-à-vis its takings claim. (*See* Compl. ¶ 77.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other Oregon cases, Plaintiff's inverse condemnation claim under Article XI, section 4 claim fails as a matter of law.

4. Plaintiff Does Not Allege Any Facts Concerning the Extent of the Alleged Damage.

Finally, Plaintiff's claim for inverse condemnation should be dismissed because it fails to allege any facts concerning the extent to which Plaintiff's property was damaged. Indeed, a fair reading of the Complaint is that, even read in the light most favorable to Plaintiff, Plaintiff has alleged only an inactionable "damaging" and not an actionable "taking."

Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Moeller v. Multnomah Cnty.*, 218 Or 413, 425-27, 345 P2d 813 (1959). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (citing *Lincoln Loan v. State Hwy Comm.*, 274 Or 49, 57, 545 P2d 105 (1976)). Plaintiff conclusorily alleges that PacifiCorp "took the Plaintiff's property" (Compl. ¶ 80), but it pleads no facts about the extent of the damage to Plaintiff's grapes—and indeed, the complaint explicitly pleads that Plaintiff did not even believe many of the grapes were damaged *at all* until after making wine and bottling it (*see, e.g.*, Compl. ¶¶ 36-37). Whether or not Plaintiff can prove that smoke taint resulting from PacifiCorp conduct damaged their grapes, damage—even damage that amounts to monetary harm—is not sufficient; Oregon law only permits inverse condemnation claims for takings.

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B. Plaintiff's Negligence and Gross Negligence Claims Fail as a Matter of Law.

Plaintiff has failed to state a claim for negligence or gross negligence. In particular, Plaintiff has not pled their alleged harm was a foreseeable result of PacifiCorp's alleged actions. It is also not clear whether Plaintiff intends to plead a claim for negligence *per se* or otherwise claim that PacifiCorp violated ORS 757.020 in relation to its claims. If Plaintiff does so, that claim fails for independent reasons.

1. Plaintiff Has Not Stated a Claim for Negligence or Gross Negligence Because It Has Not Pled Injury to Its Wine Was Reasonably Foreseeable.

Plaintiff cannot otherwise plead a claim for negligence or gross negligence because it has not suffered a foreseeable harm. When a defendant's duty is not defined by a special relationship, as here,[6] a plaintiff must plead that the harm it suffered was a foreseeable risk of defendant's conduct. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987) ("the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff"). This means a plaintiff must plead "harms that a reasonable factfinder, applying community standards, could consider within the range of foreseeable possibilities." 303 Or at 13.

"To gauge the reasonable foreseeability of the harm that occurred to plaintiffs, [courts] must consider whether 'the person harmed is one of the general class threatened' by defendants' conduct and whether the harm resulting from the conduct is 'of the general kind

[6] Plaintiff pleads that "statutes and regulations regulating utilities" create a "special relationship" between Plaintiff and PacifiCorp. (Compl. ¶ 64). Such conclusory allegations must be dismissed because they fail to state from which "statutes and regulations" this "special relationship" arises and what duty it entails. However, even if the Court were to find that PacifiCorp has a special statutory or regulatory duty, it could not be a duty to this Plaintiff entirely or largely outside of PacifiCorp's service territory for unforeseeable harm. *See Allstate Ins. Co. v. Tenant Screening Servs., Inc.*, 140 Or App 41, 50, 914 P2d 16, 21 (1996) ("where the special relationship does not prescribe the scope of the duty, common law principles of reasonable care and foreseeability of harm are relevant.") (cleaned up).

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to be anticipated from the conduct.'" *McPherson v. State ex rel. Dep't of Corr.*, 210 Or App 602, 614, 152 P3d 918, 924 (2007) (quoting *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 609, 469 P2d 783 (1970)). A claim for gross negligence also must consider the probability of the harm. *WSB Investments, LLC v. Pronghorn Development Co., LLC*, 269 Or App 342, 360, 344 P3d 548, 560 (2015) ("Gross negligence' generally means negligence characterized by near total disregard or indifference to the rights of others or the probable consequences of a course of conduct."). Where no reasonable juror could find that the kind of harm that befell the plaintiff was the foreseeable result of the defendant's alleged negligent act, the harm is unforeseeable as a matter of law. *Buchler v. State By & Through Oregon Corr. Div.*, 316 Or 499, 509, 853 P2d 798 (1993).

Here, the wineries are not of the general class threatened by PacifiCorp's alleged conduct, and the unmarketability of Plaintiff's wine is not the general kind of harm a reasonable factfinder would anticipate. In *Chapman v. Mayfield*, 358 Or 196, 218 P3d 566 (2015), for example, the Oregon Supreme Court rejected allegations that bad acts were the foreseeable result of serving alcohol to a visibly intoxicated person. The court explained that even though it may be "common knowledge that intoxicated people often have impaired judgment and may, therefore, act improperly," such acts are not foreseeable without more specific allegations. *Id.* at 361. Similarly, while it may be common knowledge that smoke results from fire, that is all Plaintiff can allege. Without more, it is not reasonably foreseeable that smoke would travel dozens or hundreds of miles to damage grape harvests months or years after a wildfire. "Hindsight . . . is not foreseeability." *Id.*

Plaintiff has not pled that the fires were on adjacent property or even that PacifiCorp operates within the Willamette Valley or on Plaintiff's land—and indeed, they were not; the furthest fires were over 200 miles away. (*See* Compl. ¶ 1.)

The tainting of wine made from grapes grown miles away from a fire is not a general way in which injuries occur and is not reasonably foreseeable. Even Plaintiff itself, and its

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winemaking professionals, apparently did not foresee the harm to their wines. Despite knowing of the Labor Day fires, Plaintiff proceeded to harvest and cleanse grapes and, thinking the grapes were untainted, turn them into wine. (Compl. ¶¶ 36-38.) What is more, Plaintiff purchased some of the allegedly damaged grapes only after the fires. (Compl. ¶ 36.) Plaintiff sold the wine into the marketplace. (Compl. ¶¶ 36-38.) If Plaintiff, and its professional grape growers and wine makers, did not know the risk the fires posed to its grapes, the alleged damage cannot be reasonably foreseeable by a reasonable person, a non-expert in wine making.

2. To the Extent Plaintiff Alleges Negligence *Per Se* or Otherwise Pursues a Claim Based on Violations of ORS 757.020, Oregon Law Forecloses Relying on General Safety Statutes like ORS 757.020

It is not clear whether Plaintiff intends to pursue a negligence *per se* claim. There is no separately labeled count. But Plaintiff cites and relies on ORS 757.020 throughout the complaint. (*See, e.g.*, Compl. ¶¶ 14, 64.) Because ORS 757.020 cannot support a negligence *per se* claim and does not set out a standard of care that can be violated, Plaintiff's claims (if any) based on ORS 757.020 should be dismissed.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout By & Through Shahtout v. Emco Garbage Co., Inc.*, 298 Or 598, 601, 695 P2d 897 (1985); *see also Moody v. Oregon Community Credit Union*, 371 Or 772, 781-82, __ P3d __ (2023) (reaffirming *Shahtout*). In *Kim v. Multnomah Cnty. ex rel. Multnomah Cnty. Cmty. Dep't of Cmty. Corr.*, 328 Or 140, 153, 970 P2d 631 (1998), the plaintiffs sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Court of Appeals affirmed, the Supreme Court noted that, even if the plaintiffs had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152-53. None of the relevant statutes "establish[ed] a

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standard of care." *Id.* at 153. At most, those statutes required the defendants to "exercise reasonable care." *Id.* And as the Supreme Court explained, general statutes and regulations that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for plaintiffs' negligence *per se* claim" as a matter of law. *Id.*

The same problem exists here: Plaintiff relies on ORS 757.020, which does not fix the standard of care in any meaningful way. (Compl. ¶ 64.) The statute offers only general guidance that PacifiCorp must operate "safely" and requires only that public utilities "furnish adequate and safe service, equipment, and facilities." ORS 757.020. Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, the direction in ORS 757.020 to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601. As a matter of law, the statute does not support a negligence *per se* claim under Oregon law. The Court should dismiss any references to ORS 757.020 in Plaintiff's Complaint and the negligence claim.[7]

C. Plaintiff Cannot Plead a "Spoliation of Evidence" Claim as a Matter of Law.

The Court should dismiss Plaintiff's Sixth Claim for Relief, "Spoliation of Evidence." Oregon courts repeatedly have refused to state whether a freestanding claim for spoliation even exists under Oregon law. *See Marcum v. Adventist Health Sys./W.*, 215 Or App 166, 191, 168 P3d 1214, 1228 (2007), *rev'd,* 345 Or 237 (2008) (noting that the parties "vehemently dispute" whether a spoliation claim is cognizable, but not deciding the issue); *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012) (same).

[7] Alternatively, pursuant to ORCP 21 D, the Court should require Plaintiff to plead more specific facts regarding the specific statutes, regulations and special relationship on which its negligence *per se* claim—if pleaded—is based.

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Whether or not an independent claim for "spoliation of evidence" exists under Oregon law, Plaintiff has not pled it. As the Court of Appeals explained in *Classen*, the bare minimum for pleading a claim for spoliation of evidence (if it exists) is that Plaintiff must "first br[ing] the underlying claim and los[e] or suffer[] diminution in its value." *Classen*, 254 Or App 216. Showing actual diminution in a claims value from "actually los[ing]" is necessary because without such a showing any claim is "purely speculative and uncertain." *Id.* (citations omitted). Plaintiff has not (yet) lost its claim as a result of any spoliation. Its claim is directly foreclosed by *Classen*.

D. The Public Nuisance Claim Fails as a Matter of Law.

To state a claim for public nuisance, Plaintiff must show (1) that PacifiCorp's conduct unreasonably interfered with a right that is common to all members of the public, (2) PacifiCorp's conduct was negligent, reckless, or intentional, and (3) the conduct caused an injury to plaintiff of a special character distinct and different from that suffered by the public generally. *See Raymond v. S. Pac. Co.*, 259 Or 629, 634, 488 P2d 460 (1971). "Public nuisances must be vindicated by the state unless an individual can show that he has suffered a special damage over and above the ordinary damage caused to the public at large." *Raymond*, 259 Or at 634. It is "not enough that [a plaintiff] suffers the same" injury as "everyone else." *Id.* Plaintiff pleads no specific damages and no injury that is distinct and different from that suffered by the public generally. Plaintiff pleads only the legal conclusion that they have "suffer[ed] a special injury distinct from the general public." (Compl. ¶ 87.) With no specific allegations, and no special injury, the public nuisance claim must fail.[8]

[8] In addition, Plaintiff's public nuisance claim appears to seek "treble" damages under ORS 477.089. (*See* Compl. ¶ 88.) Yet, ORS 477.089 does not allow for treble damages. Therefore, Plaintiff cannot seek them for this claim. Separately, Plaintiff seeks double damages under the same statute for its gross negligence, inverse condemnation, and public nuisance claims. While PacifiCorp does not challenge this in this motion, it reserves the right to do so later.

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E. Plaintiff's Request for an Injunction Fails as a Matter of Law.

The Court also should dismiss Plaintiff's request for an injunction set forth in its Prayer for Relief. As a threshold matter, Plaintiff has not identified which claim it contends permits it to seek injunctive relief. For that reason alone, the requested relief should be dismissed.

Moreover, Plaintiff's requested injunction (if granted) effectively would require the Court to run Oregon's second-largest utility—a job more appropriately left to the PUC. As Plaintiff would have it, the Court should compel PacifiCorp to:

- "[T]rim and remove trees that are within its right of way and capable of contacting or falling into its powerlines;"
- "[I]nspect and replace its broken, obsolete, and defective electrical equipment where it has reason to know that such equipment has previously been associated with fire ignitions or may be associated with fire ignitions;"
- "[R]efrain from re-energizing powerlines on red flag warning days during fire season until all sections of line to be re-energized have been inspected to be clear of hazards;"
- "[E]valuate actual real-time evidence for the purpose of turning off the power in territory subject to a red flag warning during fire season if government officials, including the Oregon Department of Forestry's Fire Protection Chief, warn the utility of the risk of starting fires without such a power turn off, like what happened on Labor Day 2020;" and
- "[W]ithhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws pertaining to its powerlines and has completed deferred maintenance pertaining to wildfire mitigation, including but not limited to inspecting wedge connectors, on its powerlines."

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(Complaint, Prayer ¶ b.) Even if Plaintiff could prove any of its claims, and even if this case proceeded through trial, and even if Plaintiff met the factors necessary for a permanent injunction, Plaintiff's request is facially absurd.

Each of these broad proscriptions requires utility expertise to administer and are already governed by existing PUC regulations. *See* OAR 860-024-0011 (requiring detailed inspections of overhead facilities with special rules for High Fire Risk Zones); OAR 860-024-0016 (setting standards for conductor clearances from vegetation); OAR 860-024-0020 (mandating utilities to implement Wildfire Mitigation Plans and protocols for the de-energization of power lines). Indeed, the Oregon Supreme Court has recognized that the PUC has primary jurisdiction over how utilities operate. *See Dreyer v. Portland Gen. Elec. Co*., 341 Or 262, 285, 142 P3d 1010, 1022 (2006) ("PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated"); *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 279, 986 P2d 35, 44 (1999). Three criteria determine whether an agency has primary jurisdiction: "(1) the extent to which the agency's expertise makes it the preferable forum; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse effect on the agency's responsibilities." *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 279, 986 P2d 35, 44 (1999). All three are easily satisfied here. Since all of the requested relief concerns utility regulation, the agency is best situated to decide what should be required. The PUC is the proper body to make uniform decisions and avoid conflict and confusion between agency requirements and court decisions.

Plaintiffs may argue that the PUC does not have primary jurisdiction because there is no pending proceeding adjudicating these issues. To start, the PUC is currently determining whether to permit certain modifications to PacifiCorp's electrical tariffs. (See PUC Advice No. 23-018.) Further proceedings are likely on this and other related issues. Either way,

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there is no requirement—in any Oregon case—to identify a currently pending regulatory proceeding in order for the Court to determine that Plaintiffs seek to put the Court in the place of PacifiCorp's regulators.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiff's First Claim for Relief (Negligence), Second Claim for Relief (Gross Negligence), Third Claim for Relief (Inverse Condemnation), Fourth Claim for Relief (Public Nuisance), Sixth Claim for Relief (Spoliation of Evidence), and Plaintiff's request for injunctive relief.

DATED: January 24, 2024

STOEL RIVES LLP

s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS PACIFICORP AND PACIFIC POWER'S PARTIAL MOTION TO DISMISS** on the following named person(s) on the date indicated below by:

☐ mailing with postage prepaid. ☒ email (*courtesy copy only*).
glusby@arnoldgallagher.com
rjulian@bakerlaw.com
ddow@bakerlaw.com
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lstuy@bakerlaw.com
mcwatts@wattsguerra.com
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☐ overnight delivery. ☒ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

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DATED: January 24, 2024

s/ Reilley D. Keating
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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR YAMHILL COUNTY

ELK COVE VINEYARDS, INC., a domestic business corporation; HOLLORAN VINEYARDS WINES LLC; HUNDRED SUNS WINE; KORE WINE COMPANY, LLC, dba LAVINEA; TORII MOR WINERY, LLC; WINE BY JOE, LLC; KELLEY STEARNS FOX WINES, LLC; ABBEY ROAD FARM; HAZELFERN CELLARS, INC.; PINE RIDGE WINERY, LLC d/b/a ARCHERY SUMMIT; JUNICHI FUJITA LLC dba JUNICHI FUJITA; WRIGLEY FAMILY VENTURES, LLC dba J WRIGLEY VINEYARDS, and LACHINI VINEYARDS, LLC, Plaintiff, vs. PACIFICORP, an Oregon corporation; and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, Defendant.	Case No. 23CV28258 **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT** Prayer Amount: $49,082,000 Fee Authority: ORS 21.105(2) and ORS 21.160(1)(e) **Claim Not Subject to Mandatory Arbitration**

Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") hereby submit their answer to Plaintiffs' First Amended Complaint ("Complaint") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiff in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiff has been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1.

PacifiCorp denies the allegations in Paragraph 1.

2.

PacifiCorp denies the allegations in Paragraph 2.

3.

PacifiCorp denies the allegations in Paragraph 3.

4.

PacifiCorp denies the allegations in Paragraph 4.

5.

PacifiCorp denies the allegations in Paragraph 5.

6.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 6, and on that basis denies them.

7.

PacifiCorp denies the allegations in Paragraph 7.

8.

PacifiCorp denies the allegations in Paragraph 8.

9.

PacifiCorp denies the allegations in Paragraph 9.

10.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. As to the second sentence of Paragraph 10, PacifiCorp admits that it is a utility with its principal place of business in Portland, Oregon, in the county of Multnomah. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in the sentence and on that basis denies the remaining allegations in the second sentence of Paragraph 10. PacifiCorp denies the remaining allegations in Paragraph 10.

11.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13, and on that basis denies them.

14.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis denies them.

15.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15, and on that basis denies them.

16.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 16, and on that basis denies them.

17.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 17, and on that basis denies them.

18.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 18, and on that basis denies them.

19.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 19, and on that basis denies them.

20.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 20, and on that basis denies them.

21.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 21, and on that basis denies them.

22.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 22, and on that basis denies them.

23.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 23, and on that basis denies them.

24.

PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiff means by PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 24.

25.

PacifiCorp admits the allegations of Paragraph 25.

26.

Paragraph 26 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 26.

27.

PacifiCorp denies the allegations in Paragraph 27.

28.

PacifiCorp lacks knowledge of information sufficient to form a belief about what is "well-known" or "not mysteries" to various other third parties, and on that basis denies such allegations. PacifiCorp denies the remaining allegations of Paragraph 28.

29.

PacifiCorp denies the allegations in Paragraph 29.

30.

PacifiCorp admits that there was a September 7 phone call between three utilities and various members of the Oregon state government. PacifiCorp denies the remaining allegations of Paragraph 30.

31.

PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 31.

32.

PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 32.

33.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 33, and on that basis denies them.

34.

PacifiCorp denies the allegations in Paragraph 34.

35.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis denies them.

36.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36, and on that basis denies them.

37.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis denies them.

38.

PacifiCorp denies that there was any "request to turn off its power." PacifiCorp denies the remaining allegations of Paragraph 38.

39.

PacifiCorp denies the allegations in Paragraph 39.

40.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 40, and on that basis denies them.

41.

PacifiCorp denies the allegations in Paragraph 41.

42.

PacifiCorp denies the allegations in Paragraph 42.

43.

PacifiCorp denies the allegations in Paragraph 43.

44.

PacifiCorp denies the allegations in Paragraph 44.

45.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 45, and on that basis denies them.

46.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 46, and on that basis denies them.

47.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 47, and on that basis denies them.

48.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 48, and on that basis denies them.

49.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 49, and on that basis denies them.

50.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 50, and on that basis denies them.

51.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 51, and on that basis denies them.

52.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 52, and on that basis denies them.

53.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 53, and on that basis denies them.

54.

PacifiCorp denies the allegations in Paragraph 54.

55.

PacifiCorp denies the allegations in Paragraph 55.

56.

PacifiCorp denies the allegations in Paragraph 56.

57.

PacifiCorp denies the allegations in Paragraph 57.

58.

Paragraph 58 takes a quotation out of context, and PacifiCorp denies the implication created by Paragraph 58. PacifiCorp denies the remaining allegations of Paragraph 58.

59.

PacifiCorp denies the allegations in Paragraph 59.

60.

PacifiCorp denies the allegations in Paragraph 60.

61.

PacifiCorp denies the allegations in Paragraph 61.

62.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 62, and on that basis denies them.

63.

PacifiCorp denies the allegations in Paragraph 63.

64.

PacifiCorp denies the allegations in Paragraph 64.

65.

PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 65.

66.

PacifiCorp denies the allegations in Paragraph 66.

67.

PacifiCorp denies the allegations in Paragraph 67.

68.

PacifiCorp denies the allegations in Paragraph 68.

69.

PacifiCorp denies the allegations in Paragraph 69.

70.

PacifiCorp denies the allegations in Paragraph 70.

71.

Paragraph 71 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72.

Paragraph 72 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 72.

73.

In response to Paragraph 73, PacifiCorp incorporates its responses to Paragraphs 1 to 72.

74.

Paragraph 74 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 74.

75.

Paragraph 75 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76.

Paragraph 76 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 76.

77.

Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78.

Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 78.

79.

Paragraph 79 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 79.

80.

Paragraph 80 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 80.

81.

Paragraph 81 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82.

Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83.

Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84.

In response to Paragraph 84, PacifiCorp incorporates its responses to Paragraphs 1 to 83.

85.

Paragraph 85 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 85.

86.

Paragraph 86 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 86.

87.

In response to Paragraph 87, PacifiCorp incorporates its responses to Paragraphs 1 to 86.

88.

PacifiCorp admits the allegations in Paragraph 88.

89.

Paragraph 8974 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90.

Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91.

Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92.

Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93.

Paragraph 93 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 93.

94.

In response to Paragraph 94, PacifiCorp incorporates its responses to Paragraphs 1 to 93.

95.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 95, and on that basis denies them.

96.

Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

97.

Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98.

Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 98.

99.

Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100.

Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 100.

101.

In response to Paragraph 101, PacifiCorp incorporates its responses to Paragraphs 1 to 100.

102.

Paragraph 102 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 102.

103.

Paragraph 103 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 103.

104.

Paragraph 104 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 104.

105.

Paragraph 105 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 105.

106.

Paragraph 106 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 106, and on that basis denies them.

107.

Paragraph 107 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 107.

108.

Paragraph 108 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 108.

109.

Paragraph 109 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 109.

110.

Paragraph 110 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 110.

111.

In response to Paragraph 111, PacifiCorp incorporates its responses to Paragraphs 1 to 110.

112.

Paragraph 112 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 112.

113.

PacifiCorp admits it initiated an investigation of the fire. PacifiCorp denies the rest of allegations in Paragraph 113.

114.

Paragraph 114 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 114.

115.

Paragraph 115 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 115.

116.

PacifiCorp denies the allegations in Paragraph 116.

117.

Paragraph 117 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 117.

118.

Paragraph 118 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 118.

119.

Paragraph 119 states the nature of Plaintiff's claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 119.

120.

Paragraph 120 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 120.

121.

Paragraph 121 recites the nature of Plaintiffs' claims for relief and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph121.

GENERAL DENIAL

122.

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSE

123.

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly. Some of the defenses below are included for completeness or preservation; by including any defense stated below, PacifiCorp does not concede that it bears the burden of proof on that issue at trial or otherwise.

FIRST AFFIRMATIVE DEFENSE

124.

As a first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

125.

As a second and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiff and Plaintiff's agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had

Plaintiff or Plaintiff's agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

THIRD AFFIRMATIVE DEFENSE

126.

As a third and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

127.

As a fourth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the losses and damages allegedly sustained by Plaintiff, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiff's recovery, if any, against PacifiCorp.

FIFTH AFFIRMATIVE DEFENSE

128.

As a fifth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's damages, if any, were proximately caused by the negligent, reckless, or intentional acts of third parties as to whom PacifiCorp had neither the right, the duty, nor the opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp. Therefore, any damages awards to Plaintiff, if any, shall be diminished in proportion to the amount attributed to said third parties.

SIXTH AFFIRMATIVE DEFENSE

129.

As an sixth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

SEVENTH AFFIRMATIVE DEFENSE

130.

As a seventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiffs are contributorily negligent and that any fault or damage for losses in this case, if any, should be apportioned or attributed to Plaintiff pursuant to ORS 31.600. As this case has just begun, discovery will determine whether Plaintiff and their agents may have acted negligently, recklessly, or intentionally.

EIGHTH AFFIRMATIVE DEFENSE

131.

As a eighth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

NINTH AFFIRMATIVE DEFENSE

132.

As a ninth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the actions and conditions complained of by Plaintiff are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, because PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

TENTH AFFIRMATIVE DEFENSE

133.

As a tenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent Plaintiff seeks recovery of damages or losses for which Plaintiff received insurance benefits, or has granted some other party an interest in their claims, Plaintiff is not the real party in interest.

ELEVENTH AFFIRMATIVE DEFENSE

134.

As a eleventh and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff is not entitled to double recovery on claims of damages or losses.

TWELFTH AFFIRMATIVE DEFENSE

135.

As a twelfth and separate affirmative defense to each and every cause of action stated in the Complaint, at all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiff is barred from any recovery in this action.

THIRTEENTH AFFIRMATIVE DEFENSE

136.

As a thirteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on laches.

FOURTEENTH AFFIRMATIVE DEFENSE

137.

As a fourteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint is barred from recovery based on estoppel.

FIFTEENTH AFFIRMATIVE DEFENSE

138.

As a fifteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff has failed to exhaust their administrative remedies.

SIXTEENTH AFFIRMATIVE DEFENSE

139.

As a sixteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that to the extent that PacifiCorp has provided, or may provide,

compensation of any kind for damages to Plaintiff and/or their insurers, such compensation may constitute an offset.

SEVENTEENTH AFFIRMATIVE DEFENSE

140.

As a seventeenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Complaint fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

EIGHTEENTH AFFIRMATIVE DEFENSE

136.

As an eighteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff's claims are preempted, in whole or in part, by federal law.

NINETEENTH AFFIRMATIVE DEFENSE

137.

As a nineteenth and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that Plaintiff knew about the risk of wildfires in the region and voluntarily undertook activities within the region that allegedly give rise to their claims.

TWENTIETH AFFIRMATIVE DEFENSE

138.

As a twentieth separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that the Court lacks subject matter jurisdiction over Plaintiff's allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive or primary jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

TWENTY-FIRST AFFIRMATIVE DEFENSE

139.

As a twenty-first and separate affirmative defense to each and every cause of action stated in the Complaint, PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates. 21

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiff takes nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: March 26, 2024

FROHNMAYER DEATHERAGE

By: /s/ *Bernard S. Moore*

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Attorneys for Defendants Pacific Power and PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT PACIFICORP'S ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT** upon:

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☐ by mailing to said attorney a copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address and deposited in the post office at Medford, Oregon, on the date set forth below.

☐ by personally delivering said attorney a copy thereof, certified by me as such, on the date set forth below.

☑ by electronic service via the Oregon Judicial Department's electronic filing system pursuant to UTCR 21.100 to all attorneys listed above.

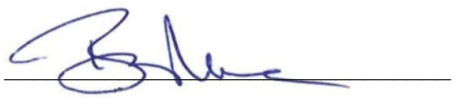
☑ by email as a courtesy copy.

☐ by personally handing said attorney a copy thereof, certified by me as such, on the date set forth below.

☐ by faxing to said attorney a copy thereof, certified by me as such, during normal office hours, addressed to said attorney at said attorney's last known facsimile number as indicated above.

☐ by sending a full, true, and correct copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney as shown above, at the last known office address of the attorney on the date set forth below.

DATED this 26th day of March, 2024.



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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

WILLAMETTE VALLEY VINEYARDS, INC, a domestic business corporation, HETTWER TREE FARM, INC. dba ST. JOHN VIANNEY; SILVERBACK ESTATE WINERY, LLC; ALLIANCE SEED FARMS; and ST. INNOCENT, LTD.,

Plaintiffs,

v.

PACIFICORP, an Oregon Corporation; PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, and DOES 1-50,

Defendants.

No. 23CV29519

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT

Assigned to: Hon. Channing Bennett

Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") hereby submit their answer to Plaintiff's Second Amended Complaint ("Complaint" or "SAC") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp.

With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1. PacifiCorp denies the allegations in Paragraph 1.

2. PacifiCorp denies the allegations in Paragraph 2.

3. In response to the allegations in Paragraph 3, PacifiCorp admits that the Beachie Creek Fire was caused by lightning and that it ignited in the Opal Creek Wilderness in August 2020. PacifiCorp denies the allegations in Paragraph 3 to the extent they relate to PacifiCorp and/or its powerlines. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 3, and on that basis, denies them.

4. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 4, and on that basis, denies them.

5. PacifiCorp denies the allegations in Paragraph 5.

6. PacifiCorp denies the allegations in Paragraph 6.

7. In response to Paragraph 7, PacifiCorp admits that on or before September 7, 2020, the National Weather Service issued fire weather messages regarding fire weather conditions in the state of Oregon. PacifiCorp lacks knowledge or information

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sufficient to form a belief about the remaining allegations in Paragraph 7, and on that basis, denies them.

8. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 8, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 8.

9. PacifiCorp denies the allegations in Paragraph 9.

10. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp admits that it is an Oregon utility with its headquarters in Multnomah County and that it operates a Portland Control Center. PacifiCorp denies the remaining allegations in Paragraph 10.

11. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13, and on that basis denies them.

14. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis denies them.

15. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15, and on that basis denies them.

16. PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiffs mean by its allegations regarding PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 16.

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17. PacifiCorp admits the allegations of Paragraph 17.

18. Paragraph 18 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 18.

19. PacifiCorp denies the allegations of Paragraph 19.

20. PacifiCorp lacks knowledge of other entities' practices and on that basis denies the allegations as to the same. PacifiCorp denies the remaining allegations of Paragraph 20.

21. PacifiCorp denies the allegations of Paragraph 21.

22. In response to paragraph 22, PacifiCorp admits that there was a phone call on September 7, 2020, between three utilities and various members of the Oregon state government. PacifiCorp denies the alleged "purpose" of that call, which multiple witnesses have testified, under oath, that Plaintiffs are presenting inaccurately. Compare Paragraph 22 (the "purpose" of the call was to "request[] the utilities to turn off the power") with the July 25, 2023, Deposition of Portland General Electric's Dave Robertson, 37:1-4 ("It would be misleading to suggest to the jury that Mr. Grafe made a request to the utilities that to de-energize the power, right?" "There was no specific request made.") PacifiCorp denies the remaining allegations of Paragraph 22.

23. In response to paragraph 23, PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 23.

24. In response to paragraph 24, PacifiCorp admits that Scott Bolton attended an 8 p.m. call by the Governor's Office on September 7, 2020. PacifiCorp denies the remainder of the allegations in Paragraph 24.

25. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis denies them.

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26. PacifiCorp denies the allegations in Paragraph 26.

27. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 27, and on that basis denies them.

28. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 28, and on that basis denies them.

29. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis denies them.

30. In response to Paragraph 30, PacifiCorp denies that there was any "request to turn off its power," which multiple witnesses have testified, under oath, never occurred. PacifiCorp denies the remaining allegations of Paragraph 30.

31. In response to Paragraph 31, PacifiCorp denies the allegations to the extent they relate to PacifiCorp. With respect to the allegations in Paragraph 31 that relate to Consumers Power, Inc., PacifiCorp lacks knowledge or information sufficient to form a belief about those allegations, and on that basis denies them.

32. PacifiCorp denies the allegations in Paragraph 32.

33. PacifiCorp denies the allegations in Paragraph 33.

34. PacifiCorp denies the allegations in Paragraph 34.

35. PacifiCorp denies the allegations in Paragraph 35.

36. PacifiCorp denies the allegations in Paragraph 36.

37. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis denies them.

38. PacifiCorp denies the allegations in Paragraph 38 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 38, and on that basis denies them.

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39. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis denies them.

40. PacifiCorp denies the allegations in Paragraph 40 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 40, and on that basis denies them.

41. PacifiCorp denies the allegations in Paragraph 41 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 41, and on that basis denies them.

42. PacifiCorp denies the allegations in Paragraph 42 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 42, and on that basis denies them.

43. PacifiCorp denies the allegations in Paragraph 43 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 43, and on that basis denies them.

44. PacifiCorp denies the allegations in Paragraph 44 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 44, and on that basis denies them.

45. PacifiCorp denies the allegations in Paragraph 45 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 45, and on that basis denies them.

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46. PacifiCorp denies the allegations of Paragraph 46.

47. PacifiCorp denies the allegations of Paragraph 47.

48. PacifiCorp denies the allegations in Paragraph 48.

49. The allegations of Paragraph 49 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 49.

50. In response to Paragraph 50, PacifiCorp admits that it published a May 21, 2020, report and that Paragraph 50 accurately quotes from part of that document. PacifiCorp further states that Paragraph 50 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 50. PacifiCorp denies the remaining allegations of Paragraph 50.

51. PacifiCorp denies the allegations of Paragraph 51.

52. PacifiCorp denies the allegations of Paragraph 52.

53. PacifiCorp denies the allegations of Paragraph 53.

54. PacifiCorp denies the allegations of Paragraph 54.

55. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 55, and on that basis denies them.

56. PacifiCorp denies the allegations in Paragraph 56.

57. In response to Paragraph 57, PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 57.

58. PacifiCorp denies the allegations in Paragraph 58.

59. The allegations in Paragraph 59 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 59.

60. PacifiCorp denies the allegations in Paragraph 60.

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61. PacifiCorp denies the allegations in Paragraph 61.

62. Paragraph 62 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63. Paragraph 63 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64. Paragraph 64 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65. In response to Paragraph 65, PacifiCorp incorporates its responses to Paragraphs 1 to 64.

66. Paragraph 66 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 66.

67. Paragraph 67 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

68. Paragraph 68 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 68.

69. Paragraph 69 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 69.

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70. Paragraph 70 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 70.

71. Paragraph 71 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72. Paragraph 72 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 72.

73. Paragraph 73 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 73.

74. Paragraph 74 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 74.

75. Paragraph 75 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76. In response to Paragraph 76, PacifiCorp incorporates its responses to Paragraphs 1 to 75.

77. Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78. Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 78.

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79. In response to Paragraph 79, PacifiCorp incorporates its responses to Paragraphs 1 to 78.

80. In response to Paragraph 80, PacifiCorp admits that it is an Oregon registered electric utility. The remaining allegations of Paragraph 80 state conclusions of law to which no response is necessary or appropriate.

81. Paragraph 81 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82. Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83. Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84. Paragraph 84 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

85. Paragraph 85 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 85.

86. In response to Paragraph 86, PacifiCorp incorporates its responses to Paragraphs 1 to 85.

87. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 87, and on that basis denies them.

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88. Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

89. Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90. Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91. Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92. Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93. In response to Paragraph 93, PacifiCorp incorporates its responses to Paragraphs 1 to 92.

94. Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 94.

95. Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 95.

96. Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

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97. Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98. Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 98.

99. Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100. Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 100, and on that basis denies them.

101. Paragraph 101 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 101.

102. Paragraph 102 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 102.

103. Paragraph 103 states the nature of Plaintiff's claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 103.

GENERAL DENIAL

104. PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

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AFFIRMATIVE DEFENSES

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiff. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiff. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

105. Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Lack of Specificity)

106. Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

(Standing)

107. Plaintiffs lack standing to bring some or all of their claims.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

108. Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through

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discovery that had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

109. The allegations in the SAC are barred, in whole or in part, for lack of jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

(Act of God)

110. Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

(Unavoidable Accident)

111. Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other beach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance with Law/Duty of Care)

112. PacifiCorp complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the SAC are barred, in whole or in part, because matters alleged and complained about in the SAC were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

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113. Additionally, the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, and the relevant public entities including their agencies, and pursuant to the law.

NINTH AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

114. Plaintiffs may be barred from recovery because the losses and damages they allegedly sustained, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

115. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties who PacifiCorp had neither the right, duty or opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Parties)

116. The SAC is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

TWELFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

117. At all times mentioned herein, Plaintiffs or third parties were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to Plaintiffs' alleged damages, if any. The fault of Plaintiffs and

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third-parties bars, in whole or in part, the damages which Plaintiffs seek to recover herein. PacifiCorp denies all liability, and without waiving this denial, the event PacifiCorp is found liable for any act or omission, PacifiCorp is entitled to apportionment pursuant to ORS 31.600.

THIRTEENTH AFFIRMATIVE DEFENSE

(Not Within PacifiCorp's Control)

118. The agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorized by Oregon Public Utilities Commission)

119. The actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, because PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

120. Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

SIXTEENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

121. Plaintiffs are not entitled to double recovery on claims of damages or losses, and they may not recover on claims of damages or losses paid by any other sources.

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SEVENTEENTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

122. At all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the SAC and therefore, Plaintiffs are barred from any recovery in this action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

123. Plaintiffs' claims are barred, in whole or in part, based on waiver.

NINETEENTH AFFIRMATIVE DEFENSE

(Laches)

124. Plaintiffs' claims are barred, in whole or in part, based on laches.

TWENTIETH AFFIRMATIVE DEFENSE

(Estoppel)

125. Plaintiffs' claims are barred, in whole or in part, based on estoppel.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(No Recovery for Unreasonable or Unlawful Damages)

126. PacifiCorp denies all liability, and without waiving this denial, alleges that if it responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

127. Plaintiffs' claims are barred because Plaintiffs have failed to exhaust their administrative remedies.

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TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Causation)

128. In relation to the subject fire(s), PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutional Violations)

129. The claims in the SAC are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution and the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Compensable Property Interest)

130. Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Offset)

131. To the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Prejudgment Interest, Expert Fees or Attorneys' Fees)

132. The SAC fails to state a cause of action for which pre-judgment interest, expert fees or attorneys' fees may be awarded.

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TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Preemption by Federal Law)

133. Plaintiffs' claims are preempted, in whole or in part, by federal law.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

134. Plaintiffs, the person(s) insured by Plaintiffs, or the underlying insureds from which Plaintiffs' claims arise, knew about the risk, and voluntarily undertook the risk that led to the accident or injuries complained of in this case.

THIRTIETH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

135. The Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Contributory Negligence)

136. PacifiCorp denies all liability, and without waiving this denial, alleges that Plaintiffs' own fault was greater than the fault of PacifiCorp.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(No Taking Under the Oregon Constitution)

137. The inverse condemnation claims in the SAC fail because none of Plaintiffs' property has been taken as required to state a claim under Article I, section 18 or Article XI, section 4 of the Oregon Constitution.

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THIRTY-THIRD AFFIRMATIVE DEFENSE

(Statute of Limitations)

138. Plaintiffs' claims are barred in whole or in part based on the applicable statute of limitations.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

139. PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

That Plaintiff takes nothing by reason of their Complaint herein;

For costs of suit incurred herein; and

For such other and further relief as the Court may deem just and proper.

DATED: April 16, 2024

STOEL RIVES LLP

s/ Reilley D. Keating

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document titled **DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT** on the following named person(s) on the date indicated below by:

☐ mailing with postage prepaid. ☒ email pursuant to agreement among parties/counsel dated April 16, 2024, consenting to service via email.

☐ overnight delivery. ☒ eService via Odyssey File & Serve.

If by mail or overnight delivery, a true copy of the above referenced document(s) was served upon said person(s) or party(ies), contained in a sealed envelope or package, addressed to said person to said person(s) or party(ies) at their last-known address(es) indicated below.

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DATED: April 16, 2024

s/ Reilley D. Keating
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Of Attorneys for Defendants PacifiCorp and Pacific Power

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

LANGE WINERY LLC, a domestic limited liability company; DOMAINE SERENE VINEYARDS AND WINERY, INC., a foreign business corporation; RETRAITE, LLC (FKA LINGUA FRANCA-LS VINEYARDS HOLDINGS, LLC), a domestic limited liability company; PARLANCE, LLC (FKA LINGUA FRANCA, LLC), a domestic limited liability company, VENDANGE, LLC (FKA LS VINEYARDS LLC), a domestic limited liability company; SAMUEL ROBERT WINERY, LLC, a domestic limited liability company; BJORN FARM, LLC, a domestic limited liability company; CHERRY HILL VINEYARD, LLC, a domestic limited liability company; EVESHAM WOOD VINEYARD & WINERY LLC, a domestic limited liability company; HADEN FIG LLC, a domestic limited liability company; LEFT COAST CELLARS, LLC, a foreign limited liability company; TERRAPIN CELLARS LLC, a domestic limited liability company; ZENITH VINEYARD, LLC, a domestic limited liability company dba ZENITH VINEYARD; BRIGADOON VINEYARDS, LLC, a domestic limited liability company; CHALICE VINEYARDS, L.L.C., a domestic limited liability company; FIVE FOURTEEN VINEYARDS, LLC a domestic limited liability company; TERRITORIAL VINEYARDS, L.L.C., a domestic limited liability company; CHATEAU BARNABY, LLC, a domestic limited liability company dba TEUTONIC WINE COMPANY; ANTIQUUM FARM L.L.C., a domestic limited liability company; DAY CRUSH, LLC, a domestic limited liability company; BRICK HOUSE WINE COMPANY, a domestic business corporation; ELV-OREGON, LLC, a domestic limited liability company; EOLA HILLS WINE CELLARS,

No. 24CV25661

DEFENDANTS PACIFICORP AND PACIFIC POWER'S ANSWER TO COMPLAINT

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INC., a domestic business corporation; OLIVER SPRINGS VINEYARD, LLC, a domestic limited liability company; PROTEUS WINES LLC, a domestic limited liability company; SCHOLLS FERRY VINEYARD, LLC, a domestic limited liability company; BECKHAM ESTATE VINEYARD LLC, a domestic limited liability company; CASCADE REAL ESTATE INVESTMENT PARTNERS, LLC, a domestic limited liability company dba SHERWOOD HILLS WINERY; AURORA COLONY VINEYARDS LLC, a domestic limited liability company; BROADLEY VINEYARDS, LLC, a domestic limited liability company dba BROADLEY VINEYARDS; JACHTER FAMILY WINES, LLC, a domestic limited liability company; KING'S VINEYARD, an assumed business name; CROFT VINEYARDS, LLC, a domestic limited liability company; AVID WINE LLC, a domestic limited liability company dba AVIDITY WINES; and DUNDEE HILLS WINE LIBRARY LLC, a domestic limited liability company,

Plaintiffs,

vs.

PACIFICORP, an Oregon corporation, et al.,

Defendants.

PACIFICORP, an Oregon Corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP,

Third-Party Plaintiffs,

vs.

MICHAEL JARROD BAKKELA,

Third-Party Defendant.

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Defendants PacifiCorp and Pacific Power ("Defendants" or "PacifiCorp") hereby submit their answer to Plaintiffs' Complaint ("Complaint") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp. With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1. PacifiCorp denies the allegations in Paragraph 1.

2. PacifiCorp denies the allegations in Paragraph 2.

3. In response to the allegations in Paragraph 3, PacifiCorp admits that the Beachie Creek Fire was caused by lightning and that it ignited in the Opal Creek Wilderness

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in August 2020. PacifiCorp denies the allegations in Paragraph 3 to the extent they relate to PacifiCorp and/or its powerlines. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 3, and on that basis, denies them.

4. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 4, and on that basis, denies them.

5. PacifiCorp denies the allegations in Paragraph 5.

6. PacifiCorp denies the allegations in Paragraph 6.

7. In response to Paragraph 7, PacifiCorp admits that on or before September 7, 2020, the National Weather Service issued fire weather messages regarding fire weather conditions in the state of Oregon. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 7, and on that basis, denies them.

8. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 8, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 8.

9. PacifiCorp denies the allegations in Paragraph 9.

10. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp admits that it is an Oregon utility with its headquarters in Multnomah County and that it operates a Portland Control Center. PacifiCorp denies the remaining allegations in Paragraph 10.

11. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13, and on that basis denies them.

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14. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis denies them.

15. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15, and on that basis denies them.

16. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 16, and on that basis denies them.

17. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 17, and on that basis denies them.

18. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 18, and on that basis denies them.

19. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 19, and on that basis denies them.

20. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 20, and on that basis denies them.

21. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 21, and on that basis denies them.

22. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 22, and on that basis denies them.

23. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 23, and on that basis denies them.

24. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 24, and on that basis denies them.

25. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis denies them.

26. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 26, and on that basis denies them.

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27. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 27, and on that basis denies them.

28. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 28, and on that basis denies them.

29. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis denies them.

30. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 30, and on that basis denies them.

31. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 31, and on that basis denies them.

32. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 32, and on that basis denies them.

33. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 33, and on that basis denies them.

34. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 34, and on that basis denies them.

35. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis denies them.

36. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36, and on that basis denies them.

37. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis denies them.

38. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 38, and on that basis denies them.

39. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis denies them.

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40. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 40, and on that basis denies them.

41. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 41, and on that basis denies them.

42. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 42, and on that basis denies them.

43. PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiffs mean by their allegations regarding PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 43.

44. PacifiCorp admits the allegations of Paragraph 44.

45. Paragraph 45 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 45.

46. PacifiCorp denies the allegations of Paragraph 46.

47. PacifiCorp lacks knowledge of other entities' practices and on that basis denies the allegations as to the same. PacifiCorp denies the remaining allegations of Paragraph 47.

48. PacifiCorp denies the allegations of Paragraph 48.

49. In response to paragraph 49, PacifiCorp admits that there was a phone call on September 7, 2020, between three utilities and various members of the Oregon state government. PacifiCorp denies the alleged "purpose" of that call, which multiple witnesses have testified, under oath, that Plaintiffs are presenting inaccurately. *Compare* Paragraph 49 (the "purpose" of the call was to "request[] the utilities to turn off the power"), *with* the July 25, 2023 Deposition of Portland General Electric's Dave Robertson, 37:1-4 ("It would be

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misleading to suggest to the jury that Mr. Grafe made a request to the utilities that to de-energize the power, right?" "There was no specific request made."). PacifiCorp denies the remaining allegations of Paragraph 49.

50. In response to paragraph 50, PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 50.

51. In response to paragraph 51, PacifiCorp admits that Scott Bolton attended an 8 p.m. call by the Governor's Office on September 7, 2020. PacifiCorp denies the remainder of the allegations in Paragraph 51.

52. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 52, and on that basis denies them.

53. PacifiCorp denies the allegations in Paragraph 53.

54. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 54, and on that basis denies them.

55. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 55, and on that basis denies them.

56. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 56, and on that basis denies them.

57. In response to Paragraph 57, PacifiCorp denies that there was any "request to turn off its power," which multiple witnesses have testified, under oath, never occurred. PacifiCorp denies the remaining allegations of Paragraph 57.

58. In response to Paragraph 58, PacifiCorp denies the allegations to the extent they relate to PacifiCorp. With respect to the allegations in Paragraph 58 that relate to Consumers Power, Inc., PacifiCorp lacks knowledge or information sufficient to form a belief about those allegations, and on that basis denies them.

59. PacifiCorp denies the allegations in Paragraph 59.

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60. PacifiCorp denies the allegations in Paragraph 60.

61. PacifiCorp denies the allegations in Paragraph 61.

62. PacifiCorp denies the allegations in Paragraph 62.

63. PacifiCorp denies the allegations in Paragraph 63.

64. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 64, and on that basis denies them.

65. PacifiCorp denies the allegations in Paragraph 65 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 65, and on that basis denies them.

66. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 66, and on that basis denies them.

67. PacifiCorp denies the allegations in Paragraph 67 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 67, and on that basis denies them.

68. PacifiCorp denies the allegations in Paragraph 68 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 68, and on that basis denies them.

69. PacifiCorp denies the allegations in Paragraph 69 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 69, and on that basis denies them.

70. PacifiCorp denies the allegations in Paragraph 70 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs.

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PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 70, and on that basis denies them.

71. PacifiCorp denies the allegations in Paragraph 71 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 71, and on that basis denies them.

72. PacifiCorp denies the allegations in Paragraph 72 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 72, and on that basis denies them.

73. PacifiCorp denies the allegations of Paragraph 73.

74. PacifiCorp denies the allegations of Paragraph 74.

75. PacifiCorp denies the allegations in Paragraph 75.

76. PacifiCorp denies the allegations of Paragraph 76.

77. In response to Paragraph 77, PacifiCorp admits that it published a May 21, 2020, report and that Paragraph 77 accurately quotes from part of that document. PacifiCorp further states that Paragraph 77 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 77. PacifiCorp denies the remaining allegations of Paragraph 77.

78. PacifiCorp denies the allegations of Paragraph 78.

79. PacifiCorp denies the allegations of Paragraph 79.

80. PacifiCorp denies the allegations of Paragraph 80.

81. PacifiCorp denies the allegations of Paragraph 81.

82. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 82, and on that basis denies them.

83. PacifiCorp denies the allegations in Paragraph 83.

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84. In response to Paragraph 84, PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 84.

85. PacifiCorp denies the allegations in Paragraph 85.

86. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. The allegations in Paragraph 86 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 86.

87. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. The allegations in Paragraph 87 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 87.

88. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. PacifiCorp denies the allegations in Paragraph 88.

89. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

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92. In response to Paragraph 92, PacifiCorp incorporates its responses to Paragraphs 1 to 91.

93. Paragraph 93 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 93.

94. Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 94.

95. Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 95.

96. Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

97. Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98. Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 98.

99. Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100. Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 100.

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101. Paragraph 101 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 101.

102. Paragraph 102 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 102.

103. In response to Paragraph 103, PacifiCorp incorporates its responses to Paragraphs 1 to 91.

104. Paragraph 104 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 104.

105. Paragraph 105 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 105.

106. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. In response to Paragraph 106, PacifiCorp incorporates its responses to Paragraphs 1 to 91.

107. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. Paragraph 107 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 107.

108. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. Paragraph 108 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 108.

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109. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. Paragraph 109 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 109.

110. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. Paragraph 110 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 110.

111. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. Paragraph 111 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 111.

112. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' inverse condemnation claim. Paragraph 112 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 112.

113. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. In response to Paragraph 113, PacifiCorp incorporates its responses to Paragraphs 1 to 91.

114. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 114 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 114.

115. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 115 consists of conclusions of law to which no

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response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 115.

116. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 116 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 116.

117. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 117 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 117.

118. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 118 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 118.

119. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 119 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 119.

120. On September 20, 2024, the Court granted PacifiCorp's motion to dismiss Plaintiffs' spoliation claim. Paragraph 120 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 120.

121. Paragraph 121 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 121.

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GENERAL DENIAL

122. PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

123. Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Lack of Specificity)

124. Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

(Standing)

125. Plaintiffs lack standing to bring some or all of their claims.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

126. Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever

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means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury, they would have been reduced or avoided altogether.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

127. The allegations in the Complaint are barred, in whole or in part, for lack of jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

(Act of God)

128. Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

(Unavoidable Accident)

129. Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance with Law/Duty of Care)

130. PacifiCorp complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the Complaint are barred, in whole or in part, because matters alleged and complained about in the Complaint were consistent with available technology,

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were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

131. Additionally, the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, and the relevant public entities including their agencies, and pursuant to the law.

NINTH AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

132. Plaintiffs may be barred from recovery because the losses and damages they allegedly sustained, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

133. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties that PacifiCorp had neither the right, duty, or opportunity to exercise control over, and who acted without the knowledge, participation, approval, or ratification of PacifiCorp.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Parties)

134. The Complaint is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

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TWELFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

135. At all times mentioned herein, Plaintiffs or third parties were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to Plaintiffs' alleged damages, if any. The fault of Plaintiffs and third-parties bars, in whole or in part, the damages which Plaintiffs seek to recover herein. PacifiCorp denies all liability, and without waiving this denial, in the event PacifiCorp is found liable for any act or omission, PacifiCorp is entitled to apportionment pursuant to ORS 31.600.

THIRTEENTH AFFIRMATIVE DEFENSE

(Not Within PacifiCorp's Control)

136. The agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorized by Oregon Public Utilities Commission)

137. The actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, PacifiCorp's vegetation management in the areas at issue complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

138. Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

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SIXTEENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

139. Plaintiffs are not entitled to double recovery on claims of damages or losses, and they may not recover on claims of damages or losses paid by any other sources.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

140. At all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the Complaint and therefore, Plaintiffs are barred from any recovery in this action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

141. Plaintiffs' claims are barred, in whole or in part, based on waiver.

NINETEENTH AFFIRMATIVE DEFENSE

(Laches)

142. Plaintiffs' claims are barred, in whole or in part, based on laches.

TWENTIETH AFFIRMATIVE DEFENSE

(Estoppel)

143. Plaintiffs' claims are barred, in whole or in part, based on estoppel.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(No Recovery for Unreasonable or Unlawful Damages)

144. PacifiCorp denies all liability, and without waiving this denial, alleges that if it responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

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TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

145. Plaintiffs' claims are barred because Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Causation)

146. In relation to the subject fire(s), PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal (proximate) cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutional Violations)

147. The claims in the Complaint are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution, the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment, and the takings clauses of Article I, Section 18, and Article XI, Section 4 of the Oregon Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Compensable Property Interest)

148. Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

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TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Offset)

149. To the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Prejudgment Interest, Expert Fees, or Attorney Fees)

150. The Complaint fails to state a cause of action for which pre-judgment interest, expert fees, or attorney fees may be awarded.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Preemption by Federal Law)

151. Plaintiffs' claims are preempted, in whole or in part, by federal law.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

152. The Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

THIRTIETH AFFIRMATIVE DEFENSE

(Contributory Negligence)

153. PacifiCorp denies all liability, and without waiving this denial, alleges that Plaintiffs' own fault was greater than the fault of PacifiCorp.

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THIRTY-FIRST AFFIRMATIVE DEFENSE

(Statute of Limitations/Repose)

154. Plaintiffs' claims are barred in whole or in part based on the applicable statute of limitations and/or repose.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

155. PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

Dated: October 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Oregon, that on the 3rd[th] day of October, 2024 I arranged for service of the foregoing DEFENDANTS PACIFICORP AND PACIFIC POWER'S ANSWER TO COMPLAINT to the party to this action as follows:

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Of Attorneys for Plaintiffs

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Ontario, OR 97914

Third-Party Defendant

by:

- ☒ U.S. Postal Service, ordinary first class mail
- ☐ U.S. Postal Service, certified or registered mail
- ☐ return receipt requested
- ☐ hand delivery
- ☐ facsimile
- ☒ electronic service
- ☐ other (specify) _____

s/ Jeff Hern
Jeff Hern, OSB #043138

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PAC_256.07.198

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE LUMOS WINE CO.; FLANEUR WINES, LLC; FLANERIE VINEYARD, LLC; KINGS GRADE VINEYARDS, LLC; WEST HILLS STABLE & VINEYARD, LLC; and PUDDING RIVER WINE CELLARS LLC, Plaintiffs, vs. PACIFICORP, an Oregon corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, Defendants.	No. 24CV51872 **DEFENDANTS' PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS** ORAL ARGUMENT REQUESTED PRAYER AMOUNT: $4,050,000 FEE AUTHORITY: ORS 21.160(1)(E)

UTCR 5.010 AND 5.050 STATEMENT

No conferral is required for the motion to dismiss for failure to state a claim under UTCR 5.010. Pursuant to UTCR 5.050, Defendants PacifiCorp and Pacific Power (together, "PacifiCorp") request telephonic oral argument and estimate that 60 minutes will be required for the hearing. PacifiCorp requests official court reporting services.

MOTION

Pursuant to ORCP 21 A(1)(h), PacifiCorp moves to dismiss Plaintiffs' claims for inverse condemnation, negligence, gross negligence, and "spoliation of evidence" (the "Motion").[1] This Motion is supported by the following points and authorities and Declaration

[1] Plaintiffs have filed identical lawsuits on behalf of other wineries across Oregon counties. *See Cooper Mountain Winery LLC v. PacifiCorp*, Washington County Circuit Court Case No. 23CV47202; *Elk Cove Vineyards, Inc. v. PacifiCorp*, Yamhill County Circuit Court Case No. 23CV28258; *Willamette Valley Vineyards, Inc. v. PacifiCorp*, Marion County Circuit

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of Rajan Trehan in Support of Defendants' Motion to Dismiss ("Trehan Decl."), filed contemporaneously herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The 2020 Labor Day windstorm caused at least 17 separate wildfires across Oregon and burned more than 1 million acres. Over four years later, six wine producers bring this lawsuit claiming that PacifiCorp ignited five fires that caused smoke particles to travel *across the state* to damage Plaintiffs' vineyards. (Compl. ¶¶ 38, 40, 43–44.) Notably, Plaintiffs' counsel have filed substantively identical lawsuits on behalf of other wineries across several Oregon counties, filing and dismissing several lawsuits in an attempt to find the most favorable venue to try their cases. In total, over 90 wineries are claiming millions of dollars of damages on the basis of allegations that do not, and cannot, meet the legal threshold necessary to sufficiently plead a lawsuit against PacifiCorp. The instant Complaint does not cure the defects present in any of the other winery lawsuits, and instead levels the same deficient allegations.

Plaintiffs allege four claims, all of which are legally deficient: negligence, gross negligence, inverse condemnation, and "spoliation of evidence." Setting aside the factual problem of proving that any smoke damage to Plaintiffs' grapes resulted from PacifiCorp

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Court Case No. 23CV29519; *Retraite, LLC v. PacifiCorp*, Polk County Circuit Court Case No. 23CV28213; *Brigadoon Vineyards, LLC v. PacifiCorp*, Lane County Circuit Court Case No. 23CV28149; *Lange Winery LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 24CV25661; and *Sokol Blosser, Ltd. v. PacifiCorp*, Multnomah County Circuit Court Case No. 24CV03044. PacifiCorp has filed similar motions to dismiss in each case. In *Cooper Mountain*, the court granted in part and denied in part the motion. In *Willamette Valley Vineyards*, the court similarly granted the motion in part and denied it in part, though it granted leave to replead. In *Elk Cove*, the court denied the motion. After motions to dismiss were filed in *Brigadoon* and *Retraite*—and a decision issued in *Brigadoon* that resulted in dismissal of numerous of Brigadoon's claims—the plaintiffs in those two cases voluntarily dismissed their actions and re-filed in this county, including as part of *Lange*, a blatant example of forum shopping. Most recently, in *Lange*, the court granted the motion in part and denied it in part. PacifiCorp attaches the orders from these cases as Exhibits 8–10, 14–15 to the Trehan Declaration.

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equipment located dozens or even hundreds of miles away, rather than from any of the other dozen or more wildfires burning over Labor Day weekend 2020, all of Plaintiffs' claims fail as a matter of law. Recognizing this, other circuit courts throughout Oregon over the last four years have dismissed similar claims with prejudice, including claims brought by Plaintiffs' counsel in more than eighteen parallel suits in Douglas County Circuit Court, where only the negligence claims were proceeding to trial (before the parties' recent settlement of those claims). The claims should be dismissed here too.

First, Plaintiffs' claim for inverse condemnation fails on every element. To state a claim for inverse condemnation, Plaintiffs must allege that (1) "the government" (2) "intentionally" acted "in a manner that necessarily caused" the injury to Plaintiffs' property (3) for a "public use," in the case of claims under Article I, Section 18, or by a corporation acting under authority of law in the case of claims under Article XI, Section 4. *Dunn v. City of Milwaukie*, 355 Or 339, 358, 328 P3d 1261, 1272 (2014). PacifiCorp is not the government, and (for the alternative claim under Article XI, Section 4) there is no allegation anywhere in the Complaint that PacifiCorp acted "under authority of law" in any relevant way. Nor do Plaintiffs allege ultimate facts sufficient to show that any of PacifiCorp's "intentional" acts were inevitable or "substantially certain" to cause smoke damage to Plaintiffs' vineyards. The Court therefore should dismiss the inverse condemnation claim with prejudice.

Second, Plaintiffs' negligence claims are similarly flawed. For example, take only the requirement that Plaintiffs allege that the harm they suffered was a "foreseeable risk" of negligent conduct. *Fazzolari ex rel. Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). Here, Plaintiffs' claim for negligence would necessitate a vast expansion of the scope of foreseeability in a manner previously rejected by the Oregon Supreme Court. Accordingly, Plaintiffs' allegations are unable to sustain a negligence claim as a matter of law.

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Third, Plaintiffs' claim for "spoliation of evidence" fails. Even if Oregon law recognized a freestanding claim for spoliation—and it does not—the Oregon Court of Appeals has expressly rejected bringing claims for spoliation unless a party "first br[ings] the underlying claim and los[es] or suffer[s] diminution in its value." *Classen v. Arete NW, LLC*, 254 Or App 216, 221, 294 P3d 520, 523 (2012). Here, Plaintiffs, having just filed their case, have obviously not reached that minimum threshold to determine whether a freestanding spoliation claim is even viable.

Finally, Plaintiffs' Prayer for Relief seeks a facially absurd injunction requiring, among other things, PacifiCorp to "refrain from re-energizing powerlines on red flag warning days" and to "withhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws." (Compl., Prayer for Relief, ¶ 111(b).) Plaintiffs have not identified which claim they contend permit them to seek injunctive relief. Even if they did, an injunction would require the Court to run Oregon's second-largest utility—a job more appropriately left to the Oregon Public Utilities Commission ("PUC").

II. BACKGROUND

PacifiCorp delivers electricity to around 773,000 customers, including around 596,000 customers in Oregon under the Pacific Power brand. (*See* Compl. ¶ 18.) PacifiCorp is regulated by the PUC, which has established comprehensive regulations regarding vegetation management practices, public safety power shutoffs ("PSPS"), and many other aspects of running an electric utility in Oregon.

Plaintiffs produce wine from grapes they grow within the broader Willamette Valley and from grapes and wines purchased from other Willamette Valley vineyards. (*See id.* ¶¶ 11–16.) Plaintiffs sell their bottled wine at wineries and via wholesale and retail wine distribution systems. (*Id.*) The six Plaintiffs are located in the broader Willamette Valley: Philomath (Lumos Wine Co.), Carlton (Flaneur Wines, LLC), Newberg (Flanerie Vineyard,

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LLC and Kings Grade Vineyards, LLC), and Salem (West Hills Stable & Vineyard, LLC and Pudding River Wine Cellars, LLC).[2] The distance between the wineries in Newberg and the winery in Salem is nearly 70 miles.

Plaintiffs allege that smoke, soot, and ash traveled there specifically from the Santiam Fire (located in the Santiam Canyon), the Echo Mountain Fire (located near Otis and Lincoln City), the Archie Creek Complex Fire (located near Glide), the 242 Fire (located near Chiloquin), and the South Obenchain Fire (located near Eagle Point). (*See id.* ¶¶ 6, 43–44.) They allege that after Labor Day, they harvested their grapes and turned the grapes into wine. (*Id.* ¶¶ 43–45.) Plaintiffs sold their wine into the marketplace but allege their wine sales were "reduced or damaged." (*Id.* ¶¶ 44–47.)

In addition to this case (*Lumos v. PacifiCorp*, No. 24CV51872), multiple other groups of winery plaintiffs have filed suit against PacifiCorp alleging smoke damage from the same fires. Each winery case is brought by the same counsel who previously litigated several negligence-only cases in Douglas County Circuit Court.

III. LEGAL STANDARD

To avoid dismissal, a complaint must state facts sufficient to constitute a cognizable claim for relief. *See* ORCP 18 A; ORCP 21 A(1)(h). Conclusory allegations or legal conclusions are insufficient. *See, e.g.*, *Zehr v. Haugen*, 318 Or 647, 656, 871 P2d 1006 (1994); *Lourim v. Swensen*, 328 Or 380, 384, 977 P2d 1157 (1999). A court must "accept as true all well-pleaded allegations and all reasonable inferences that may be drawn therefrom, but disregard any allegations that are conclusions of law." *Huang v. Claussen*, 147 Or App

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[2] Plaintiffs' filings with the Oregon Secretary of State indicate the locations where the Plaintiff wineries are registered. PacifiCorp requests that the Court take judicial notice of these factual documents attached as Exhibit 16 to the Trehan Declaration. *See* OEC 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is * * * (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). As these are Plaintiffs' filings, these factual documents are not subject to reasonable dispute. *See, e.g.*, *League of Oregon Cities v. State*, 334 Or 645, 654 n 8, 56 P3d 892, 899 (2002) (taking judicial notice of documents filed with the Secretary of State).

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330, 332, 936 P2d 394 (1997), *rev den,* 325 Or 438 (1997) (citations omitted). When a pleaded claim is legally deficient, it must be dismissed. *See Fuhrer v. Gearhart-By-The-Sea, Inc.*, 306 Or 434, 441–42, 760 P2d 874 (1988).

IV. ARGUMENT

A. Plaintiffs' Inverse Condemnation Claim Fails as a Matter of Law.

Multiple trial courts in Oregon have dismissed similar inverse condemnation claims, including some brought by Plaintiffs' attorneys, in cases arising out of the Labor Day fires. (*See* Trehan Decl., Exs. 1–8.) This includes substantively identical lawsuits brought by Plaintiffs' counsel for other winery plaintiffs. (*See* Trehan Decl., Exs. 8–10, 14–15.) Although none of those decisions is binding on this Court, the Court may find them instructive or helpful in evaluating the claims in this case. As explained below, Plaintiffs' Third Claim for Relief for inverse condemnation is subject to dismissal for multiple reasons.

Typically, a taking begins with a formal eminent domain proceeding. However, governments and corporations acting under authority of law may also "take[] property interests through [their] actions without first initiating condemnation proceedings." *Dunn v. City of Milwaukie*, 355 Or 339, 347, 328 P3d 1261 (2014). In those cases, a property owner may recover under the doctrine of inverse condemnation. In short, when the government or a corporation acting under authority of law "takes property, it must pay for it." *Id*.

The Oregon Constitution has two takings clauses. Article I, Section 18 prohibits the government from taking "private property" for "public use" without "just compensation." Article XI, Section 4 states in full that "[n]o person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." Here, Plaintiffs do not state under which clause they assert their Third Claim for Relief for inverse condemnation.

Plaintiffs cannot satisfy the elements of either clause as a matter of law. *First*, Plaintiffs cannot meet the intent requirement applicable to all Oregon takings claims: that the

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defendant "intentionally undertook its actions and that the inevitable result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358–59. *Second*, Plaintiffs cannot show either that PacifiCorp is a "governmental defendant," or that it took Plaintiffs' properties "for a public use" as required by Article I, Section 18. *Third*, Plaintiffs cannot show that PacifiCorp acted "under authority of law" as required by Article XI, Section 4 in any relevant respect to their claims here. Because none of these problems can be fixed by amendment, Plaintiffs' inverse condemnation claim should be dismissed with prejudice.

1. Plaintiffs Fail to Allege that PacifiCorp Intentionally Undertook to Act in a Manner that Necessarily Caused Plaintiffs' Injuries.

Absent evidence of "specific intent" to take property, a plaintiff may maintain an inverse condemnation action by proving that the government "intentionally undertook * * * actions," the "inevitable result" of which, "in the ordinary course of events, was the invasion of the plaintiff's property that is the basis for the * * * inverse condemnation claim." *Dunn*, 355 Or at 358–59; *see also Morrison v. Clackamas Cnty.*, 141 Or 564, 569, 18 P2d 814 (1933) (a defendant "intend[s] to do those things which are the natural and ordinary consequences of his act"). While that "burden is less than specific intent would make it, it is still exacting." *Dunn*, 355 Or at 358. If the plaintiff's evidence shows that the invasion of their property was a "less than certain consequence—such as a conceivable, possible, or plausible outcome, or one that otherwise might or might not occur—that is not enough." *Id.* at 359. Nor can "negligence alone * * * support a claim for inverse condemnation." *Id.* at 352; *see also Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) ("[A] takings claim cannot be based on * * * 'negligent government conduct.'" (citation omitted)).

Dunn illustrates the high standard Plaintiffs must meet. In that case, the Oregon Supreme Court rejected a plaintiff's inverse condemnation claim arising out of the City of Milwaukie's hydrocleaning program—a process that "can cause water in the sewer lines to

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backflow" if lateral sewer lines are kept at too low a pressure. *Dunn*, 355 Or at 341–42. The plaintiff argued that she had "sufficiently proved the city's intent by showing that the flooding of her house was the direct result of the city's purposeful act of hydrocleaning"—in other words, that because the city intended the public improvement, it intended any "natural and ordinary consequence[]" of that improvement, and so was liable for inverse condemnation. *Id*. at 345–46 (citation omitted). The Oregon Supreme Court rejected that formulation, and instead held that if a governmental entity is liable any time its public improvements are the "but-for" cause of damage, that would effectively "eliminate[] the requirement of intent altogether" and fail to "adequately distinguish between governmental negligence and intentional takings." *Id.* at 358. In short, under *Dunn*, it is not enough that the government intends some public improvement that *risks* damaging property or in fact causes damage—instead, Plaintiffs must show that the "*inevitable* result of those actions, in the ordinary course of events, was the invasion of the plaintiff's property." *Id.* (emphasis added).

Under *Dunn*, Plaintiffs cannot allege that it was inevitable that smoke might invade "somewhere," or that the smoke could spread to Plaintiffs' properties. Instead, Plaintiffs must allege that the invasion "into [Plaintiffs'] [properties] was the necessary, certain, predictable, or inevitable result" of PacifiCorp's conduct: each step of the causal chain from PacifiCorp's conduct to Plaintiffs' damages must have been "substantially certain" to occur. *Dunn*, 355 Or at 360–61.

In *Worman v. Columbia Cnty.*, 223 Or App 223, 236, 195 P3d 414 (2008), the plaintiffs sued the county, alleging that the county negligently conducted a roadside spray operation and damaged their property. The Oregon Court of Appeals affirmed the trial court's conclusion that the plaintiffs failed to state an inverse condemnation claim because they had not alleged (nor offered evidence) that the county spray program for roadside ditches "would naturally and ordinarily cause damage to plaintiffs' property in particular, or, for that matter, that the spray program, properly carried out, would naturally or ordinarily

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cause damage to any property." *Id.* (emphasis omitted). The court rejected the plaintiffs' inverse condemnation theory premised on their arguments that "had the county not performed those spray operations in a negligent manner, plaintiffs' property would not have been harmed," and concluded that such allegations were insufficient to establish that the county had designed and carried out a project for public use that would damage the plaintiffs' property as a natural and ordinary consequence of the project. *Id.*

Consistent with this line of cases, other Oregon circuit courts have repeatedly rejected attempts to use an inverse condemnation claim against utility companies for wildfire damages, including in cases brought by Plaintiffs' attorneys. Several examples follow:

- In a substantially identical case involving wildfire smoke and wineries, Washington County Circuit Court Judge Brandon Thompson dismissed Cooper Mountain Winery LLC's inverse condemnation claim with prejudice. (*See* Trehan Decl., Ex. 14.)
- In another substantially identical case, Judge Shelley D. Russell of Multnomah County dismissed the 36 Willamette Valley plaintiff wineries' inverse condemnation claim against PacifiCorp in *Lange* in its entirety. (*See* Trehan Decl., Ex. 15, at 2.).
- Judge Johnson of the Douglas County Circuit Court dismissed an inverse condemnation claim against PacifiCorp, recognizing that *Dunn* requires a plaintiff asserting inverse condemnation in the context of a wildfire to allege facts sufficient to show both that "1. The intentional act by Defendants was substantially certain to cause a fire; and 2. The fire was substantially certain to cause damage to property owned by Plaintiffs." (Trehan Decl., Ex. 5, at 4.)
- Judge Conover of Lane County dismissed inverse condemnation claims against the Eugene Water & Electric Board and Lane Electric Cooperative, Inc. arising out of Labor Day 2020 wildfires, specifically finding "that there

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was no intent by either defendant to damage the plaintiffs' properties." (Trehan Decl., Ex. 3, at 30 (p. 71 of the transcript); *see also* Ex. 4, at 1.) Although Judge Conover allowed the plaintiffs in that case a chance to amend their complaint, Judge Conover subsequently dismissed the amended inverse condemnation claims with prejudice. (Trehan Decl., Ex. 2.)

- In yet another case, Judge Johnson of Douglas County dismissed inverse condemnation claims against PacifiCorp in the *Roseburg Resources* case, Douglas County Circuit Court Case No. 22CV09346. (Trehan Decl., Ex. 1.) Judge Johnson dismissed the original complaint, granting leave to replead if the plaintiffs could allege ultimate facts that the damage to their property "was an inevitable or natural result of [PacifiCorp's] intentional act that was not dependent on other intervening factors." (*Id*.) The plaintiffs repleaded, and Judge Johnson dismissed the inverse condemnation claim again, without leave to amend. (Trehan Decl., Ex. 7.) In reaching that conclusion, Judge Johnson found that the plaintiffs' allegations about the "hazard," "risk," and "danger" that a fire would start and the alleged "certainty to the fire will spread, and the predictability of that spread, once a fire ignites" were insufficient to allege "any facts from which one could conclude that the fire was substantially certain to occur as opposed to at a high risk of occurring." (*Id*.)
- In November 2023, Multnomah County Circuit Court Judge Baggio dismissed Article I, Section 18 and Article XI, Section 4 claims against PacifiCorp because the allegations did not satisfy *Dunn*. (Trehan Decl., Ex. 13.)

Although none of these circuit court cases is binding on this Court, the Court may find the analysis and reasoning in those decisions helpful in resolving the issues in this case.[3]

[3] On February 2, 2023, Multnomah County Circuit Court Judge Beth A. Allen issued an order denying PacifiCorp's motion to dismiss inverse condemnation claim brought pursuant to Article XI, Section 4 arising out of a different 2020 Labor Day fire (the Pike Road wildfire

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Just as the plaintiffs' pleadings fell short in those other cases, Plaintiffs here too cannot allege that any of the necessary causal steps from PacifiCorp's actions to Plaintiffs' damaged grapes were "substantially certain" to occur.

Plaintiffs make the conclusory allegation that "the damages caused to Plaintiffs' grapes and wines by each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and South Obenchain Fires' harmful smoke was the inevitable result of PacifiCorp's actions," but Plaintiffs have pled no facts to support this. (Compl. ¶ 97.) Plaintiffs allege PacifiCorp was negligent in nine potential ways, including: trimming vegetation adjacent to electrical lines, replacing electrical equipment with "strong, safe parts," designating the Santiam Canyon, North Umpqua Canyon, and Echo Mountain as areas "designated for a power shutoff program," turning off power in "the service area adjacent to the Willamette Valley," and ensuring "operations personnel understood and knew how and when to de-energize power lines during high-wind, high-fire conditions." (*Id.* ¶ 38.) But this generalized list of actions does not support the conclusions that fires would inevitably start, those fires would inevitably grow large enough to create harmful smoke, that smoke would inevitably travel many miles to Plaintiffs' grapes, and that those grapes would inevitably no longer be viable for wine making after the smoke exposure. Plaintiffs' allegations amount to a "conclusion[] of law," and do not suffice to state "ultimate facts" entitling Plaintiffs to relief. *Huang*, 147 Or App at 332.

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in Tillamook County). *See Stroh Coastal Holdings LLC v. PacifiCorp*, Multnomah County Circuit Court Case No. 22CV29695. Although PacifiCorp does not concede that the *Stroh* allegations were legally sufficient (they were not), *Stroh* is distinguishable because of the unique and highly unusual allegations in that case, specifically the presence of an easement on the subject property. As the court recounted, the plaintiff in *Stroh* alleged that wildfire damage to the plaintiff's property was substantially certain because it had specifically alleged that PacifiCorp maintained a utility line easement across the plaintiff's property (*i.e.*, the plaintiff's property was right under a powerline), that the Pike Road fire ignited due to power facilities contacting a hazard tree "just adjacent to [that] easement," and that the plaintiff had personally put PacifiCorp on actual notice of that specific hazard tree prior to the fire. (Ex. 6, at 7–8.) Plaintiffs here do not allege any similar facts; indeed, Plaintiffs' allegations center around smoke from fires many miles away.

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Plaintiffs have not alleged any other specific facts supporting a finding of "substantial certainty." Indeed, Plaintiffs' factual allegations center on fire "risk" because there was no substantial certainty of Plaintiffs' specific smoke damage. The Complaint refers to "risk" or "fire risk" over ten times. (*See, e.g.*, Compl. ¶¶ 8, 22, 25, 29–31, 36, 49, 64, 67.) The reason Plaintiffs focus on "risk" is that it is the best they can do; it is implausible (at best) to suggest that PacifiCorp's alleged actions were *certain* to ignite a fire when other intervening causes (competent ignition source, wind events, dry weather, wind direction and strength to carry the smoke, etc.) are necessary for Plaintiffs' alleged damages to occur. Even more implausibly, Plaintiffs cannot allege that PacifiCorp's alleged actions were *certain* to cause smoke to travel in a specific direction to damage Plaintiffs' grape crops. In *Lange*, Judge Shelley D. Russell of Multnomah County found that such allegations failed to "show that [damage to the grapes from smoke caused from the fires] was the inevitable result of [PacifiCorp's] conduct." (*See* Trehan Decl., Ex. 15, at 2.) Judge Russell accordingly dismissed the 36 Willamette Valley plaintiff wineries' inverse condemnation claim against PacifiCorp in *Lange* in its entirety. (*Id.*)

As federal decisions have long explained, allegations of fire "risk" are not sufficient to state a claim for inverse condemnation—and the Oregon Supreme Court has explicitly instructed Oregon courts to look to federal inverse condemnation decisions. *See Dunn*, 355 Or at 357 (explaining that the "natural and ordinary consequences" test is "consistent with" the "natural and ordinary consequences" test that federal courts use to evaluate inverse condemnation claims). In *Cary v. United States*, 552 F3d 1373 (Fed Cir 2009), the plaintiffs challenged the United States Forest Service's fire management policies, alleging that the government was "aware" that its policies "created a significant risk that a wildfire * * * would spread to adjacent landowners' properties." *Id.* at 1377. The court rejected the plaintiffs' argument that mere heightened fire "risk" could satisfy the requirement that a plaintiff's injuries must be the "'direct, natural, or probable'" result of government conduct

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to state a claim. *Id.* at 1378 (citation omitted). As the court explained, "[t]aking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable." *Id.* For that reason, "[l]iability for damage caused by" fire "has traditionally been determined under tort law," not inverse condemnation. *Thune v. United States*, 41 Fed Cl 49, 53 (1998); *see also Dunn*, 355 Or at 356 n 13 (citing *Thune* with approval).

Even if Plaintiffs could allege that PacifiCorp's conduct was "substantially certain" to ignite a fire (and they cannot), Plaintiffs make no effort to allege the next step of the required causal chain: that the alleged ignition was "substantially certain" to result in the "invasion of the plaintiff's property that is the basis for the plaintiff's inverse condemnation claim." *Dunn*, 355 Or at 358–59. At best, Plaintiffs allege that PacifiCorp's actions were substantially certain to cause ignitions that were the but-for cause of fires that were the but-for cause of smoke, that was the but-for cause of Plaintiffs' damages. But as the Oregon Supreme Court explained in *Dunn*, "under the natural and ordinary consequences test" the defendant is required "to have intended *the invasion of plaintiff's property*, and not just the acts that, in some causal way, led to or contributed to that invasion." *Id.* at 360 (emphasis added). Plaintiffs have not alleged that the fire ignitions here were substantially certain to result in invasions to Plaintiffs' properties, and they cannot do so.

Plaintiffs' allegations about computer modeling and analysis do not save their inverse condemnation claim from dismissal. (*See* Compl. ¶ 21 ("Responsible electric utilities use computer modeling and analysis on a regular basis as part of their de-energization programs to predict how a weather pattern will evolve and how a fire would be spread amidst such winds, heat, and lack of humidity.").) Indeed, Plaintiffs' Complaint is devoid of any allegations that such computer modeling and analysis would have predicted fires igniting at any particular point, let alone the particular points of ignition alleged in the Complaint. Plaintiffs also allege that "PacifiCorp had information available to it that predicted the

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advancing weather patterns, the expected wind directions pushing toward the Willamette Valley, and the impact that any fire *might* have in inundating the Willamette Valley with smoke for days and weeks." (*Id.* ¶ 50 (emphasis added).) But, as *Dunn* makes clear, it "is not enough" to assert that an invasion, *i.e.*, fire impact, "might" occur to "infer that the invasion was intentional." 355 Or at 359. Nor do Plaintiffs allege any facts to show that fire was "necessary, inevitable, or otherwise certain" to ignite at any particular point on the hundreds (indeed, thousands) of miles of powerlines maintained by PacifiCorp, much less in sufficient proximity to Plaintiffs such that any computer modeling would have predicted the fire would invade Plaintiffs' land. *Id.* at 351.

Fires spread unpredictably with constant opportunities for intervening causes based on winds, firefighting, and myriad other factors. *See City of Austin v. Liberty Mut. Ins.*, 431 SW3d 817, 825–26 (Tex App 2014) (describing seven-step chain of causation required for a utility-caused fire to damage plaintiff's property, most of which were not "almost certain" to occur, foreclosing takings claim). Even with an "intentionally set fire[]" that "escape[d] because of intervening winds" or other causes, liability for fire damage "has traditionally been determined under tort law," not inverse condemnation. *Thune*, 41 Fed Cl at 53. Because Plaintiffs do not and cannot allege that any alleged fire caused "certain and inevitable" damage to Plaintiffs in particular "for purposes of a takings claim," Plaintiffs fail to state a claim for inverse condemnation. *Dunn*, 355 Or at 356 n 13.

2. Any Alleged Article I, Section 18 Inverse Condemnation Claim Fails Because PacifiCorp Is Not a Public Entity and Did Not Take Property for Public Use.

(a) PacifiCorp Is Not a Public Entity.

Oregon law has long been clear that "a claim for inverse condemnation" under Article I, Section 18 "requires a showing that the *governmental defendant* intended to take private property for a public use." *Vokoun*, 335 Or at 27–29 (emphasis added); *see also*

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Dunn, 355 Or at 358 (same); *Boise Cascade Corp. v. Bd. of Forestry*, 325 Or 185, 197, 935 P2d 411 (1997) (same). PacifiCorp is aware of no Oregon appellate case applying inverse condemnation against a private entity, and the Court should not accept Plaintiffs' invitation to be the first. *See Motes v. PacifiCorp*, 230 Or App 701, 706, 217 P3d 1072 (2009) (rejecting "without discussion" a plaintiff's appeal of a dismissed inverse condemnation claim against PacifiCorp). Indeed, multiple Oregon trial courts have recognized that, as a matter of law, a plaintiff cannot state an inverse condemnation claim under Article I, Section 18 against a private entity like PacifiCorp. (*See, e.g.*, Trehan Decl., Ex. 3, at 29–30 (transcript pp. 70–71); Ex. 4, at 1; Ex. 11, at 16–19; Ex. 12.)

Plaintiffs may cite cases showing that private entities may be involved in *direct* condemnation actions. *See, e.g.*, *Grande Ronde Elec. Co. v. Drake*, 46 Or 243, 78 P 1031 (1905). But the fact that corporations may have a *statutory* right to condemnation (*see* ORS 35.245) says nothing about whether corporations may be liable for *constitutional* inverse condemnation claims. *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432, 60 P3d 557 (2002) ("[I]t does not necessarily follow that, because the [defendant] may have violated the [condemnation] statutes, the proper remedy is an action for damages in inverse condemnation.").

Dismissing any Article I, Section 18 claim also makes sense from a policy perspective because PacifiCorp is unlike governmental entities that can unilaterally spread the cost of public improvements by raising taxes. PacifiCorp may only raise rates if the PUC finds that a rate increase would be "fair, just and reasonable." ORS 757.210(1)(a). PacifiCorp would also not qualify as a "[g]overnment body" under Oregon's tort claim statute. ORS 30.260(4) ("'Public body' means * * * [a] public body as defined in ORS 174.109[.]"); ORS 174.109 ("[A]s used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies."); ORS 174.117(1) (special government bodies are, among other things, "school district[s]," entities that are "created by

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statute, ordinance or resolution," or "intergovernmental bod[ies]"). Plaintiffs' Complaint alleges no facts to rebut either point. Because only "governmental defendants" are liable for inverse condemnation, the Court should dismiss Plaintiffs' Article I, Section 18 claim. *Vokoun*, 335 Or at 28.

(b) Plaintiffs Do Not Allege that PacifiCorp Took Property for "Public Use."

Any Article I, Section 18 inverse condemnation claim also fails for the independent reason that Plaintiffs cannot demonstrate that their properties were taken "for a public use." *Vokoun*, 335 Or at 23; *see also Worman*, 223 Or App at 236 (plaintiffs could not state an inverse condemnation claim where "no reasonable juror could conclude that a county employee who intentionally and maliciously sprays herbicide onto private property is acting 'for a public use'"). As the Court of Appeals has explained, the term "public use" requires an "intimate relationship between the public and an item of property which has been acquired"; the "public's use and occupation of the property must be direct." *Mossberg v. Univ. of Oregon*, 240 Or App 490, 500–01, 247 P3d 331 (2011), *rev den,* 351 Or 216 (2011) (internal quotation marks and citation omitted). In other words, Plaintiffs must allege that PacifiCorp took their property "intending to put that property" *itself* "to public use." *Id*. (*See* Trehan Decl., Ex. 3 (p. 71 of the transcript) (dismissing inverse condemnation claim against utilities because "there were no facts established of the intent to take the property for public use, nor that the alleged taking by wild fire was for a public use or public purpose[, and] there was no intent to put the plaintiffs' property to public use."); *see also* Ex. 4, at 1.)

Plaintiffs' only allegation here is that "PacifiCorp has the statutory power to condemn property in the State of Oregon and utilizes such property in the operation of its utility for a public use." (Compl. ¶ 95.) Plaintiffs have not alleged that any supposed taking was for public use or that PacifiCorp even used the property in the operation of its utility. Plaintiffs must meet the test for public use set forth in *Mossberg*: they must allege that "the

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government took private property intending to put that property to public use." 240 Or App at 501. Because Plaintiffs cannot make that showing and make no effort to do so, they fail to state an inverse condemnation claim under Article I, Section 18 of the Oregon Constitution.

3. Plaintiffs' Inverse Condemnation Claim Under Article XI, Section 4 Fails Because Plaintiffs Do Not and Cannot Allege that PacifiCorp Acted Under Authority of Law.

Any Article XI, Section 4 inverse condemnation claim also has a separate fatal flaw: Plaintiffs cannot allege that PacifiCorp acted "under authority of law" in allegedly igniting the fires that Plaintiffs contend damaged them. By its own terms, the takings clause in Article XI, Section 4 only applies to a "corporation under authority of law." Plaintiffs attempt to meet this requirement by alleging that PacifiCorp has a general power of condemnation, (Compl. ¶ 95), or that it operates as a public utility, (*id.* ¶ 94). (*See id.* ¶ 98 (alleging PacifiCorp "took Plaintiffs' grapes and wines via color of its state law monopoly and utility rights").) But Plaintiffs fail to allege that any of PacifiCorp's alleged *conduct* was "under authority of law." Because they cannot do so, their inverse condemnation claim under Article XI, Section 4 fails.

Judge Conover's ruling in Lane County reinforces this conclusion. There, Lane Electric Cooperative moved to dismiss the plaintiffs' Article XI, Section 4 inverse condemnation claim on precisely this point and the court agreed, finding "Lane Electric did not act under authority of law to the extent" there was in fact "a taking of the plaintiffs[']properties." (Trehan Decl., Ex. 3, at 30 (p. 71 of the transcript); *see also* Ex. 4, at 1.) Similarly, Douglas County Circuit Court Judge Johnson dismissed the plaintiffs' Article XI, Section 4 claim, stating that the Court had "serious reservations that any amount of evidence would support, or any statement of ultimate facts could be made, that would support a claim that all property damaged as a result of the fire was taken under authority of law." (Trehan Decl., Ex. 7; *see also* Ex. 12.)

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Nor can Plaintiffs cite any binding authority to the contrary. Article XI, Section n 4 is rarely invoked. To PacifiCorp's knowledge, the only Oregon appellate authority interpreting its provisions in any depth in the context of a takings claim since the 1930s—*City of Keizer v. Lake Labish Water Control District*—expressly did not consider the question presented here: whether a plaintiff must allege that a taking itself was committed "under authority of law," or whether a plaintiff may state a claim by simply alleging that a defendant generally operates with legal authority (as Plaintiffs allege).[4] *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 443 n 5, 60 P3d 557 (2002), *rev den,* 336 Or 60 (2003) (noting that the water district did "not contend that, when it decided to take the action that resulted in the flooding of city property, it was not acting 'under authority of law,' as that phrase is used in Article XI, section 4").

The only Oregon cases permitting Article XI, Section 4 claims to go forward have involved a direct connection between a corporation's exercise of legal authority and the alleged taking. The primary cases applying Article XI, Section 4 were decided in the late 19th and early 20th centuries and involved railroads that took property pursuant to a municipal ordinance or council grant explicitly authorizing the activities claimed to constitute a taking. *See Tooze v. Willamette Valley S. Ry. Co.*, 77 Or 157, 159, 150 P 252 (1915) (railroad's "right to construct a trestle [was] based upon an ordinance passed by the city council of Oregon City"); *Kurtz v. S. Pac. Co.*, 80 Or 213, 215, 155 P 367 (1916) (railroad's construction activities authorized by "an ordinance * * * to build the switch"); *McQuaid v. Portland & V. Ry. Co.*, 18 Or 237, 239, 22 P 899 (1889) (the railroad at issue was "constructed in pursuance of authority granted by the common council of the city of East

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[4] A handful of other modern cases have addressed Article XI, Section 4 takings claims but like *City of Keizer* did not interpret the meaning of "under authority of law." *See, e.g.*, *Nw. Nat. Gas Co. v. City of Portland*, 300 Or 291, 312–13, 711 P2d 119 (1985) (no liability under either Article I, Section 18 or Article XI, Section 4 because revocation of a right-of-way was not a taking); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 671, 131 P3d 805 (2006), *rev den,* 341 Or 80 (2006) (rejecting Article XI, Section 4 claim in passing, and collecting cases doing the same thing).

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Portland"). PacifiCorp is not aware of any Oregon appellate authority holding that a corporation acts "under authority of law" whenever it is generally subject to regulation or holds eminent domain power—no matter how disconnected its conduct is from the corporation's eminent domain authority or from the corporation's affirmative compliance with regulations.

The "under authority of law" language of Article XI, Section 4 must be read to require a direct connection between a corporation's legal authority and the alleged taking because unlike Article I, Section 18's takings clause, Article XI, Section 4 contains no textual "public use" requirement. The "under authority of law" requirement fulfills the same limiting function in distinguishing private torts from compensable takings. If the theory advanced by Plaintiffs was correct, corporations subject to state regulation (effectively every corporation) or holding the power of eminent domain could be subject to a takings claim for a broad swath of conduct, no matter how disconnected from those regulations or from a corporation's exercise of eminent domain power. That interpretation "'would be absurd to attribute to the framers'" of the Oregon Constitution, and the Court should reject it. *City of Keizer*, 185 Or App at 430 (quoting *Tomasek v. State*, 196 Or 120, 147, 248 P2d 703 (1952)).[5]

This conclusion is reinforced by the analogous federal state action doctrine, which was articulated in *Jackson v. Metro. Edison Co.*, 419 US 345, 95 S Ct 449, 42 L Ed 2d 477 (1974). In *Jackson*, a customer brought constitutional claims against a utility, arguing that the utility was subject to the Fifth Amendment because it was "subject to extensive state regulation" and held eminent domain power. *Id.* at 350. The Supreme Court rejected this

[5] If the Court interprets Article XI, Section 4's "under authority of law" provision to only require a loose connection between legal authority and the alleged taking, then, in the alternative only, the Court should infer a public use requirement into Article XI, Section 4—and Plaintiffs' claim would then fail for the same reason that their Article I, Section 18 claim fails, as described above. *See, e.g.*, *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F Supp 530, 539 (D Or 1980), *aff'd*, 701 F2d 99 (9th Cir 1983) (Article XI, Section 4 "has been construed by the Oregon Supreme Court to have the same meaning as Article I section 18" (citing *MacVeagh v. Multnomah Cnty.*, 126 Or 417, 270 P 502 (1928)).

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argument and found that the utility was not a state actor because it did not "*exercise* * * * some power delegated to it by the State * * * such as eminent domain" in deciding to discontinue service (the conduct that formed the basis of the plaintiff's complaint). *Id.* at 353 (emphasis added). Although the federal and state takings clauses are not coextensive in all cases, Oregon courts have looked to federal constitutional decisions in determining the scope of the Oregon takings clause. *See, e.g.*, *Lincoln Loan Co. v. State ex rel. State Highway Comm'n*, 274 Or 49, 52 n 2, 545 P2d 105 (1976) ("Article I, § 18, of our Oregon Constitution is identical in language and meaning with the Fifth Amendment of the Constitution of the United States."); *cf. Suess Builders Co. v. City of Beaverton*, 294 Or 254, 259 n 5, 656 P2d 306 (1982).

In sum, Plaintiffs cannot claim that PacifiCorp acted "under authority of law" in allegedly igniting the fires at issue here, nor do Plaintiffs even attempt to do so. Plaintiffs do not allege that PacifiCorp's conduct in *following* state regulations led to the alleged fires. In fact, Plaintiffs specifically allege that PacifiCorp was "not authorized under any state law or regulation to take the actions that it took causing ignition and spread of fire and smoke, soot, and ash therefrom of each of the Santiam, Echo Mountain, Archie Creek Complex, 242, and/or South Obenchain Fires as alleged herein and Plaintiffs' resulting damages." (Compl. ¶ 98.) Plaintiffs similarly do not allege that PacifiCorp used the power of eminent domain to take their property, nor to take any relevant land at issue in this case. The most Plaintiffs allege is that PacifiCorp generally has the "power of eminent domain"—not that PacifiCorp used that power in any relevant way vis-à-vis their takings claim. (*See id.* ¶ 95.) Absent a direct connection between the exercise of PacifiCorp's eminent domain power and the alleged taking, similar to those present in *Tooze*, *Kurtz*, and other Oregon cases, Plaintiffs' inverse condemnation claim under Article XI, Section 4 claim fails as a matter of law.

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4. Plaintiffs Do Not Allege Any Facts Concerning the Extent of the Alleged Damage.

Finally, Plaintiffs' claim for inverse condemnation should be dismissed because they fail to allege any facts concerning the extent to which Plaintiffs' properties were damaged. Indeed, a fair reading of the Complaint is that, even read in the light most favorable to Plaintiffs, Plaintiffs have alleged only an inactionable "damaging" and not an actionable "taking."

Oregon courts have long held that "[p]roperty is not 'taken' if it is simply damaged." *Moeller v. Multnomah Cnty.*, 218 Or 413, 425–27, 345 P2d 813 (1959). Rather, the test is whether "there has been a 'substantial' interference with property rights." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992) (citing *Lincoln Loan Co.*, 274 Or at 57). Plaintiffs make the conclusory allegation that PacifiCorp "took Plaintiffs' grapes and wines" (Compl. ¶ 98), but they plead no facts about the extent of the damage to Plaintiffs' grapes—and indeed, the Complaint explicitly pleads that Plaintiffs did not even believe many of the grapes were damaged *at all* until after making wine and bottling it (*see, e.g.*, *id.* ¶¶ 43–44.) Whether or not Plaintiffs can prove that smoke taint resulting from PacifiCorp's conduct damaged their grapes, damage—even damage that amounts to monetary harm—is not sufficient; Oregon law only permits inverse condemnation claims for takings.

B. Plaintiffs' Negligence and Gross Negligence Claims Fail as a Matter of Law.

Plaintiffs have also failed to state a claim for negligence or gross negligence because Plaintiffs have not pled their alleged harm was a foreseeable result of PacifiCorp's alleged actions. It is also not clear whether Plaintiffs intend to plead a claim for negligence *per se* or otherwise claim that PacifiCorp violated ORS 757.020 in relation to their claims. If Plaintiffs do so, that claim fails for independent reasons.

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1. Plaintiffs' Negligence Claim Fails Because It Alleges Harm to a Class of Plaintiffs Not Reasonably Foreseeable.

Plaintiffs, who are wineries and vineyards that are located in some cases over 250 miles away from some of the alleged fires, are not foreseeable plaintiffs. For example, under Plaintiffs' own pleaded allegations and Secretary of State filings, some of the Plaintiffs are located in Newberg, in Yamhill County in the far north of the state, while some of the alleged fires are at the far southern part of the state in Chiloquin, Klamath County and Eagle Point, Jackson County. (*See* Compl. ¶ 1.) This distance spans almost the entire length of the state, and the distance between Newberg and Eagle Point is approximately 260 miles apart. Plaintiffs' claim for negligence fails because it requires the court to expand the scope of foreseeability in a manner previously rejected by the Oregon Supreme Court.

In Oregon, the traditional elements of duty and breach are subsumed within the question of foreseeability, a prospective inquiry that asks whether the plaintiff has pleaded facts demonstrating that the defendant knew or should have known, at the time of their alleged negligent conduct, that their actions posed an unreasonable risk of harm to a particular class of plaintiffs. Foreseeability requires the court to determine "the line at which the defendant's liability ends" and thus "serves as a limit on the scope of liability." *Chapman v. Mayfield*, 358 Or 196, 206, 361 P3d 566 (2015). "[A]t the outer margins of debatable conduct a court is obliged to say 'that the conduct does or does not meet the standard.'" *Fazzolari*, 303 Or at 12 (quoting *Stewart v. Jefferson Plywood Co*., 255 Or 603, 608, 469 P2d 783 (1970)). In *Chapman*, the Oregon Supreme Court clarified its foreseeability jurisprudence, "declin[ing] plaintiffs' invitation to extend the limits of foreseeability" and reaffirming the "trial court's screening role." 358 Or at 205.

The modern approach to the line-drawing exercise of foreseeability, the *Chapman* court observed, is a mechanical one that "necessar[il]y" begins with the identification and description of the "type of harm at risk and the class of plaintiffs at risk." *Id* at 220. In its

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review of past decisions on the matter, the *Chapman* court noted that the analysis places "emphasis on * * * a particular class of plaintiffs." *Id*. at 208 (emphasis added).

For example, in *Buchler*, an unsupervised prisoner escaped a work camp via prison van and drove fifty miles to his mother's home, whereupon he acquired a gun and shot two people, killing one. *Buchler v. State ex rel. Or. Corr. Div.*, 316 Or 499, 853 P2d 798 (1993). As relevant to the instant case, *Buchler* analyzed whether "the state knew or should have known that there was an unreasonable risk * * * that persons in the vicinity of [the] mother's home would be expected victims." *Chapman*, 358 Or at 210 (citing to *Buchler*, 316 Or at 515). The Court of Appeals held that the generalized nature of the risk to the community made the harm reasonably foreseeable. It reasoned that it "is hardly farfetched to decide that it is foreseeable that an escaped felon might * * * 'pose a threat of physical injury' to persons that he might encounter while on the run." *Buchler v. State ex rel. Or. Corr. Div.*, 104 Or App 547, 554, 803 P.2d 733, 736 (1990), *rev'd*, 316 Or 499 (quoting *Christensen v. Epley*, 287 Or 539, 566, 601 P2d 1216 (1979)). The Supreme Court reversed, holding that "[w]hatever may be the utility of a generalized foreseeability principle * * * the current state of tort law does not reach so far as plaintiffs [and the Court of Appeals] would have it reach." In doing so, the Supreme Court explicitly rejected the adoption of a generalized foreseeability principle, instead holding that such a generalized theory of risk did not constitute "facts showing defendant's knowledge of unreasonable risk of danger to the particular plaintiffs involved" as a matter of law. *Buchler*, 316 Or at 511.

Here, too, the indefinite and generalized nature of Plaintiffs' allegations serves to constrain the scope of liability. Plaintiffs allege in conclusory fashion that they "are within the general class of people and businesses that Defendants reasonably should have anticipated might be harmed by their conduct." (Compl. ¶ 89.) This does little to establish a foreseeable risk of harm to wineries and vineyards located, in some instances, more than two hundred miles from the nearest fire. (*Id.* ¶ 1.) Plaintiffs attempt to bridge this gap by citing

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the generalized nature of the risk posed by "high winds, dry conditions, [and] high fuel loads." (*Id.* ¶ 61.) This, too, is insufficient. Reliance upon these allegations to find foreseeability would require this Court to adopt the generally foreseeable principle rejected in *Buchler*, namely, that the broad and generalized nature of a risk extends the scope of foreseeable plaintiffs. Here, where Plaintiffs attempt to extend the scope of liability based upon the risk to winery grapes posed by smoke blown by the wind more than two hundred miles in some cases, the Court should decline to find foreseeability.

Indeed, courts that have addressed foreseeability in the context of smoke damage have limited the scope of foreseeable plaintiffs to neighboring buildings and parcels. *See, e.g.*, *Cuevas v. Quandt's Foodservice Distribs., Inc.*, 6 AD3d 973, 974, 775 NYS2d 429 (2004) (smoke and water damage to adjacent buildings); *White v. United Heritage Prop. & Cas. Co.*, No. 3:21-cv-01524, 2023 WL 2526137, *2 (D Or Jan 27, 2023) (smoke damage from fire "at an adjacent building"); *Stankova v. Metro. Prop. & Cas. Ins. Co.*, 788 F3d 1012, 1013 (9th Cir 2015) (flooding after wildfire destroyed vegetation on adjacent hillside). Each of these cases is consistent with the limited scope of liability prescribed in *Chapman*. No case has attempted to expand the scope of foreseeability to cover distances that span an entire state, and this court should not sanction such a drastic expansion.[6]

Hawkins involved a negligence claim brought against a tavern owner after ejected patrons assaulted *another* patron. Noting that the assault occurred "in the street and in a parking lot not on the tavern's premises," the *en banc* court cast *Hawkins* as yet another decision where plaintiff had failed to demonstrate "an unreasonable risk of harm * * * to *a*

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[6] The Supreme Court has also held that negligence actions related to foreseeability can be properly disposed of in the early stages of litigation. In *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988), the Supreme Court reversed the Court of Appeals, which had held that the question of negligence was a fact issue. Instead, the *Hawkins* court reversed and held that no common law negligence action could be sustained at the motion for judgment on the pleadings stage, which is governed by the same legal standard as a motion to dismiss. *Id.* at 269.

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foreseeable plaintiff." *Chapman*, 358 Or at 214 (citing *Hawkins*, 307 Or at 264–65) (emphasis added).

Plaintiffs' attempt to bolster their Complaint with allegations of a past risk to other wineries is similarly without merit. (*See, e.g.*, Compl. ¶¶ 53–54 (discussing damage to Sonoma and Napa County and Rogue River valley wine regions).). Damage to other wineries in unrelated wildfires (including wildfires in different states with different topographies) does not establish the foreseeability of damage to *these* winery plaintiffs. *See Chapman*, 358 Or at 209 (quoting *Fazzolari*, 303 Or at 22) (emphasizing that application of foreseeability hinges upon the "specific location[]".) It does nothing to move the needle with respect to these wineries and these wildfires on the question of foreseeability. For foreseeability to have meaning, it must be connected to the wineries in question; a more generalized concept of risk is untethered to any limiting principle. *See Chapman*, 358 Or at 201 (emphasizing that a plaintiff's location is a critical factor in determining whether they belong to the foreseeable class).

Even Plaintiffs themselves, and their winemaking professionals, apparently did not foresee the harm to their wines. Despite knowing of the Labor Day fires, Plaintiffs proceeded to harvest and cleanse grapes and, thinking the grapes were untainted, turn them into wine. (Compl. ¶¶ 43–45.) What is more, Plaintiffs purchased some of the allegedly damaged grapes only after the fires. (*Id.* ¶ 43.) Plaintiffs sold the wine into the marketplace. (*Id.* ¶¶ 43–45.) If Plaintiffs, and their professional grape growers and wine makers, did not know the risk the fires posed to its grapes, the alleged damage cannot be reasonably foreseeable by a reasonable person, a non-expert in wine making.

Finally, to the extent the Complaint alleges past damage to wineries specifically located in the Willamette Valley, it fails to address or provide grounds for any reasonable inferences regarding foreseeability arising from the *named* fires. As stated previously, some of the named fires are in the southern portion of Oregon, while some of the named Plaintiffs

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are in the far north of the state. Plaintiffs' allegations amount to an assertion that since fires had caused damage to wineries in the past, it is reasonably foreseeable that fires *anywhere* can cause damage to *all* wineries in the Willamette Valley, which is itself a large geographic area. The Court should reject Plaintiffs' generalized view of the nature of the risk.

2. To the Extent Plaintiffs Allege Negligence *Per Se* or Otherwise Pursue a Claim Based on Violations of ORS 757.020, Oregon Law Forecloses Relying on General Safety Statutes like ORS 757.020.

It is not clear whether Plaintiffs intend to pursue a negligence *per se* claim. There is no separately labeled count. But Plaintiffs cite and rely on ORS 757.020 throughout the Complaint. (*See, e.g.*, Compl. ¶¶ 19, 82.) Because ORS 757.020 cannot support a negligence *per se* claim and does not set out a standard of care that can be violated, Plaintiffs' claims (if any) based on ORS 757.020 should be dismissed.

Only statutes and regulations that "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine" can establish a claim for negligence *per se*. *Shahtout ex rel. Shahtout v. Emco Garbage Co., Inc.*, 298 Or 598, 601, 695 P2d 897 (1985); *see also Moody v. Oregon Cmty. Credit Union*, 371 Or 772, 781–82, 542 P3d 24 (2023) (reaffirming *Shahtout*). In *Kim v. Multnomah Cnty. ex rel. Multnomah Cnty. Cmty. Dep't of Cmty. Corr.*, 328 Or 140, 153, 970 P2d 631 (1998), the plaintiffs sued for negligence *per se* based on several statutes governing the conduct of probation officers. After the trial court granted summary judgment to the defendants and the Court of Appeals affirmed, the Supreme Court noted that, even if the plaintiffs had established predicate facts for the negligence *per se* claim to proceed, the relevant statutes failed to support negligence *per se* as a matter of law. *Id*. at 152–53. None of the relevant statutes "establish[ed] a standard of care." *Id.* at 142. At most, those statutes required the defendants to "exercise reasonable care." *Id.* And as the Supreme Court explained, general statutes and regulations

that instruct parties to do no more than "exercise reasonable care" do not "provide a foundation for plaintiffs' negligence *per se* claim" as a matter of law. *Id.*

The same problem exists here: Plaintiffs rely on ORS 757.020, which does not fix the standard of care in any meaningful way. (Compl. ¶ 82.) The statute offers only general guidance that PacifiCorp must operate "safely" and only requires that public utilities "furnish adequate and safe service, equipment and facilities." ORS 757.020. Just as a statute that "merely provides that probation officers have such duties as may be provided by regulation[] does not establish a standard of care," *Kim*, 328 Or at 153, the direction in ORS 757.020 to "furnish adequate and safe service" does not "so fix[] the legal standard of conduct that there is no question of due care left for a factfinder to determine." *Shahtout*, 298 Or at 601. As a matter of law, the statute does not support a negligence *per se* claim under Oregon law. The Court should dismiss any references to ORS 757.020 in Plaintiffs' Complaint and the negligence claim.[7]

C. Plaintiffs Cannot Plead a "Spoliation of Evidence" Claim as a Matter of Law.

Plaintiffs also cannot maintain their Fourth Claim for Relief for spoliation of evidence. Oregon courts repeatedly have refused to state whether a freestanding claim for spoliation even exists under Oregon law. *See Marcum v. Adventist Health Sys./W.*, 215 Or App 166, 191, 168 P3d 1214, 1228 (2007), *rev'd*, 345 Or 237, 198 P3d 1 (2008) (noting that the parties "vehemently dispute" whether a spoliation claim is cognizable, but not deciding the issue); *Classen*, 254 Or App at 221 (same). Because it's not clear that such a claim is even cognizable, the Court should dismiss it.

But regardless of whether an independent claim for "spoliation of evidence" exists under Oregon law, the spoliation claims alleged by Plaintiffs fail as a matter of law. As the

[7] Alternatively, pursuant to ORCP 21 D, the Court should require Plaintiffs to plead more specific facts regarding the specific statutes, regulations, and special relationship on which their negligence *per se* claim—if pleaded—is based.

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Court of Appeals explained in *Classen*, the bare minimum for pleading a claim for spoliation of evidence (if it exists) is that Plaintiffs must "first br[ing] the underlying claim and los[e] or suffer[] diminution in its value." *Classen*, 254 Or App at 222. Showing actual diminution in a claims value from "actually los[ing]" is necessary because without such a showing any claim is "purely speculative and uncertain." *Id.* (citations omitted). Plaintiffs have not (yet) lost their claim as a result of any spoliation. Their claim is directly foreclosed by *Classen*.

D. Plaintiffs' Request for an Injunction Fails as a Matter of Law.

The Court also should dismiss Plaintiffs' request for an injunction set forth in its Prayer for Relief. As a threshold matter, Plaintiffs have not identified which claim they contend permits them to seek injunctive relief. For that reason alone, the requested relief should be dismissed.

Moreover, Plaintiffs' requested injunction (if granted) effectively would require the Court to run Oregon's second-largest utility—a job more appropriately left to the PUC. As Plaintiffs would have it, the Court should compel PacifiCorp to:

- "[T]rim and remove trees that are within its right of way and capable of contacting or falling into its powerlines;"
- "[I]nspect and replace its broken, obsolete, and defective electrical equipment where it has reason to know that such equipment has previously been associated with fire ignitions or may be associated with fire ignitions;"
- "[R]efrain from re-energizing powerlines on red flag warning days during fire season until all sections of line to be re-energized have been inspected to be clear of hazards;"
- "[E]valuate actual real-time evidence for the purpose of turning off the power in territory subject to a red flag warning during fire season if government officials, including the Oregon Department of Forestry's Fire Protection Chief, warn the utility

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of the risk of starting fires without such a power turn off, like what happened on Labor Day 2020;" and

- "[W]ithhold distribution payments to its parent company, Berkshire Hathaway Energy, until PacifiCorp can certify it is sufficiently compliant with Oregon tree trimming laws pertaining to its powerlines and has completed deferred maintenance pertaining to wildfire mitigation, including but not limited to inspecting wedge connectors, on its powerlines."

(Compl., Prayer for Relief, ¶ 111(b).) Even if Plaintiffs could prove any of their claims, and even if this case proceeded through trial, and even if Plaintiffs met the factors necessary for a permanent injunction, Plaintiffs' request is facially absurd.

Each of these broad prescriptions requires utility expertise to administer and are already governed by existing PUC regulations. *See* OAR 860-024-0011 (requiring detailed inspections of overhead facilities with special rules for High Fire Risk Zones); OAR 860-024-0016 (setting standards for conductor clearances from vegetation); OAR 860-024-0020 (mandating utilities to implement Wildfire Mitigation Plans and protocols for the de-energization of power lines). Indeed, the Oregon Supreme Court has recognized that the PUC has primary jurisdiction over how utilities operate. *See Dreyer v. Portland Gen. Elec. Co*., 341 Or 262, 285, 142 P3d 1010, 1022 (2006) ("PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated."); *Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 279, 986 P2d 35, 44 (1999). Three criteria determine whether an agency has primary jurisdiction: "(1) the extent to which the agency's expertise makes it the preferable forum; (2) the need for uniform resolution of the issue; and (3) the potential that judicial resolution of the issue will have an adverse effect on the agency's responsibilities." *Portland General Elec. Co.*, 162 Or App at 279. All three are easily satisfied here. Since all of the requested relief concerns utility regulation, the agency is best situated to decide what should

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be required. The PUC is the proper body to make uniform decisions and avoid conflict and confusion between agency requirements and court decisions.

Last, Plaintiffs may argue that judicial efficiency warrants injunctive relief. But that cannot require that the Court intervene in areas already regulated by the PUC, as discussed above. Instead, judicial efficiency requires the court to avoid conflict and confusion between agency requirements and court decisions. The agency is best situated to decide how utilities should be run.

V. CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court dismiss Plaintiffs' First Claim for Relief (Negligence), Second Claim for Relief (Gross Negligence), Third Claim for Relief (Inverse Condemnation), and Fourth Claim for Relief (Spoliation of Evidence), and Plaintiffs' request for injunctive relief.

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Attorneys for Defendants PacifiCorp and Pacific Power

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Oregon, that on the 14th day of January, 2025, I arranged for service of the foregoing **DEFENDANTS PACIFICORP AND PACIFIC POWER'S MOTION TO DISMISS** to the party to this action as follows:

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Of Attorneys for Plaintiffs

by:

- ☒ U.S. Postal Service, ordinary first class mail
- ☐ U.S. Postal Service, certified or registered mail
- ☐ return receipt requested
- ☐ hand delivery
- ☐ facsimile
- ☒ electronic service (for parties receiving such service via eFiling)
- ☒ other (specify) courtesy email copies to counsel of record

s/ Jeff Hern
Jeff Hern, OSB #043138

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PAC_256.07.199

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

WILLAMETTE VALLEY VINEYARDS, INC, a domestic business corporation, HETTWER TREE FARM, INC. dba ST. JOHN VIANNEY; SILVERBACK ESTATE WINERY, LLC; ALLIANCE SEED FARMS; and ST. INNOCENT, LTD, Plaintiffs, vs. PACIFICORP, an Oregon corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, Defendants. PACIFICORP, an Oregon Corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP, Third-Party Plaintiffs, vs. MICHAEL JARROD BAKKELA, Third-Party Defendant.	No. 23CV29519 Judge Channing Bennett **DEFENDANTS PACIFICORP AND PACIFIC POWER'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendants PacifiCorp, an Oregon corporation, and Pacific Power, an Oregon registered electric utility and assumed business name of PacifiCorp, (collectively, "PacifiCorp" or "Defendants") hereby submit their answer to Plaintiffs' Third Amended Complaint ("Complaint" or "TAC") as follows:

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ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp. With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1. PacifiCorp denies the allegations in Paragraph 1.

2. PacifiCorp denies the allegations in Paragraph 2.

3. In response to the allegations in Paragraph 3, PacifiCorp admits that the Beachie Creek Fire ignited in the Opal Creek Wilderness in August 2020. PacifiCorp denies the allegations in Paragraph 3 to the extent they relate to PacifiCorp and/or its powerlines. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining

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allegations in Paragraph 3, and on that basis, denies them.

4. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 4, and on that basis, denies them.

5. PacifiCorp denies the allegations in Paragraph 5.

6. PacifiCorp denies the allegations in Paragraph 6.

7. In response to Paragraph 7, PacifiCorp admits that on or before September 7, 2020, the National Weather Service issued fire weather messages regarding fire weather conditions in the state of Oregon. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 7, and on that basis, denies them.

8. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 8, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 8.

9. PacifiCorp denies the allegations in Paragraph 9.

10. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp admits that it is an Oregon utility with its headquarters in Multnomah County and that it operates a Portland Control Center. PacifiCorp denies the remaining allegations in Paragraph 10.

11. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13, and on that basis denies them.

14. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis denies them.

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15. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15, and on that basis denies them.

16. PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiffs mean by the allegations regarding PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 16.

17. PacifiCorp admits the allegations of Paragraph 17.

18. Paragraph 18 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 18.

19. PacifiCorp denies the allegations of Paragraph 19.

20. PacifiCorp lacks knowledge of other entities' practices and on that basis denies the allegations in Paragraph 20 as to the same. PacifiCorp denies the remaining allegations of Paragraph 20.

21. PacifiCorp denies the allegations of Paragraph 21.

22. In response to Paragraph 22, PacifiCorp admits that there was a phone call on September 7, 2020, between three utilities and various members of the Oregon state government. PacifiCorp denies the alleged "purpose" of that call, which multiple witnesses have testified, under oath, that Plaintiffs are presenting inaccurately. *Compare* Paragraph 22 (the "purpose" of the call was to "request[] the utilities to turn off the power"), *with* the July 25, 2023, Deposition of Portland General Electric's Dave Robertson, 37:1-4 ("It would be misleading to suggest to the jury that Mr. Grafe made a request to the utilities that to de-energize the power, right?" "There was no specific request made.") PacifiCorp denies the remaining allegations of Paragraph 22.

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23. In response to Paragraph 23, PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 23.

24. In response to Paragraph 24, PacifiCorp admits that Scott Bolton attended an 8 p.m. call by the Governor's Office on September 7, 2020. PacifiCorp denies the remainder of the allegations in Paragraph 24.

25. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis denies them.

26. PacifiCorp denies the allegations of Paragraph 26.

27. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 27, and on that basis denies them.

28. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 28, and on that basis denies them.

29. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis denies them.

30. In response to Paragraph 30, PacifiCorp denies that there was any "request to turn off its power," which multiple witnesses have testified, under oath, never occurred. PacifiCorp denies the remaining allegations of Paragraph 30.

31. In response to Paragraph 31, PacifiCorp denies the allegations to the extent they relate to PacifiCorp. With respect to the allegations in Paragraph 31 that relate to Consumers Power, Inc., PacifiCorp lacks knowledge or information sufficient to form a belief about those allegations, and on that basis denies them.

32. PacifiCorp denies the allegations of Paragraph 32.

33. PacifiCorp denies the allegations of Paragraph 33.

34. PacifiCorp denies the allegations of Paragraph 34.

35. PacifiCorp denies the allegations of Paragraph 35.

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36. PacifiCorp denies the allegations of Paragraph 36.

37. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis denies them.

38. PacifiCorp denies the allegations in Paragraph 38 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 38, and on that basis denies them.

39. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis denies them.

40. PacifiCorp denies the allegations in Paragraph 40 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 40, and on that basis denies them.

41. PacifiCorp denies the allegations in Paragraph 41 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 41, and on that basis denies them.

42. PacifiCorp denies the allegations in Paragraph 42 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 42, and on that basis denies them.

43. PacifiCorp denies the allegations in Paragraph 43 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 43, and on that basis denies them.

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44. PacifiCorp denies the allegations in Paragraph 44 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 44, and on that basis denies them.

45. PacifiCorp denies the allegations in Paragraph 45 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 45, and on that basis denies them.

46. PacifiCorp denies the allegations of Paragraph 46.

47. PacifiCorp denies the allegations of Paragraph 47.

48. PacifiCorp denies the allegations of Paragraph 48.

49. PacifiCorp denies the allegations of Paragraph 49.

50. In response to Paragraph 50, PacifiCorp admits that it published a May 21, 2020, report and that Paragraph 50 accurately quotes from part of that document. PacifiCorp further states that Paragraph 50 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 50. PacifiCorp denies the remaining allegations of Paragraph 50.

51. PacifiCorp denies the allegations of Paragraph 51.

52. PacifiCorp denies the allegations of Paragraph 52.

53. PacifiCorp denies the allegations in Paragraph 53.

54. PacifiCorp denies the allegations in Paragraph 54.

55. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 55, and on that basis denies them.

56. PacifiCorp denies the allegations in Paragraph 56.

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57. In response to Paragraph 57, PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 57.

58. PacifiCorp denies the allegations in Paragraph 58.

59. The allegations in Paragraph 59 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 59.

60. PacifiCorp denies the allegations in Paragraph 60.

61. PacifiCorp denies the allegations in Paragraph 61.

62. Paragraph 62 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 62.

63. Paragraph 63 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 63.

64. Paragraph 64 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 64.

65. In response to Paragraph 65, PacifiCorp incorporates its responses to Paragraphs 1 to 64.

66. Paragraph 66 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 66.

67. Paragraph 67 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 67.

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68. Paragraph 68 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 68.

69. Paragraph 69 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 69.

70. Paragraph 70 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 70.

71. Paragraph 71 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 71.

72. Paragraph 72 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 72.

73. Paragraph 73 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 73.

74. Paragraph 74 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 74.

75. Paragraph 75 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 75.

76. In response to Paragraph 76, PacifiCorp incorporates its responses to Paragraphs 1 to 64.

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77. Paragraph 77 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 77.

78. Paragraph 78 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 78.

79. In response to Paragraph 79, PacifiCorp incorporates its responses to Paragraphs 1 to 64.

80. In response to Paragraph 80, PacifiCorp admits that it is an Oregon registered electric utility. The remaining allegations of Paragraph 80 state conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the remaining allegations of Paragraph 80.

81. Paragraph 81 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 81.

82. Paragraph 82 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 82.

83. Paragraph 83 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 83.

84. Paragraph 84 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 84.

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85. Paragraph 85 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 85.

86. In response to Paragraph 86, PacifiCorp incorporates its responses to Paragraphs 1 to 64.

87. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 87, and on that basis denies them.

88. Paragraph 88 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 88.

89. Paragraph 89 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 89.

90. Paragraph 90 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91. Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92. Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93. In response to Paragraph 93, PacifiCorp incorporates its responses to Paragraphs 1 to 64.

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94. Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 94.

95. Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 95.

96. Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

97. Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98. Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 98.

99. Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100. Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations in Paragraph 100.

101. Paragraph 101 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 101.

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102. Paragraph 102 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 102.

103. In response to Paragraph 103, PacifiCorp denies that Plaintiffs are entitled to punitive damages.

104. Paragraph 104 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 104.

GENERAL DENIAL

105. PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

106. Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

107. Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

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SECOND AFFIRMATIVE DEFENSE

(Lack of Specificity)

108. Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

(Standing)

109. Plaintiffs lack standing to bring some or all of their claims.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

110. Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that Plaintiffs' alleged loss, damage, or injury would have been reduced or avoided altogether, had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

111. The allegations in the TAC are barred, in whole or in part, for lack of jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

(Act of God)

112. Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

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SEVENTH AFFIRMATIVE DEFENSE

(Unavoidable Accident)

113. Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance with Law/Duty of Care)

114. PacifiCorp complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the TAC are barred, in whole or in part, because matters alleged and complained about in the TAC were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

115. Additionally, the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, and the relevant public entities including their agencies, and pursuant to the law.

NINTH AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

116. Plaintiffs may be barred from recovery because the losses and damages they allegedly sustained, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

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TENTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

117. Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties that PacifiCorp had neither the right, duty, nor opportunity to exercise control over, and that acted without the knowledge, participation, approval, or ratification of PacifiCorp.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Parties)

118. The TAC is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

TWELFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

119. At all times mentioned herein, Plaintiffs or third parties were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to Plaintiffs' alleged damages, if any. The fault of Plaintiffs, third-party defendant(s), and/or third parties bars, in whole or in part, the damages which Plaintiffs seek to recover herein. PacifiCorp denies all liability, and without waiving this denial, in the event PacifiCorp is found liable for any act or omission, PacifiCorp is entitled to apportionment pursuant to ORS 31.600.

THIRTEENTH AFFIRMATIVE DEFENSE

(Not Within PacifiCorp's Control)

120. The agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Authorized by Oregon Public Utilities Commission)

121. The actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, PacifiCorp's vegetation management in the areas at issue, which complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

122. Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

SIXTEENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

123. Plaintiffs are not entitled to double recovery on claims of damages or losses, and they may not recover on claims of damages or losses paid by any other sources.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

124. At all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the TAC and therefore, Plaintiffs are barred from any recovery in this action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

125. Plaintiffs' claims are barred, in whole or in part, based on waiver.

NINETEENTH AFFIRMATIVE DEFENSE

(Laches)

126. Plaintiffs' claims are barred, in whole or in part, based on laches.

/ / /

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TWENTIETH AFFIRMATIVE DEFENSE

(Estoppel)

127. Plaintiffs' claims are barred, in whole or in part, based on estoppel.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(No Recovery for Unreasonable or Unlawful Damages)

128. PacifiCorp denies all liability, and without waiving this denial, alleges that if it responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

129. Plaintiffs' claims are barred because Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Causation)

130. In relation to the subject fire(s), PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutional Violations)

131. The claims in the TAC are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution, the takings clause of the Fifth

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Amendment of the United States Constitution as incorporated against the States by the Fourteenth Amendment, and the takings clauses of Article I, Section 18, and Article XI, Section 4 of the Oregon Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Compensable Property Interest)

132. Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Offset)

133. To the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Prejudgment Interest, Expert Fees, or Attorney Fees)

134. The TAC fails to state a cause of action for which pre-judgment interest or expert fees may be awarded.

135. The TAC fails to allege any facts, statute, or rule that provides a basis for an award of attorney fees in this action.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Preemption by Federal Law)

136. Plaintiffs' claims are preempted, in whole or in part, by federal law.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

137. The Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's

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performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

THIRTIETH AFFIRMATIVE DEFENSE

(Contributory Negligence)

138. PacifiCorp denies all liability, and without waiving this denial, alleges that Plaintiffs' own fault was greater than the fault of PacifiCorp.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(No Taking Under the Oregon Constitution)

139. The inverse condemnation claims in the SAC fail because none of Plaintiffs' property has been taken as required to state a claim under Article I, section 18 or Article XI, section 4 of the Oregon Constitution.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations/Repose)

140. Plaintiffs' claims are barred in whole or in part based on the applicable statute of limitations and/or repose.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

141. PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

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WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: February 18, 2025

SCHWABE, WILLIAMSON & WYATT, P.C.

By: *s/ Jeff Hern*

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Attorneys for Defendants and Third-Party Plaintiffs PacifiCorp and Pacific Power

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Oregon, that on the 18th day of February, 2025 I arranged for service of the foregoing **DEFENDANTS' PACIFICORP AND PACIFIC POWER'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' THIRD AMENDED COMPLAINT** to the party to this action as follows:

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Third-Party Defendant

by:

- ☒ U.S. Postal Service, ordinary first class mail
- ☐ U.S. Postal Service, certified or registered mail
- ☐ return receipt requested
- ☐ hand delivery
- ☐ facsimile
- ☒ electronic service (for parties receiving such service via eFiling)
- ☒ other (specify) courtesy email copies to counsel of record

s/ Jeff Hern
Jeff Hern, OSB #043138

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PAC_256.07.200

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

SOKOL BLOSSER, LTD., 00 OREGON LLC, DISTEL CELLARS, LLC, BHV LLC, RIBBON RIDGE WINERY, RIBBON RIDGE LLC, PATRICIA GREEN CELLARS, KING ESTATE WINERY LIMITED PARTNERSHIP, DOMAINE DROUHIN OREGON, INC., DOMAINE NICOLAS JAY, LLC, ADELSHEIM VINEYARD, L.L.C., STOLLER VINEYARDS, INC., AYRES VINEYARD, LLC, ARCHER WINES LLC., BETHEL HEIGHTS VINEYARD, INC., BIG TABLE FARM, INC, COEUR DE TERRE VINEYARD, LLC, DE PONTE CELLARS, LLC, DURANT VINEYARDS WINERY LLC, G.C. WINE COMPANY, LLC, STONE WOLF VINEYARDS LLC dba DUCK POND CELLARS, NEXUS BRANDS, LLC, KRAEMER FARMS, LLC, LIA'S VINEYARD LLC, LONGPLAY WINE LLC, OKP, LLC dba WALTER SCOTT WINES, PORTLAND WINE CO, LLC, SMALL WORLD WINE COMPANY, L.L.C. dba COMPTON FAMILY WINES, GMS WINERY LLC dba SASS WINERY, PFEIFFER VINYARDS, LLC, HOPE WELL WINE, INC., NICHOLAS VINEYARD, LLC dba ANAM CARA CELLARS, CARABELLA VINEYARD AND WINERY LLC, and LADD HILL PARTNERS LTD,,

Plaintiffs,

vs.

PACIFICORP, an Oregon corporation, and PACIFIC POWER, an Oregon registered

No. 24CV03044

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' THIRD AMENDED COMPLAINT

Hon. Kelly Skye

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electric utility and assumed business name of PACIFICORP,

Defendants.

Defendants PacifiCorp, an Oregon corporation, and Pacific Power, an Oregon registered electric utility and assumed business name of PacifiCorp, (collectively, "PacifiCorp" or "Defendants") hereby submit their answer to Plaintiffs' Third Amended Complaint ("Complaint" or "TAC") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp. With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

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1.

PacifiCorp denies the allegations in Paragraph 1.

2.

PacifiCorp denies the allegations in Paragraph 2.

3.

In response to the allegations in Paragraph 3, PacifiCorp admits that the Beachie Creek Fire ignited in the Opal Creek Wilderness in August 2020. PacifiCorp denies the allegations in Paragraph 3 to the extent they relate to PacifiCorp and/or its powerlines. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 3, and on that basis, denies them.

4.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 4, and on that basis, denies them.

5.

PacifiCorp denies the allegations in Paragraph 5.

6.

PacifiCorp denies the allegations in Paragraph 6.

7.

In response to Paragraph 7, PacifiCorp admits that on or before September 7, 2020, the National Weather Service issued fire weather messages regarding fire weather conditions in the state of Oregon. PacifiCorp additionally admits that Stefan Bird was a member of the Oregon Governor's wildfire response council in 2019. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 7, and on that basis, denies them.

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8.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 8, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 8.

9.

PacifiCorp denies the allegations in Paragraph 9.

10.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp admits that it is an Oregon utility with its headquarters in Multnomah County and that it operates a Portland Control Center. PacifiCorp denies the remaining allegations in Paragraph 10.

11.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13, and on that basis denies them.

14.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis, denies them.

15.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15, and on that basis, denies them.

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16.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 16, and on that basis, denies them.

17.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 17, and on that basis, denies them.

18.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 18, and on that basis, denies them.

19.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 19, and on that basis, denies them.

20.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 20, and on that basis, denies them.

21.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 21, and on that basis denies them.

22.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 22, and on that basis denies them.

23.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 23, and on that basis denies them.

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24.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 24, and on that basis, denies them.

25.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis, denies them.

26.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 26, and on that basis, denies them.

27.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 27, and on that basis, denies them.

28.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 28, and on that basis, denies them.

29.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis, denies them.

30.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 30, and on that basis, denies them.

31.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 31, and on that basis denies them.

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32.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 32, and on that basis denies them.

33.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 33, and on that basis denies them.

34.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 34, and on that basis, denies them.

35.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis, denies them.

36.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36, and on that basis, denies them.

37.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis, denies them.

38.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 38, and on that basis, denies them.

39.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis, denies them.

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40.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 40, and on that basis, denies them.

41.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 41, and on that basis, denies them.

42.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 42, and on that basis, denies them.

43.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 43, and on that basis, denies them.

44.

PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiffs mean by the allegations regarding PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 44.

45.

PacifiCorp admits the allegations of Paragraph 45.

46.

Paragraph 46 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 46.

47.

PacifiCorp denies the allegations of Paragraph 47.

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48.

PacifiCorp lacks knowledge of other entities' practices and on that basis denies the allegations in Paragraph 48 as to the same. PacifiCorp denies the remaining allegations of Paragraph 48.

49.

PacifiCorp denies the allegations of Paragraph 49.

50.

In response to Paragraph 50, PacifiCorp admits that there was a phone call on September 7, 2020, between three utilities and various members of the Oregon state government. PacifiCorp denies the alleged "purpose" of that call, which multiple witnesses have testified, under oath, that Plaintiffs are presenting inaccurately. *Compare* Paragraph 50 (the "purpose" of the call was to "request[] the utilities to turn off the power"), with the July 25, 2023, Deposition of Portland General Electric's Dave Robertson, 37:1-4 ("It would be misleading to suggest to the jury that Mr. Grafe made a request to the utilities that to de-energize the power, right?" "There was no specific request made.") PacifiCorp denies the remaining allegations of Paragraph 50.

51.

In response to Paragraph 51, PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 51.

52.

In response to Paragraph 52, PacifiCorp admits that Scott Bolton attended an 8 p.m. call by the Governor's Office on September 7, 2020. PacifiCorp denies the remainder of the allegations in Paragraph 52.

53.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 53, and on that basis denies them.

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54.

PacifiCorp denies the allegations of Paragraph 54.

55.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 55, and on that basis denies them.

56.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 56, and on that basis denies them.

57.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 57, and on that basis denies them.

58.

In response to Paragraph 58, PacifiCorp denies that there was any "request to turn off its power," which multiple witnesses have testified, under oath, never occurred. PacifiCorp denies the remaining allegations of Paragraph 58.

59.

In response to Paragraph 59, PacifiCorp denies the allegations to the extent they relate to PacifiCorp. With respect to the allegations in Paragraph 59 that relate to Consumers Power, Inc., PacifiCorp lacks knowledge or information sufficient to form a belief about those allegations, and on that basis denies them.

60.

PacifiCorp denies the allegations of Paragraph 60.

61.

PacifiCorp denies the allegations of Paragraph 61.

62.

PacifiCorp denies the allegations of Paragraph 62.

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63.

PacifiCorp denies the allegations of Paragraph 63.

64.

PacifiCorp denies the allegations of Paragraph 64.

65.

PacifiCorp denies the allegations of Paragraph 65.

66.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 66, and on that basis denies them.

67.

PacifiCorp denies the allegations in Paragraph 67 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 67, and on that basis denies them.

68.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 68, and on that basis denies them.

69.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 69, and on that basis denies them.

70.

PacifiCorp denies the allegations in Paragraph 70 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 70, and on that basis denies them.

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71.

PacifiCorp denies the allegations in Paragraph 71 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 71, and on that basis denies them.

72.

PacifiCorp denies the allegations in Paragraph 72 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 72, and on that basis denies them.

73.

PacifiCorp denies the allegations in Paragraph 73 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 73, and on that basis denies them.

74.

PacifiCorp denies the allegations in Paragraph 74 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 74, and on that basis denies them.

75.

PacifiCorp denies the allegations in Paragraph 75 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 75, and on that basis denies them.

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76.

PacifiCorp denies the allegations of Paragraph 76.

77.

PacifiCorp denies the allegations of Paragraph 77.

78.

PacifiCorp denies the allegations of Paragraph 78.

79.

PacifiCorp denies the allegations in Paragraph 79 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 79, and on that basis denies them.

80.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 80, and on that basis denies them.

81.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 81, and on that basis denies them.

82.

PacifiCorp denies the allegations of Paragraph 82.

83.

PacifiCorp denies the allegations in Paragraph 83 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 83, and on that basis denies them.

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84.

In response to Paragraph 84, PacifiCorp admits that David Lucas presented testimony to the House Interim Committee on Energy and Environment and that Paragraph 84 accurately quotes from part of that testimony. PacifiCorp further states that Paragraph 84 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 84. PacifiCorp denies the remaining allegations of Paragraph 84 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs.

85.

In response to Paragraph 85, PacifiCorp admits that David Lucas presented testimony to the House Interim Committee on Energy and Environment and that Paragraph 85 accurately quotes from part of that testimony. PacifiCorp further states that Paragraph 85 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 85. PacifiCorp denies the remaining allegations of Paragraph 85 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs.

86.

In response to Paragraph 86, PacifiCorp admits that David Lucas presented testimony to the House Interim Committee on Energy and Environment and that Paragraph 86 accurately quotes from part of that testimony. PacifiCorp further states that Paragraph 86 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 86. PacifiCorp denies the remaining allegations of Paragraph 86 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs.

87.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 87, and on that basis denies them.

88.

PacifiCorp denies the allegations of Paragraph 88.

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89.

PacifiCorp denies the allegations of Paragraph 89.

90.

PacifiCorp denies the allegations of Paragraph 90.

91.

In response to Paragraph 91, PacifiCorp admits that it published a May 21, 2020, report and that Paragraph 91 accurately quotes from part of that document. PacifiCorp further states that Paragraph 91 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 91. PacifiCorp denies the remaining allegations of Paragraph 91.

92.

PacifiCorp denies the allegations of Paragraph 92.

93.

PacifiCorp denies the allegations of Paragraph 93.

94.

PacifiCorp denies the allegations in Paragraph 94.

95.

PacifiCorp denies the allegations in Paragraph 95.

96.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 96, and on that basis denies them.

97.

PacifiCorp denies the allegations in Paragraph 97.

98.

In response to Paragraph 98, PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 98.

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99.

PacifiCorp denies the allegations in Paragraph 99.

100.

The allegations in Paragraph 100 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 100.

101.

PacifiCorp denies the allegations in Paragraph 101.

102.

PacifiCorp denies the allegations in Paragraph 102.

103.

Paragraph 103 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 103.

104.

Paragraph 104 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 104.

105.

Paragraph 105 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 105.

106.

In response to Paragraph 106, PacifiCorp incorporates its responses to Paragraphs 1 to 105.

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107.

Paragraph 107 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 107.

108.

Paragraph 108 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 108.

109.

Paragraph 109 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 109.

110.

Paragraph 110 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 110.

111.

Paragraph 111 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 111.

112.

Paragraph 112 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 112.

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113.

Paragraph 113 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 113.

114.

Paragraph 114 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 114.

115.

Paragraph 115 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 115.

116.

Paragraph 116 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 116.

117.

In response to Paragraph 117, PacifiCorp incorporates its responses to Paragraphs 1 to 105.

118.

Paragraph 118 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 118.

119.

Paragraph 119 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 119.

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120.

In response to Paragraph 120, PacifiCorp denies that Plaintiffs are entitled to punitive damages.

121.

Paragraph 121 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 121.

122.

Paragraph 122 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 122.

123.

Paragraph 123 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 123.

GENERAL DENIAL

124.

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

125.

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

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FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

126.

Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Lack of Specificity)

127.

Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

THIRD AFFIRMATIVE DEFENSE

(Standing)

128.

Plaintiffs lack standing to bring some or all of their claims.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

129.

Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that Plaintiffs' alleged loss, damage, or injury would have been reduced or avoided altogether, had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury.

/ / /

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FIFTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

130.

The allegations in the TAC are barred, in whole or in part, for lack of jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

(Act of God)

131.

Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

(Unavoidable Accident)

132.

Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance with Law/Duty of Care)

133.

PacifiCorp complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the TAC are barred, in whole or in part, because matters alleged and complained about in the TAC were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

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134.

Additionally, the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, and the relevant public entities including their agencies, and pursuant to the law.

NINTH AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

135.

Plaintiffs may be barred from recovery because the losses and damages they allegedly sustained, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against PacifiCorp.

TENTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

136.

Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties that PacifiCorp had neither the right, duty, nor opportunity to exercise control over, and that acted without the knowledge, participation, approval, or ratification of PacifiCorp.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Parties)

137.

The TAC is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

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TWELFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

138.

At all times mentioned herein, Plaintiffs or third parties were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to Plaintiffs' alleged damages, if any. The fault of Plaintiffs, third-party defendant(s), and/or third parties bars, in whole or in part, the damages which Plaintiffs seek to recover herein. PacifiCorp denies all liability, and without waiving this denial, in the event PacifiCorp is found liable for any act or omission, PacifiCorp is entitled to apportionment pursuant to ORS 31.600.

THIRTEENTH AFFIRMATIVE DEFENSE

(Not Within PacifiCorp's Control)

139.

The agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorized by Oregon Public Utilities Commission)

140.

The actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, PacifiCorp's vegetation management in the areas at issue, which complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

141.

Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

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SIXTEENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

142.

Plaintiffs are not entitled to double recovery on claims of damages or losses, and they may not recover on claims of damages or losses paid by any other sources.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

143.

At all relevant times, PacifiCorp acted in conformity with industry standards based upon the state of knowledge existing at the time alleged in the TAC and therefore, Plaintiffs are barred from any recovery in this action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

144.

Plaintiffs' claims are barred, in whole or in part, based on waiver.

NINETEENTH AFFIRMATIVE DEFENSE

(Laches)

145.

Plaintiffs' claims are barred, in whole or in part, based on laches.

TWENTIETH AFFIRMATIVE DEFENSE

(Estoppel)

146.

Plaintiffs' claims are barred, in whole or in part, based on estoppel.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

(No Recovery for Unreasonable or Unlawful Damages)

147.

PacifiCorp denies all liability, and without waiving this denial, alleges that if it is responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

148.

Plaintiffs' claims are barred because Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Causation)

149.

In relation to the subject fire(s), PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutional Violations)

150.

The claims in the TAC are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution, the takings clause of the Fifth Amendment of the United States

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Constitution as incorporated against the States by the Fourteenth Amendment, and the takings clauses of Article I, Section 18, and Article XI, Section 4 of the Oregon Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Compensable Property Interest)

151.

Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Offset)

152.

To the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Prejudgment Interest, Expert Fees, or Attorney Fees)

153.

The TAC fails to state a cause of action for which pre-judgment interest or expert fees may be awarded.

154.

The TAC fails to allege any facts, statute, or rule that provides a basis for an award of attorney fees in this action.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Preemption by Federal Law)

155.

Plaintiffs' claims are preempted, in whole or in part, by federal law.

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TWENTY-NINTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

156.

The Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

THIRTIETH AFFIRMATIVE DEFENSE

(Contributory Negligence)

157.

PacifiCorp denies all liability, and without waiving this denial, alleges that Plaintiffs' own fault was greater than the fault of PacifiCorp.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(No Taking Under the Oregon Constitution)

158.

The inverse condemnation claims in the TAC fail because none of Plaintiffs' property has been taken as required to state a claim under Article I, section 18 or Article XI, section 4 of the Oregon Constitution.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations/Repose)

159.

Plaintiffs' claims are barred in whole or in part based on the applicable statute of limitations and/or repose.

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THIRTY-THIRD AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

160.

PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: April 24, 2025

SCHWABE, WILLIAMSON & WYATT, P.C.

By: *s/ Jeff Hern*

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Oregon, that on the 24th day of April, 2025, I arranged for service of the foregoing DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' THIRD AMENDED COMPLAINT to the parties to this action as follows:

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Of Attorneys for Plaintiffs

by:

- ☐ U.S. Postal Service, ordinary first class mail
- ☐ U.S. Postal Service, certified or registered mail
- ☐ return receipt requested
- ☐ hand delivery
- ☐ facsimile
- ☒ electronic service (for parties receiving such service via eFiling)
- ☒ other (specify) courtesy email copies to counsel of record

s/ Jeff Hern
Jeff Hern, OSB #043138

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PAC_256.07.201

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

LANGE WINERY LLC, a domestic limited liability company; DOMAINE SERENE VINEYARDS AND WINERY, INC., a foreign business corporation; RETRAITE, LLC (FKA LINGUA FRANCA-LS VINEYARDS HOLDINGS, LLC), a domestic limited liability company; PARLANCE, LLC (FKA LINGUA FRANCA, LLC), a domestic limited liability company; VENDANGE, LLC (FKA LS VINEYARDS LLC), a domestic limited liability company; SAMUEL ROBERT WINERY, LLC, a domestic limited liability company; BJORN FARM, LLC, a domestic limited liability company; CHERRY HILL VINEYARD, LLC, a domestic limited liability company; EVESHAM WOOD VINEYARD & WINERY LLC, a domestic limited liability company; HADEN FIG LLC, a domestic limited liability company; LEFT COAST CELLARS, LLC, a foreign limited liability company; TERRAPIN CELLARS LLC, a domestic limited liability company; ZENITH VINEYARD, LLC dba ZENITH VINEYARD, a domestic limited liability company; BRIGADOON VINEYARDS, LLC, a domestic limited liability company; CHALICE VINEYARDS, L.L.C., a domestic limited liability company; FIVE FOURTEEN VINEYARDS, LLC a domestic limited liability company; TERRITORIAL VINEYARDS, L.L.C., a domestic limited liability company; CHATEAU BARNABY, LLC dba TEUTONIC WINE COMPANY, a domestic limited liability company; ANTIQUUM FARM L.L.C, a domestic limited liability company; DAY CRUSH, LLC, a domestic limited liability company; BRICK HOUSE WINE COMPANY, a domestic business corporation; ELV-OREGON, LLC, a domestic limited liability company; EOLA HILLS WINE CELLARS, INC., a domestic business corporation; OLIVER

No. 24CV25661

DEFENDANTS' PACIFICORP AND PACIFIC POWER'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Prayer Amount: $104,092,298
Fee Authority: ORS 21.160(1)(e)

Claim Not Subject to Mandatory Arbitration

Hon. Shelley D. Russell

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SPRINGS VINEYARD, LLC, a domestic limited liability company; PROTEUS WINES LLC, a domestic limited liability company; SCHOLLS FERRY VINEYARD, LLC, a domestic limited liability company; BECKHAM ESTATE VINEYARD LLC, a domestic limited liability company; CASCADE REAL ESTATE INVESTMENT PARTNERS, LLC dba SHERWOOD HILLS WINERY, a domestic limited liability company; AURORA COLONY VINEYARDS LLC, a domestic limited liability company; BROADLEY VINEYARDS, LLC dba BROADLEY VINEYARDS, a domestic limited liability company; JACHTER FAMILY WINES, LLC, a domestic limited liability company; KING'S VINEYARD, an assumed business name; CROFT VINEYARDS, LLC, a domestic limited liability company; AVID WINE LLC dba AVIDITY WINES, a domestic limited liability company; and DUNDEE HILLS WINE LIBRARY LLC, a domestic limited liability company; and COOPER MOUNTAIN WINERY LLC, a domestic limited liability company,

Plaintiffs,

vs.

PACIFICORP, an Oregon Corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP,

Defendants.

PACIFICORP, an Oregon Corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PACIFICORP

Third-Party Plaintiffs,

vs.

MICHAEL JARROD BAKKELA,

Third-Party Defendant.

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Defendants PacifiCorp, an Oregon corporation, and Pacific Power, an Oregon registered electric utility and assumed business name of PacifiCorp, (collectively, "PacifiCorp" or "Defendants") hereby submit their answer to Plaintiffs' First Amended Complaint ("Complaint" or "FAC") as follows:

ANSWER

GENERAL RESPONSES

Except as expressly admitted herein, PacifiCorp denies any and all material allegations in the Complaint. PacifiCorp generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegation contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act, or omission of PacifiCorp. With the exception of the Affirmative Defenses, the numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. To the extent paragraphs in the Complaint are grouped under headings, PacifiCorp responds generally that such headings and groupings are conclusions of law or fact and denies each and every such allegation made or implied by such headings or groupings.

SPECIFIC RESPONSES

PacifiCorp, without the benefit of completing discovery as to Plaintiffs in this action, generally and specifically denies each and every, all and singular, conjunctively and disjunctively, allegations contained in the Complaint, and each and every part thereof, and each and every cause of action thereof, and further specifically denies that Plaintiffs have been injured or damaged in the sum alleged, or in any other sum, or at all, by reason of any carelessness, negligence, act or omission of PacifiCorp.

1.

In response to Paragraph 1, PacifiCorp denies the allegation that its "electrical system ignited the Santiam Fire." On March 19, 2025, the Oregon Department of Forestry ("ODF")

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issued its 2020 Santiam Canyon Wildfire Event investigation report that concluded, among other things, that "ODF investigators found no evidence of powerline ignitions contributing to the spread of the fire in the Santiam Canyon." PacifiCorp denies the remaining allegations in Paragraph 1.

2.

PacifiCorp denies the allegations in Paragraph 2.

3.

In response to the allegations in Paragraph 3, PacifiCorp admits that the Beachie Creek Fire ignited in the Opal Creek Wilderness in August 2020. PacifiCorp denies the allegations in Paragraph 3 to the extent they relate to PacifiCorp and/or its powerlines. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 3, and on that basis, denies them.

4.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 4, and on that basis, denies them.

5.

PacifiCorp denies the allegations in Paragraph 5.

6.

PacifiCorp denies the allegations in Paragraph 6.

7.

In response to Paragraph 7, PacifiCorp admits that on or before September 7, 2020, the National Weather Service issued fire weather messages regarding fire weather conditions in the state of Oregon. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 7, and on that basis, denies them.

8.

PacifiCorp lacks knowledge or information sufficient to form a belief about the

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allegations in the first sentence of Paragraph 8, and on that basis denies them. PacifiCorp denies the remaining allegations in Paragraph 8.

9.

PacifiCorp denies the allegations in Paragraph 9.

10.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in the first sentence of Paragraph 10, and on that basis denies them. PacifiCorp admits that it is an Oregon utility with its headquarters in Multnomah County and that it operates a Portland Control Center. PacifiCorp denies the remaining allegations in Paragraph 10.

11.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 11, and on that basis denies them.

12.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 12, and on that basis denies them.

13.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 13, and on that basis denies them.

14.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 14, and on that basis, denies them.

15.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 15, and on that basis, denies them.

16.

PacifiCorp lacks knowledge or information sufficient to form a belief about the

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allegations in Paragraph 16, and on that basis, denies them.

17.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 17, and on that basis, denies them.

18.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 18, and on that basis, denies them.

19.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 19, and on that basis, denies them.

20.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 20, and on that basis, denies them.

21.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 21, and on that basis denies them.

22.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 22, and on that basis denies them.

23.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 23, and on that basis denies them.

24.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 24, and on that basis, denies them.

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25.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 25, and on that basis, denies them.

26.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 26, and on that basis, denies them.

27.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 27, and on that basis, denies them.

28.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 28, and on that basis, denies them.

29.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 29, and on that basis, denies them.

30.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 30, and on that basis, denies them.

31.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 31, and on that basis denies them.

32.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 32, and on that basis denies them.

33.

PacifiCorp lacks knowledge or information sufficient to form a belief about the

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allegations in Paragraph 33, and on that basis denies them.

34.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 34, and on that basis, denies them.

35.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 35, and on that basis, denies them.

36.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 36, and on that basis, denies them.

37.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 37, and on that basis, denies them.

38.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 38, and on that basis, denies them.

39.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 39, and on that basis, denies them.

40.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 40, and on that basis, denies them.

41.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 41, and on that basis, denies them.

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42.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 42, and on that basis, denies them.

43.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 43, and on that basis, denies them.

44.

PacifiCorp admits that it is an Oregon utility with its principal place of business in Portland, Oregon. PacifiCorp is unable to assess what Plaintiffs mean by the allegations regarding PacifiCorp operating power lines "on Oregon State lands adjacent" to the Willamette Valley, and accordingly denies the allegation as to the same. PacifiCorp denies the remaining allegations of Paragraph 44.

45.

PacifiCorp admits the allegations of Paragraph 45.

46.

Paragraph 46 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 46.

47.

PacifiCorp denies the allegations of Paragraph 47.

48.

PacifiCorp lacks knowledge of other entities' practices and on that basis denies the allegations in Paragraph 48 as to the same. PacifiCorp denies the remaining allegations of Paragraph 48.

49.

PacifiCorp denies the allegations of Paragraph 49.

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50.

In response to Paragraph 50, PacifiCorp admits that there was a phone call on September 7, 2020, between three utilities and various members of the Oregon state government. PacifiCorp denies the alleged "purpose" of that call, which multiple witnesses have testified, under oath, that Plaintiffs are presenting inaccurately. *Compare* Paragraph 50 (the "purpose" of the call was to "request[] the utilities to turn off the power"), *with* the July 25, 2023, Deposition of Portland General Electric's Dave Robertson, 37:1-4 ("It would be misleading to suggest to the jury that Mr. Grafe made a request to the utilities that to de-energize the power, right?" "There was no specific request made.") PacifiCorp denies the remaining allegations of Paragraph 50.

51.

In response to Paragraph 51, PacifiCorp admits that the Governor's Chief of Staff had a call on September 7, 2020, on which PacifiCorp was represented. PacifiCorp denies the remaining allegations of Paragraph 51.

52.

In response to Paragraph 52, PacifiCorp admits that Scott Bolton attended an 8 p.m. call by the Governor's Office on September 7, 2020. PacifiCorp denies the remainder of the allegations in Paragraph 52.

53.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 53, and on that basis denies them.

54.

PacifiCorp denies the allegations of Paragraph 54.

55.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 55, and on that basis denies them.

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56.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 56, and on that basis denies them.

57.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 57, and on that basis denies them.

58.

In response to Paragraph 58, PacifiCorp denies that there was any "request to turn off its power," which multiple witnesses have testified, under oath, never occurred. PacifiCorp denies the remaining allegations of Paragraph 58.

59.

In response to Paragraph 59, PacifiCorp denies the allegations to the extent they relate to PacifiCorp. With respect to the allegations in Paragraph 59 that relate to Consumers Power, Inc., PacifiCorp lacks knowledge or information sufficient to form a belief about those allegations, and on that basis denies them.

60.

PacifiCorp denies the allegations of Paragraph 60.

61.

PacifiCorp denies the allegations of Paragraph 61.

62.

PacifiCorp denies the allegations of Paragraph 62.

63.

PacifiCorp denies the allegations of Paragraph 63.

64.

PacifiCorp denies the allegations of Paragraph 64.

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65.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 65, and on that basis denies them.

66.

PacifiCorp denies the allegations in Paragraph 66 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 66, and on that basis denies them.

67.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 67, and on that basis denies them.

68.

PacifiCorp denies the allegations in Paragraph 40 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 68, and on that basis denies them.

69.

PacifiCorp denies the allegations in Paragraph 69 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 69, and on that basis denies them.

70.

PacifiCorp denies the allegations in Paragraph 70 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 70, and on that basis denies them.

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71.

PacifiCorp denies the allegations in Paragraph 71 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 71, and on that basis denies them.

72.

PacifiCorp denies the allegations in Paragraph 72 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 72, and on that basis denies them.

73.

PacifiCorp denies the allegations in Paragraph 73 to the extent they relate to PacifiCorp and/or allege that PacifiCorp is responsible for any alleged damages to Plaintiffs. PacifiCorp lacks knowledge or information sufficient to form a belief about the remaining allegations in Paragraph 73, and on that basis denies them.

74.

PacifiCorp denies the allegations in Paragraph 74.

75.

PacifiCorp denies the allegations in Paragraph 75.

76.

PacifiCorp denies the allegations of Paragraph 76.

77.

PacifiCorp denies the allegations of Paragraph 77.

78.

In response to Paragraph 78, PacifiCorp admits that it published a May 21, 2020, report and that Paragraph 78 accurately quotes from part of that document. PacifiCorp further states

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that Paragraph 78 takes the quotation out of context, and PacifiCorp denies the implication created by Paragraph 78. PacifiCorp denies the remaining allegations of Paragraph 78.

79.

PacifiCorp admits that Stefan Bird was a member of the Oregon Governor's wildfire response council. PacifiCorp denies the rest of the allegations in Paragraph 79.

80.

PacifiCorp denies the allegations in Paragraph 80.

81.

PacifiCorp denies the allegations in Paragraph 81.

82.

PacifiCorp denies the allegations of Paragraph 82.

83.

PacifiCorp lacks knowledge or information sufficient to form a belief about the allegations in Paragraph 83, and on that basis denies them.

84.

PacifiCorp denies the allegations of Paragraph 84.

85.

In response to Paragraph 85, PacifiCorp admits that it began its privileged investigation into the Labor Day Fires on September 8, 2020. PacifiCorp denies the remaining allegations in Paragraph 85.

86.

PacifiCorp denies the allegations of Paragraph 86.

87.

The allegations in Paragraph 87 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 87.

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88.

PacifiCorp denies the allegations of Paragraph 88.

89.

PacifiCorp denies the allegations of Paragraph 89.

90.

The allegations in Paragraph 90 are conclusions of law to which no response is required. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 90.

91.

Paragraph 91 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 91.

92.

Paragraph 92 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 92.

93.

In response to Paragraph 93, PacifiCorp incorporates its responses to Paragraphs 1 to 92.

94.

Paragraph 94 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 94.

95.

Paragraph 95 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 95.

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96.

Paragraph 96 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 96.

97.

Paragraph 97 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 97.

98.

Paragraph 98 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 98.

99.

Paragraph 99 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 99.

100.

Paragraph 100 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 100.

101.

Paragraph 101 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 101.

102.

Paragraph 102 consists of conclusions of law to which no response is necessary or

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appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 102.

103.

Paragraph 103 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 103.

104.

In response to Paragraph 104, PacifiCorp incorporates its responses to Paragraphs 1 to 92.

105.

Paragraph 105 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 105.

106.

Paragraph 106 consists of conclusions of law to which no response is necessary or appropriate. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 106.

107.

In response to Paragraph 107, PacifiCorp denies that Plaintiffs are entitled to punitive damages.

108.

Paragraph 108 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 108.

109.

Paragraph 109 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 109.

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110.

Paragraph 110 states the nature of Plaintiffs' claims and does not require a response. To the extent a response is required, PacifiCorp denies the allegations of Paragraph 110.

GENERAL DENIAL

111.

PacifiCorp expressly denies each and every allegation in the Complaint that is not expressly admitted herein.

AFFIRMATIVE DEFENSES

112.

Investigations into the events alleged in the Complaint are currently being undertaken by the parties as well as third parties. PacifiCorp has yet to receive all facts and evidence which may be relevant to a determination as to the application of these affirmative defenses as to Plaintiffs. It may be determined at some later stage of the proceeding that not all affirmative defenses apply to Plaintiffs. In addition to the affirmative defenses set forth below, PacifiCorp reserves the right to allege additional defenses as they become known, or as they evolve during the litigation, and to amend this Answer accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

113.

Plaintiffs' pleading fails to state facts sufficient to constitute a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Lack of Specificity)

114.

Plaintiffs' pleading fails to set forth facts with reasonable precision and specific particularity and therefore fails due to uncertainty.

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THIRD AFFIRMATIVE DEFENSE

(Standing)

115.

Plaintiffs lack standing to bring some or all of their claims.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

116.

Plaintiffs may be barred from recovering damages, in whole or in part, for the harm alleged therein by reason of their failure to mitigate such alleged damages by whatever means were reasonably possible. Various Plaintiffs and Plaintiffs' agents, who have yet to be determined, may have failed to take reasonable steps to mitigate, delayed in taking such steps, or took steps to compound the alleged damages. It may be determined through discovery that Plaintiffs' alleged loss, damage, or injury would have been reduced or avoided altogether, had Plaintiffs or Plaintiffs' agents timely and diligently taken reasonable steps to mitigate the alleged loss, damage, or injury.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

117.

The allegations in the FAC are barred, in whole or in part, for lack of jurisdiction.

SIXTH AFFIRMATIVE DEFENSE

(Act of God)

118.

Plaintiffs' damages, if any, were caused by an uncontrollable force/Act of God, which PacifiCorp did not control, could not predict, and from which it did not have a duty to protect the Plaintiffs.

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SEVENTH AFFIRMATIVE DEFENSE

(Unavoidable Accident)

119.

Plaintiffs' damages, if any, were the result of an unavoidable accident insofar as PacifiCorp is concerned, were unintentional, and occurred without any negligence, want of care, default, or other breach of duty on the part of PacifiCorp.

EIGHTH AFFIRMATIVE DEFENSE

(Compliance with Law/Duty of Care)

120.

PacifiCorp complied with the law and acted reasonably with the intent to obey the law, and such compliance demonstrates that due care and reasonable prudence were exercised. The claims in the FAC are barred, in whole or in part, because matters alleged and complained about in the FAC were consistent with available technology, were in compliance with applicable regulations, and alternative product or facility design was not feasible or practical. Causation has not yet been determined so PacifiCorp pleads a general response now to avoid delay in the litigation.

121.

Additionally, the use of properties, equipment, and/or other activities by PacifiCorp was at all times lawful and authorized by agreement, license, easement, and the relevant public entities including their agencies, and pursuant to the law.

NINTH AFFIRMATIVE DEFENSE

(Intervening and/or Superseding Cause)

122.

Plaintiffs may be barred from recovery because the losses and damages they allegedly sustained, if any, were proximately caused by intervening and superseding acts of others, which intervening and superseding acts bar and/or diminish Plaintiffs' recovery, if any, against

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TENTH AFFIRMATIVE DEFENSE

(Negligence/Fault of Third Parties)

123.

Plaintiffs may be barred from recovery because the injuries or losses they sustained were caused, in whole or in part, by the negligent, reckless, or intentional unforeseeable acts of third parties that PacifiCorp had neither the right, duty, nor opportunity to exercise control over, and that acted without the knowledge, participation, approval, or ratification of PacifiCorp.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary Parties)

124.

The FAC is defective for non-joinder of parties who are necessary and/or indispensable, including, for example, Plaintiffs' insurers and any other individual or entities who may have an economic interest in Plaintiffs' claims.

TWELFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

125.

At all times mentioned herein, Plaintiffs or third parties were or may have been wholly or partially at fault, and conducted themselves so as to contribute partially, substantially, or wholly to Plaintiffs' alleged damages, if any. The fault of Plaintiffs, third-party defendant(s), and/or third parties bars, in whole or in part, the damages which Plaintiffs seek to recover herein. PacifiCorp denies all liability, and without waiving this denial, in the event PacifiCorp is found liable for any act or omission, PacifiCorp is entitled to apportionment pursuant to ORS 31.600.

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THIRTEENTH AFFIRMATIVE DEFENSE

(Not Within PacifiCorp's Control)

126.

The agency or instrumentality causing the incident was not within PacifiCorp's exclusive management or control.

FOURTEENTH AFFIRMATIVE DEFENSE

(Authorized by Oregon Public Utilities Commission)

127.

The actions and conditions complained of by Plaintiffs are expressly authorized by the State of Oregon and the Oregon Public Utilities Commission including, but not limited to, PacifiCorp's vegetation management in the areas at issue, which complied with minimum vegetation clearance requirements set forth in OAR 860-024-0016.

FIFTEENTH AFFIRMATIVE DEFENSE

(Setoff for Insurance Payments)

128.

Plaintiffs may not recover on claims of damages or losses paid as a result of coverage under any applicable policy of insurance.

SIXTEENTH AFFIRMATIVE DEFENSE

(Setoff for Other Collateral Sources)

129.

Plaintiffs are not entitled to double recovery on claims of damages or losses, and they may not recover on claims of damages or losses paid by any other sources.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Compliance with Industry Standards)

130.

At all relevant times, PacifiCorp acted in conformity with industry standards based upon

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the state of knowledge existing at the time alleged in the FAC and therefore, Plaintiffs are barred from any recovery in this action.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

131.

Plaintiffs' claims are barred, in whole or in part, based on waiver.

NINETEENTH AFFIRMATIVE DEFENSE

(Laches)

132.

Plaintiffs' claims are barred, in whole or in part, based on laches.

TWENTIETH AFFIRMATIVE DEFENSE

(Estoppel)

133.

Plaintiffs' claims are barred, in whole or in part, based on estoppel.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(No Recovery for Unreasonable or Unlawful Damages)

134.

PacifiCorp denies all liability, and without waiving this denial, alleges that if it responsible for Plaintiffs' injuries, damages, and expenses, PacifiCorp is only obligated to the extent that such injuries, damages, and expenses are reasonable and lawfully occurred. Until reasonable discovery is completed, PacifiCorp denies that the injuries, damages, and expenses for which these Plaintiffs seek reimbursement are either reasonable or lawfully occurred.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

135.

Plaintiffs' claims are barred because Plaintiffs have failed to exhaust their administrative

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remedies.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Causation)

136.

In relation to the subject fire(s), PacifiCorp neither acted nor failed to act in a manner that violated any statute, ordinance, or regulation that was a legal cause of the subject fire(s), including those related to the assessment, management, and maintenance of vegetation.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Constitutional Violations)

137.

The claims in the FAC are barred, in whole or in part, because they violate state and federal constitutional rights, including but not limited to due process under the Fourteenth Amendment of the United States Constitution, the takings clause of the Fifth Amendment of the United States Constitution as incorporated against the States by the

Fourteenth Amendment, and the takings clauses of Article I, Section 18, and Article XI, Section 4 of the Oregon Constitution.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Compensable Property Interest)

138.

Plaintiffs lack a compensable interest in the properties or property rights allegedly taken.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Offset)

139.

To the extent that PacifiCorp has provided, or may provide, compensation of any kind for damages to the individual Plaintiffs and/or their insurers, such compensation may constitute an offset.

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TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Prejudgment Interest, Expert Fees, or Attorney Fees)

140.

The FAC fails to state a cause of action for which pre-judgment interest or expert fees may be awarded.

141.

The FAC fails to allege any facts, statute, or rule that provides a basis for an award of attorney fees in this action.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Preemption by Federal Law)

142.

Plaintiffs' claims are preempted, in whole or in part, by federal law.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

143.

The Court lacks subject matter jurisdiction over Plaintiffs' allegations relating to PacifiCorp's policies and decisions that are guided and governed by orders or decisions of the Oregon Public Utilities Commission, or otherwise implicate the Commission's performance of its official duties, because the Commission is vested with exclusive jurisdiction over the appropriateness of PacifiCorp's policies and decisions.

THIRTIETH AFFIRMATIVE DEFENSE

(Contributory Negligence)

144.

PacifiCorp denies all liability, and without waiving this denial, alleges that Plaintiffs' own fault was greater than the fault of PacifiCorp.

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THIRTY-FIRST AFFIRMATIVE DEFENSE

(No Taking Under the Oregon Constitution)

145.

The inverse condemnation claims in the FAC fail because none of Plaintiffs' property has been taken as required to state a claim under Article I, section 18 or Article XI, section 4 of the Oregon Constitution.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations/Repose)

146.

Plaintiffs' claims are barred in whole or in part based on the applicable statute of limitations and/or repose.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Reservation of Right to Assert Additional Defenses)

147.

PacifiCorp alleges that it presently has insufficient knowledge or information on which to form a belief as to whether PacifiCorp may have additional, as yet unstated, defenses available. Accordingly, PacifiCorp reserves the right to assert such additional defenses that are proper as discovery, investigation, or analysis indicates.

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WHEREFORE, PacifiCorp prays judgment as follows:

1. That Plaintiffs take nothing by reason of their Complaint herein;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper.

DATED: April 28, 2025

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Oregon, that on the 28th day of April, 2025, I arranged for service of the foregoing **DEFENDANTS' PACIFICORP AND PACIFIC POWER'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' FIRST AMENDED COMPLAINT** to the party to this action as follows:

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REPORT OF INVESTIGATION *(Reference FSH 5309.11)*	Case/File Number **20-05-MBBK0WI**
Controlling Office **R5 - Law Enforcement and Investigations**	Investigating Office **LE&I – Klamath National Forest**
Case Type **Fire**	Investigative Period From: **10/5/20** To **12/8/20**
Case Status **Pending Judicial Action**	Report Type **Supplemental/Final**
Case Name **Slater Fire**	Investigated By **Special Agent** b6 & b7C

SYNOPSIS

On September 8, 2020, the "Slater Fire" ignited on U.S. Forest Service (USFS) land on Slater Butte, 5 miles north of Happy Camp within the Klamath National Forest (KNF).

At the time of report the fire has been estimated at burning 157,229 acres with firefighting cost yet to be determined. Approximately 237 structures have been reported damaged with 197 of those being residential. Two fatalities are being investigated related to the Slater Fire.

An origin and cause investigation was conducted 3 days after discovery of the fire. A general origin area of the Slater Fire was located just off Forest Road (FR) 17N48 below the Slater Butte Lookout. The cause of the Slater Fire was determined to be down power lines.

The power line is operated by PacifiCorp and is permitted by the KNF.

Case pending judicial action.

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Prepared By: b6 & b7C *Signature* *Date*

Reviewed By: *Signature* *Date*

Approved By: b6 & b7C *Signature* *Date*

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REPORT OF INVESTIGATION *(Reference FSH 5309.11)*	Case/File Number 20-05-MBBK0WI

INTRODUCTION

The case originated on September 8, 2020 when fire was reported in the early morning hours on Slater Butte within the KNF. The fire would eventually spread to the north and west and impact 157,229 acres to also include portions of the Six Rivers NF, the Rouge Siskiyou NF, and the counties of Siskiyou (CA), Del Norte (CA), and Josephine (OR).

DETAILS

Applicable Statutes – Not Limited to:

Title 18 of the United States Code, 1855- Willfully, without authority, set a fire in any National Forest land within Special Maritime and Territorial Jurisdiction- Felony.

Title 18 of the United States Code, 1856- Kindle a fire in any National Forest land within Special Maritime and Territorial Jurisdiction- Misdemeanor.

36 Code of Federal Regulations 261.5(a) – Carelessly placing a lighted substance that may cause a fire on National Forest land - Misdemeanor

36 Code of Federal Regulations 261.5(c) – Causing timber, trees, slash, brush or grass to burn on National Forest land without proper authorization - Misdemeanor

36 Code of Federal Regulations 261.5(e) – Allowing a fire to escape from control on National Forest land - Misdemeanor

California Penal Code section 451(d) – Willfully and maliciously set fire to any forest land - Felony

California Penal Code section 452(d) - Unlawfully Causing a fire of any forest land - Misdemeanor

Report of Fire

On September 08, 2020 b6 & b7C a U.S. Forest Service (USFS) employee, awoke in the Slater Butte Lookout to discover that the power had went out sometime during the night. b6 & b7C reported very strong winds had arisen during the night and when awoke he could smell smoke. b6 & b7C got into his vehicle and found a large tree blocking his FR 17N48. The tree was near the gate used to close the road to the lookout and just beyond the gate b6 & b7C said he could see flames and a down power line to the west of the road. b6 & b7C reported his finding at 0638 hours.

REPORT OF INVESTIGATION
(Reference FSH 5309.11)

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20-05-MBBK0WI

Specific Origin Identification

Reduced fire activity allowed SA b6 & b7C and b6 & b7C to access Slater Butte on September 11, 2020 and an examination of the area revealed a 69kv transmission power line coming up the west slope of Slater Butte, crossing over a saddle at FR 17N48, and continuing down the east slope toward Cade Mountain. A 12kv power line was mounted under the 69kv line and split off at the saddle and turned south running up the ridge towards the lookout **(Exhibit 1- Distribution Line Google Map)**. The insulators and cross member where the 12kv line left the transmission line were bent. b6 & b7C an employee with PacifiCorp met investigators on scene to confirm the that the power line was deenergized. b6 & b7C indicated this was his first opportunity to see the equipment on Slater Butte and that he had made no alterations to the equipment. Two fuses were still in place with spare fuses hanging on a hook on the pole **(Exhibit 2- Fuse Between Transmission and Distribution Line Photos)**. b6 & b7C stated that the fuses had been changed out months to weeks ago and the old fuses had been left hanging on the pole. Fuses at the top of Slater Butte where the 12kv distribution line terminated at the mountain top equipment also remained in place **(Exhibit 3- Fuse between Distribution Line and Transformer)**. With the equipment deenergized at other locations, all equipment was left in the state it was found. A series of short videos was recorded by SA b6 & b7C shortly after arrival to document the scene as it was found.

The 12kv distribution line was approximately 1/3 of a mile long from the transmission line to where it terminated at a transformer located near the lookout tower. After the first pole south of the transmission line (Pole 6, 135400) the west conductor was down on the ground. The remnants of a large tree were located on the ground between Pole 5 (35300) and Pole 4 (136300) **(Exhibit 4- Photo of Fallen Tree into ROW)**. The large tree, a White Fir, was the same tree that blocked FR 17N48 and appeared to have impacted the power lines when it fell. The center of the tree was hallowed and rotted but appeared healthy on the exterior with green needles and cones. A glossy, newly formed, fulgurite was located on the ground next to the west conductor in this same area. Burn marks were found on the upper portions of vegetation where the west conductor was resting in brush. The west Conductor was severed near this point with the north end resting in a small tree and the south end recoiling and coming to rest between Pole 4 (136300) and Pole 3 (136201). The east conductor remained intact but was pulled down from the Pole 4 (136300) and was resting on the ground at the base of the pole. Both conductors returned to the cross member on Pole 3 (136201) and continued to the point of termination near the lookout at Pole 1 (136102). The RAWS weather station located on Slater Butte had recorded winds that averaged 33 to 37 mph between 01:00 and 06:00 out of the east. The maximum wind speed recorded for that time was at 54 mph at 05:00 and 06:00 and relative humidity fell to 20 percent **(Exhibit 5- Slater RAWS Weather)**.

The perimeter of the suspected general origin area was walked by SA b6 & b7C and b6 & b7C and then walked again in the opposing direction. By examining macro and micro burn pattern indicators SA b6 & b7C and SA b6 & b7C identified the initial run that the fire made from northeast to southwest, from the ridge under the power line, and across the western flank of Slater Butte. SA b6 & b7C and SA b6 & b7C worked back and forth across the initial run identifying fire indicators until the heel of the fire was reached. The heel of the fire was near the west side down conductor near where the vegetation had been struck by the conductor and the fulgurite was found. The area near the fulgurite and the struck vegetation was lightly burned. The top of the down tree lay between the fulgurite and struck vegetation and was largely consumed. Fire heavily impacted the area between the fulgurite and the vegetation strikes. It is likely multiple ignition points existed in this area, but indicators were destroyed by fire after the initial ignition. The origin and cause investigation concluded that a down power line was the most probable cause of the Slater Fire. The area was mapped on September 15, 2020 by SA b6 & b7C using a FARO laser scanning system.

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Loss of Power to Slater Butte Lookout

b6 & b7C reported the Slater fire to dispatch at 06:38 hours after awaking to find the power out at the lookout and going to investigate the reason for the power outage. Slater Butte host several communication sites permitted by the USFS. Several of the parties were contacted to determine if equipment had logged the power outage in order to determine the time that power was lost. Siskiyou County consulted online access to the digital PacifiCorp meter on its equipment and reported power loss at 05:15 AM. The meter reports in 15-minute intervals. Siskiyou Telephone reported receiving an interruption of power alarm at 05:41 AM. Verizon Wireless reported receiving an alarm for commercial power failure at 05:41 AM. CalOES also reported a fail alarm at 05:41 AM. All of these reports indicated a loss of commercial power and a switch to on site generated power **(Exhibit 6- Power Fail Alarm Reports)**. Generators provided power for several days. b6 & b7C, an employee of the Grey Eagle Mine located on the west slope of Slater Butte, reported that an employee of PacifiCorp, b6 & b7C, passed through the mine at approximately 08:15 AM on September 8 and disconnected the power on the 69kv transmission line above the mine as the transmission line continued up to the saddle on Slater Butte **(Exhibit 7- Memorandum of Interview** b6 & b7C .

Probable Course of Events

Evidence supports that at some time in the early morning hours of September 8, 2020 a White Fir tree located on the east side of FR 17N48 near the Slater Butte lookout gate fell towards the west, onto the road, and into the 12kv distribution line of PacifiCorp that serviced equipment on the top of Slater Butte. A RAWS weather station on Slater Butte had registered increasing winds through the early morning hours of September 8, 2020. At 18:00 hours on September 7 the winds averaged 6 mph with a maximum gust of 23 mph. By 06:00 the following morning the winds averaged 34 mph with a maximum gust of 54 mph, the highest recorded gust prior to the fire's discovery. Red Flag warnings had been issued for the area by the National Weather Service through Wednesday, September 9 with the expectation that critical fire weather would persist **(Exhibit 8- Red Flag Fire Weather Forecast)**. The White Fir tree was approximately 2 feet 10 inches at breast height and was cut and/or broken into several sections after it fell. When reconstructed the tree was estimated to be approximately 95.5 feet tall when it fell. It was approximately 43 feet from the base of the tree to the east edge of the of the power line right of way measured along the trunk of the tree.

When the tree fell it appears to have struck both conductors causing the east conductor to be pulled from the insulator of Pole 4. The west conductor and the insulator were broken from the crossmember of Pole 4. The west conductor then severed. The east conductor remained intact and possibly was freed from the tree as the tree burned. It is unknown at what time the conductors were struck by the tree or how long the conductors remained energized once struck by the tree or after contacting the ground.

KNF Permits Issued to PacifiCorp

The U.S. Forest Service had issued 11 separate permits to PacifiCorp at the time of the Slater Fire for distribution facilities crossing federal lands within the KNF. Work was underway to consolidate the 11 permits under one master permit at the time of the Slater fire. The 12Kv distribution line where the Slater Fire originated is located in Section 13 of Township 17N and Range 7E and it is approximately 1,860 feet from its origin at the 69Kv transmission line to Pole 1 at the top of Slater Butte. The distribution line consisted of six power poles. Both the 69Kv transmission line and 12Kv distribution line are addressed under the following permits.

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HAP4029 12 was signed December 29, 1970 and is in effect for 50 years expiring on December 29 of 2020 **(Exhibit 9- Special Use Permit HAP4029 12)**. The permit outlines the construction, operating, and maintenance of single-phase distribution lines of various voltages not to exceed 12.5Kv. The permit applies to lands and improvements up to 17,664 feet in length across lands of the United States within the Klamath National Forest in various sections to include Section 13, Township 17 N, Range 7E on Slater Butte. The permit states that the right of way will be 20 feet in width. Among the many provisions the permit states that the permittee will take all reasonable precautions to prevent and suppress forest fires, pay the United States the suppression costs resulting from any fires caused by the operation, and the permittee shall pay the United States for any damage resulting from this use .

The location of the distribution line, Section 13, T 17N, R7E, is also discussed in HAP4029 01 signed December 28, 1992 **(Exhibit 10- Special Use Permit HAP4029-01)**. The permit that covers Sec. 13, T17N, R7E is listed as previously being covered by a permit dated March 18, 1952 and states the right of way being 40 feet. The legal descriptions within section 13 and the width of the right of way indicate that this permit was intended to include the 69Kv transmission line, and not the 12Kv distribution line in that same section.

Evidence of Prior Line Maintenance

Upon arrival on September 11, 2020 SA b6 & b7C and SA b6 & b7C located evidence of maintenance to the 12Kv power line. Two fuses were hanging from the center pole of the 69Kv transmission line. Several discarded pieces of power line and cooper wire were found within the power line right of way of the 12Kv distribution line. The power line pieces were determined to be discarded pieces from prior line maintenance due to the nature in the way it was located. The line was coiled and removed to the sides, or even outside the right of way. When digging out a fulgurite, solid copper wire was located buried below ground **(Exhibit 11- Discarded Conductor)**.

The 12Kv distribution power lines had several splices located in the section where the Slater fire originated **(Exhibit 12- Photo of Line Splices)**. Eight splices were located on the east conductor and 12 splices were located on the west over the span of the distribution line. In some places the splices were separated by only a few feet of conductor. At the point where the west conductor was severed, it appeared two separate diameters of aluminum power line were spliced together, one without a center steel wire.

Outside of the general origin area, between Pole 5 and 6, SA b6 & b7C and SA b6 & b7C noticed numerous fulgurites. The fulgurites were generally small and weathered. Burn pattern indicators did not support any of these fulgurites being the origin of the Slater fire. A video was taken to document the locations of the fulgurites and at the conclusion of the investigation the fulgurites were removed and approximately 40 separate pieces of fulgurite were collected **(Exhibit 13- Prior Fulgurite Collection)**. The presence of fulgurites indicates that at some point in the past live conductors had impacted the ground in this area.

Maintenance records, line data, and hazard reduction records from PacifiCorp have not been obtained.

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Description of West Conductor

The west conductor severed at the approximate location the top of the large fallen tree had entered the power line right of way between Pole 5 and Pole 4. The north end of the severed west conductor was gathered into a short tree and had more or less appeared to come down in the same place as it had been suspended. The tree had burn marks around all the branches emanating from the tree trunk indicating the tree had become electrically charged. The frayed north end of the west conductor had strands that were necked down consistent with a tensile overload fracture **(Exhibit 14- Photo of North End of West Conductor End in Charred Tree)**. Several other stems on trees and shrubs were located nearby with electrically burned and charred vegetation. Marks on the conductor corresponded to the charred vegetation **(Exhibit 15- Charred Vegetation & West Conductor)**. In several places along the conductor the outer aluminum strands had been melted and stretched revealing the inner steel center strand. Where the west conductor had severed the center steel strand was not visible and it appeared this thinner section may be comprised of only aluminum strands. Further testing will be required to determine the conductor configuration.

The west conductor to the south of the severe had recoiled and had come to rest in the vegetation between Poles 4 and 3 **(Exhibit 16- Photo of South End of West Conductor End)**. Vegetation in the area had charred marks indicating that the conductor remained energized after it had severed. An insulator was still attached to the west conductor from where it broke free from the top of Pole 4. The south end severe also had necked down strands consistent with a tensile overload fracture. No center steel strand was identifiable in the conductor.

The White Fir tree had fallen in the area just north of the severed north end of the west conductor and south of the fulgurite. The fallen tree top section had been largely consumed by fire and the west conductor had been melted into several sections in this area between Pole 4 and Pole 5 **(Exhibit 17- Photo of Melted Sections West Conductor)**. No indication of the middle steel strand was found in these melted sections.

Description of East Conductor

The east conductor remained intact over the course of the span. A small diameter tree was resting on the east conductor between Poles 5 and 4. The tree had not been consumed by fire at the top but was heavily impacted at the base. The tree showed no signs of charring where it impacted the east conductor **(Exhibit 18- Photos of Contact of East Conductor and tree post fire)**. This tree was unrelated to the incident that ignited the Slater fire.

Near where the west conductor was severed and just south of the fallen tree that had blocked FR 17N48, debris was located on the east conductor. The debris, which appeared to be sap and bark, was consistent with a tree impacting the conductor **(Exhibit 19- Photo of Residue on East Conductor)**.

The east conductor was pulled from the insulator at the top of Pole 4 and was touching the ground at the base of Pole 4. No fulgurites, arc erosion on the conductor, or burn pattern indicators to suggest an ignition point were found at this location.

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Examination of Fulgurite

Along the west conductor and to the north of the north side severed conductor, a large fulgurite was located adjacent to the west conductor within the specific origin of the fire. The fulgurite had a thin, delicate glassy bubble on the top. The west conductor had marks where it was arc eroded and melted next to the fulgurite **(Exhibit 20- Fulgurite and West Conductor at Origin)**. The soil was carefully removed from around the fulgurite with brushes, dental picks, and trowels by SA b6 & b7C and b6 & b7C. The fulgurite persisted just under the surface of the soil for several inches and then made a vertical turn down for several more inches. The fulgurite was removed in two sections and then the following day the third vertical sections was extricated. The fulgurite had a hallow center and terminated against the root of a tree approximately 8 inches underground. The root where it was impacted by the fulgurite was charred and burned. A mass of solid copper wire was unearthed near the fulgurite and a section of the wire was melted to the exterior of the fulgurite. Overall the fulgurite was approximately 27 inches long. The size of the fulgurite, depending on soil conditions, may indicate that the current flowed through the conductor for an extended period of time. No information on automatic circuit reclosers have been obtained from PacifiCorp.

Examination of Fallen Tree

b6 & b7C located a tree across FR 17N48 when he left the lookout on the morning of September 8, 2020, just prior to the lookout gate across the road. Engine 327 was dispatched to remove the tree from the roadway in order to free b6 & b7C Engine 327 cut five pieces out of the tree and rolled them off the downslope side of the road in order to open the road. The tree had partially uprooted as it fell. The trunk of the tree then cracked at about six feet above ground level on the windward (east) side. The tree then cracked open down to the ground level on the west side. The interior of the tree near the base was hallow with wet, rotten wood **(Exhibit 21- White Fire Tree Photos)**. b6 & b7C , a Forest Pathologist with the USFS examined the tree and determined it to be a White Fire. b6 & b7C found heart-rot in the basal portion of the bole from below ground level extending upwards approximately six feet. b6 & b7C also discovered a white-rot and Rhizomorphs (melanized mycelial cords) present on the decaying wood **(Exhibit 22-**b6 & b7C **REPORT)**. A cross section of the tree base was collected and stored by the USFS as evidence. The tree measured approximately 137 feet tall. The upper branches of the tree, though now burned, showed evidence of green healthy needles and was producing cones. b6 & b7C b6 & b7C an entomologist with the USFS described the tree as one that would not be identified or classified as a hazard given its outward appearance.

Cost to the Government

To this date, the cost to the government for fire suppression has not been determined as cost continue to be incurred. Final costs, along with resource damages, have not been determined. As of November 28, 2020 the Slater Fire was 100% contained.

*****

DISPOSITION

Case closed pending judicial or civil action.

REPORT OF INVESTIGATION *(Reference FSH 5309.11)*	Case/File Number 20-05-MBBK0WI

SUMMARY

On September 8, 2020, the Slater Fire was reported within the boundaries of the KNF. An origin and cause investigation was initiated, located a specific origin, and determined the cause of the fire to be down power lines. The Slater fire consumed 156,773 acres and caused two fatalities. 440 structures were lost due to the fire, with 197 being residences. The dower line was permitted by the USFS and was owned and operated by PacifiCorp. No suppression cost available.

*****

EXHIBITS

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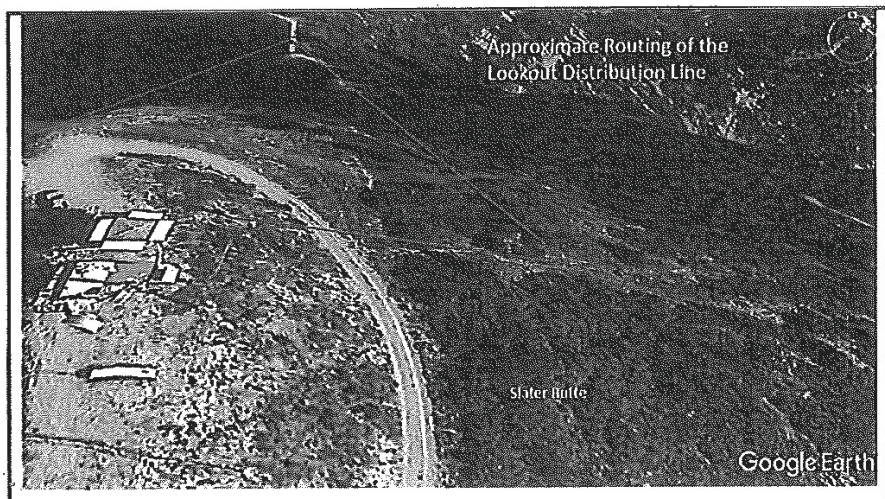
United States Department of Agriculture
Forest Service

Photograph Exhibit 1

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



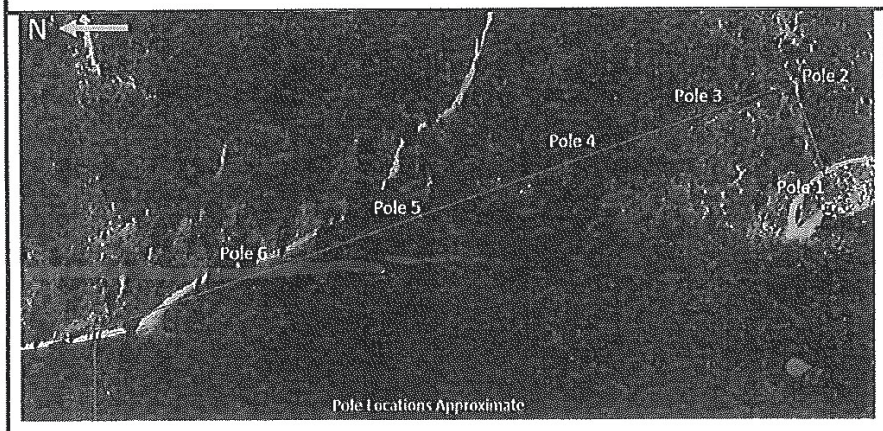
Photograph Number: NA

Date: NA

Time: NA

Photographer: NA

Subject: Approximate Route of Distribution Line



Photograph Number: NA

Date: NA

Time: NA

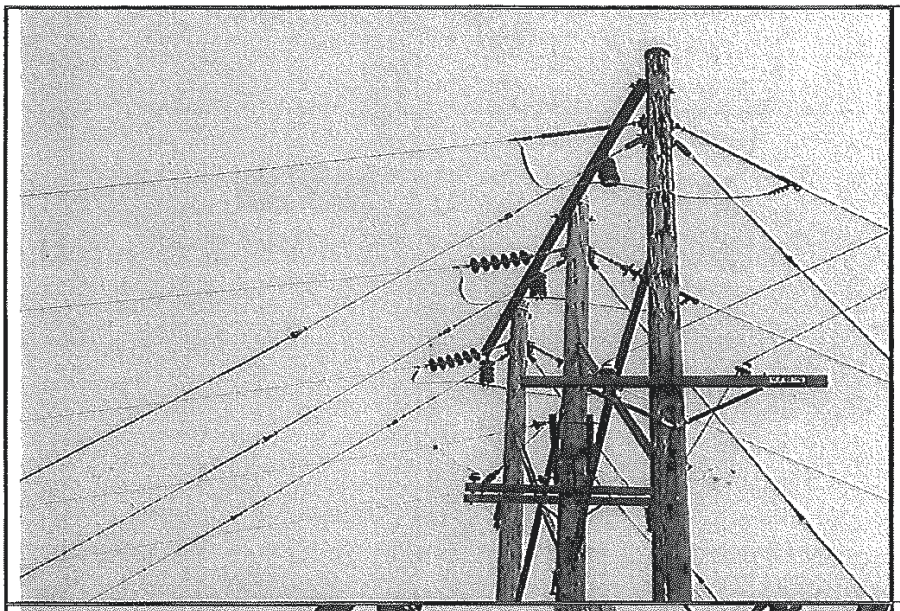
Photographer: NA

Subject: Power Pole Sequence In Distribution Line

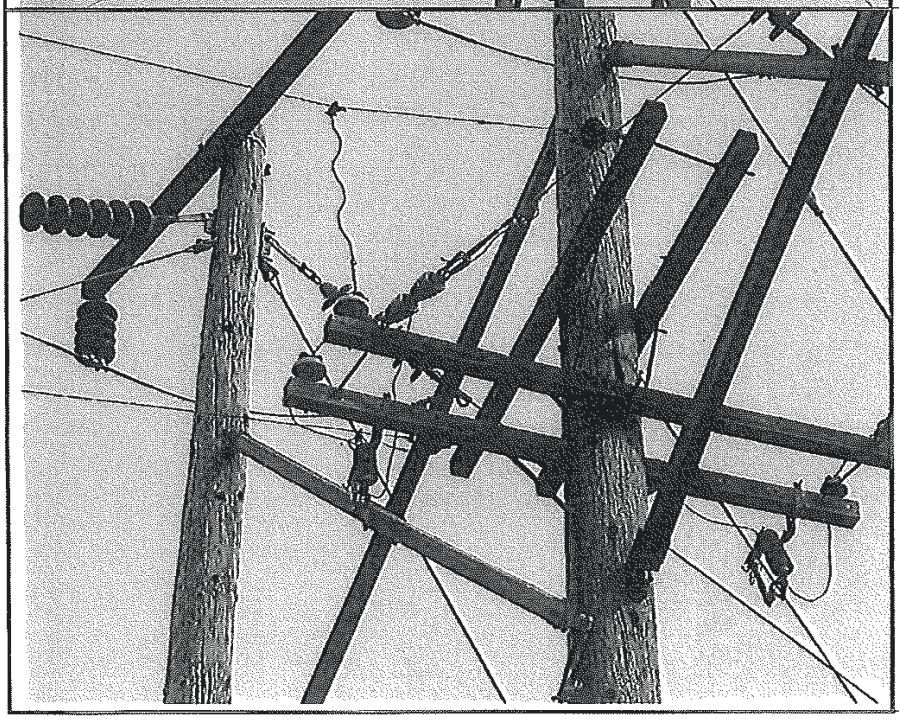
United States Department of Agriculture
Forest Service

Photograph Exhibit 2

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



Photograph Number:
5 Electrical
Date:
9/13/20
Time:
1105
Photographer:
b6 & b7C
Subject:
Point at saddle where 69kv transmission line and 12kv distribution line diverge.

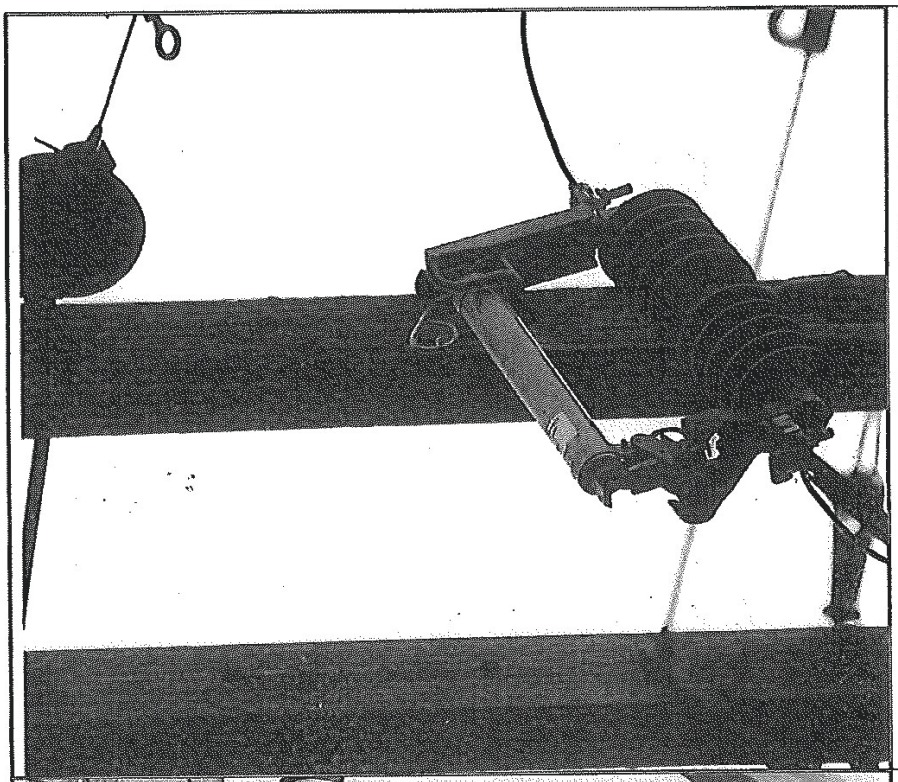


Photograph Number:
9 Electrical
Date:
9/13/20
Time:
1109
Photographer:
b6 & b7C
Subject:
Overall of fuses on 12kv distribution line.

United States Department of Agriculture
Forest Service

Photograph Exhibit 2

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



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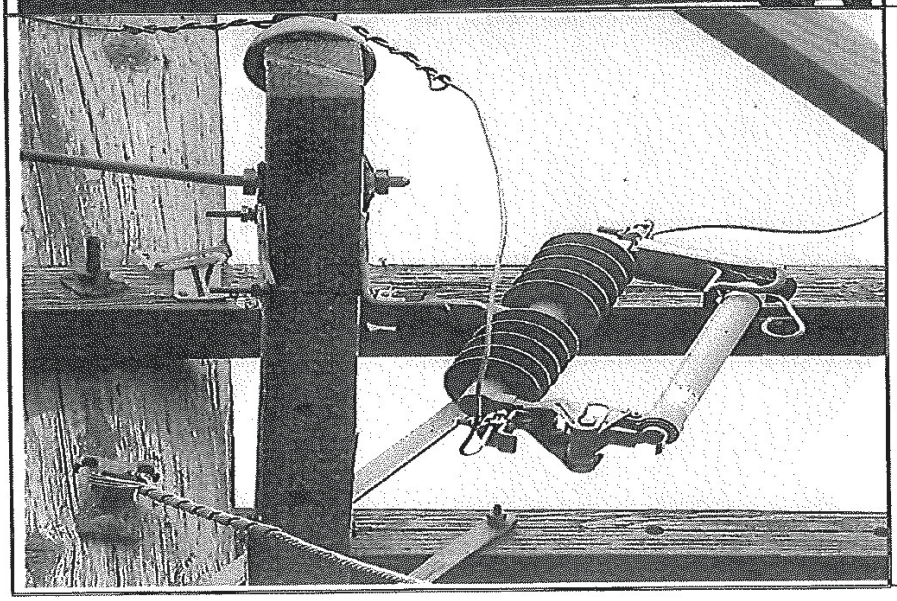
12 Electrical
Date:
9/13/20
Time:
1115
Photographer:
b6 & b7C
Subject:
Close up of west fuse

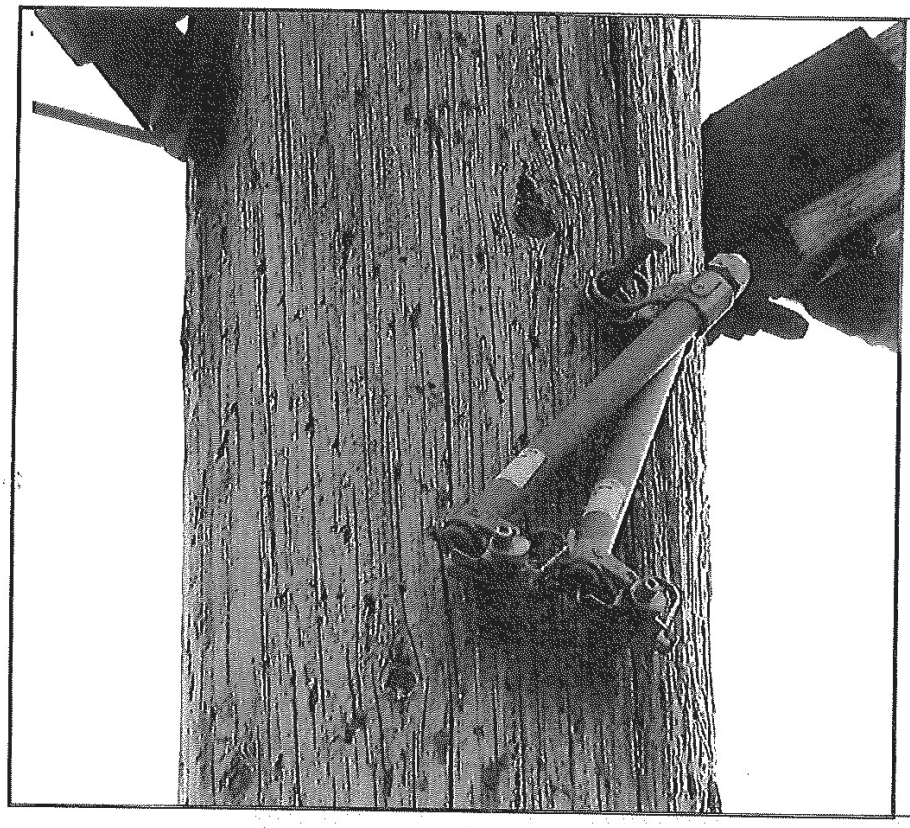


Photograph Number:
15 Electrical
Date:
9/13/20
Time:
1118
Photographer:
b6 & b7C
Subject:
Close up of east fuse

United States Department of Agriculture
Forest Service

Photograph Exhibit 2

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

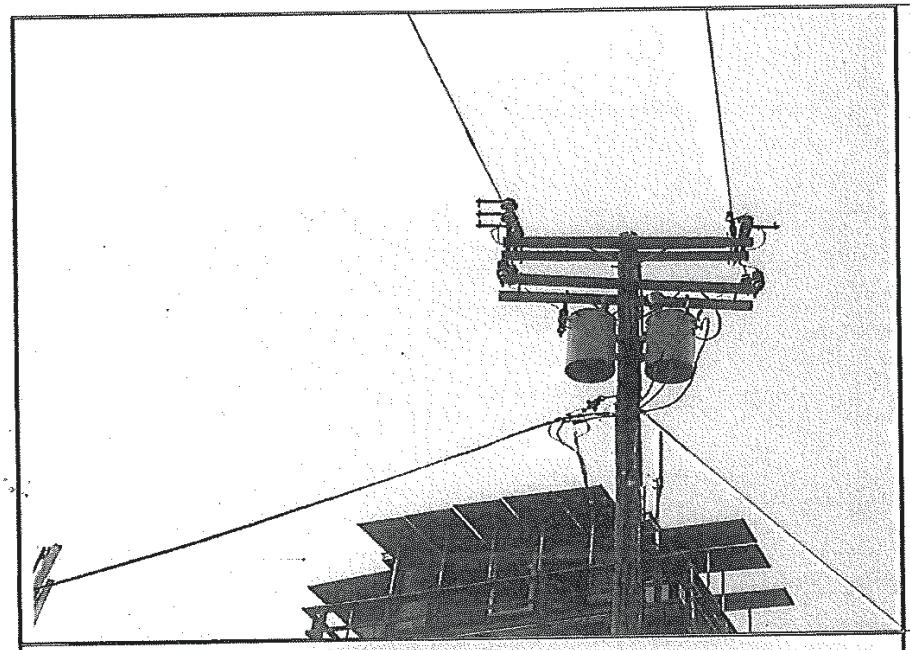


Photograph Number:
19 Electrical
Date:
9/13/20
Time:
1122
Photographer:
b6 & b7C
Subject:
Close up of additional fuses hanging from pole

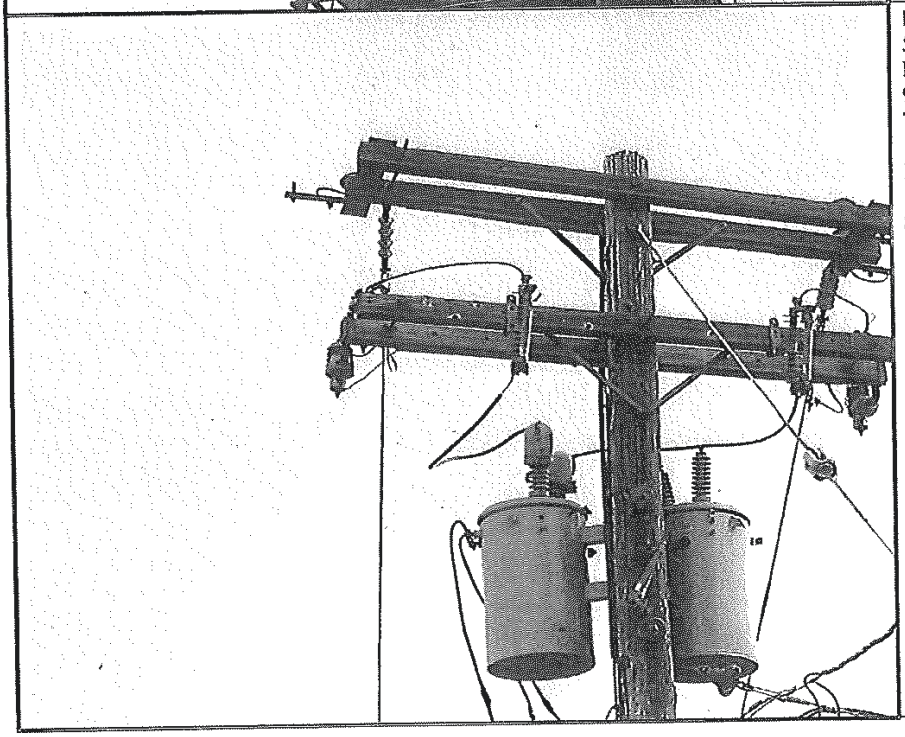
United States Department of Agriculture
Forest Service

Photograph Exhibit 3

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



Photograph Number:
55 Electrical
Date:
9/13/20
Time:
1228
Photographer:
b6 & b7C
Subject:
East side of Pole 1



Photograph Number:
58 Electrical
Date:
9/13/20
Time:
1230
Photographer:
b6 & b7C
Subject:
West side of Pole 1

United States Department of Agriculture
Forest Service

Photograph Exhibit 4

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

Photograph Number:
14 Tree
Date:
9/12/20
Time:
0951
Photographer:
b6 & b7C
Subject:
White Fir tree fallen across road towards 12kv distribution line to the west. Photo is looking to the north.

Photograph Number:
53 Tree
Date:
9/12/20
Time:
1044
Photographer:
b6 & b7C
Subject:
White Fir tree from cut out section looking west uphill towards power line right of way.

United States Department of Agriculture
Forest Service

Photograph Exhibit 4

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

Photograph Number:
57 Tree
Date:
9/12/20
Time:
1051
Photographer:
b6 & b7C
Subject:
Top of White Fir tree looking west with east conductor visible near end of tree trunk

Photograph Number:
58
Date:
9/12/20
Time:
1052
Photographer:
b6 & b7C
Subject:
Top of White Fir tree under 12kv distribution line. Tree leaning on east conductor not associated with initial wind event and cam

United States Department of Agriculture
Forest Service

Photograph Exhibit 5

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

Slater Butte California

Daily Summary for

September 8, 2020

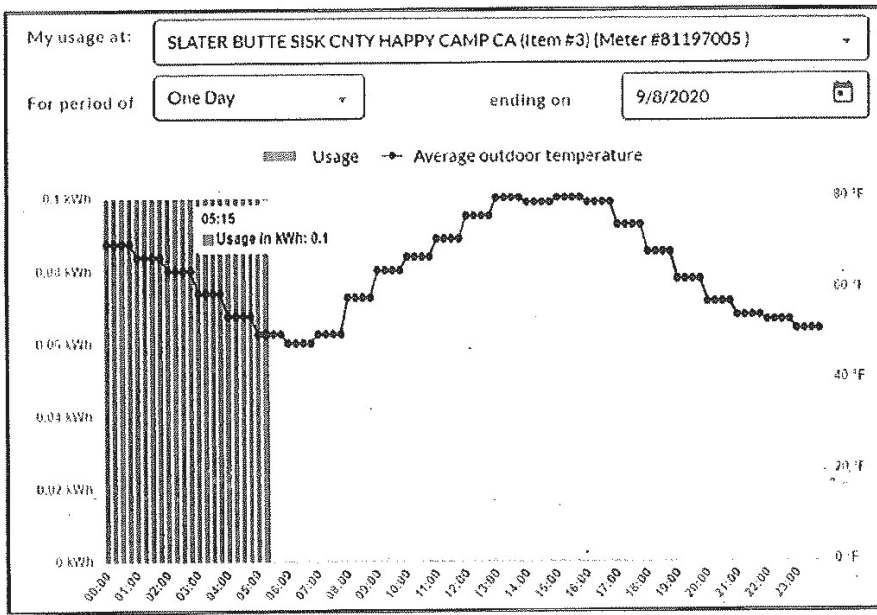
Hour of Day Ending at L.S.T.	Total Solar Rad. ly.	Wind Ave. mph	Wind V. Dir. Deg	Wind Max. mph	Air Temperature Mean Deg. F.	Fuel Temperature Mean Deg. F.	Fuel Moisture Mean Percent	Relative Humidity Mean Percent	Dew Point Deg. F.	Wet Bulb	Total Precip. inches
1 am	0.0	35.0	73	46.0	64.0	63.0	3.8	33	34	48	0.00
2 am	0.0	36.0	79	50.0	61.0	60.0	3.9	34	32	46	0.00
3 am	0.0	33.0	80	50.0	59.0	58.0	4.0	26	24	43	0.00
4 am	0.0	37.0	89	51.0	57.0	56.0	4.1	19	15	40	0.00
5 am	0.0	34.0	88	54.0	55.0	54.0	4.2	20	15	38	0.00
6 am	0.1	34.0	85	54.0	54.0	52.0	4.2	20	14	38	0.00
7 am	6.5	28.0	91	49.0	54.0	55.0	4.3	19	13	38	0.00
8 am	22.7	27.0	89	49.0	56.0	58.0	4.3	19	14	39	0.00
9 am	39.2	36.0	77	51.0	56.0	61.0	4.4	21	17	39	0.00
10 am	52.5	42.0	84	58.0	58.0	65.0	4.4	18	15	40	0.00
11 am	62.1	35.0	80	63.0	60.0	70.0	4.4	17	15	41	0.00
12 pm	52.4	33.0	72	52.0	63.0	68.0	4.4	15	15	42	0.00
1 pm	65.1	32.0	77	50.0	67.0	76.0	4.3	13	15	44	0.00

Photograph Number:
NA
Date:
9/8/20
Time:
NA
Subject:
Slater Butte RAWS Weather data for 9/8/20.

United States Department of Agriculture
Forest Service

Photograph Exhibit 6

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



Provider:
Siskiyou County
Date:
9/30/20
Time:
1032
Subject: Digital Meter Usage for Siskiyou County Equipment on Slater Butte, 9/8/20

DPS Telecom

Standard History

Item	Site	Alarm date/time	Acknowledged date/time	Initials	Description
53.1.9.1	TMon Environmentals	2020-09-08 05:30:44	2020-09-08 07:35:46	DPS	Low Case Fan RPM Warning
53.1.9.3	TMon Environmentals	2020-09-08 05:30:44	2020-09-08 07:35:46	DPS	High Case Fan RPM
53.1.10.1	TMon Environmentals	2020-09-08 05:30:45	2020-09-08 07:35:46	DPS	Low CPU Fan RPM Warning
53.1.10.3	TMon Environmentals	2020-09-08 05:30:45	2020-09-08 07:35:46	DPS	High CPU Fan RPM
53.1.11.1	TMon Environmentals	2020-09-08 05:30:46	2020-09-08 07:35:46	DPS	Low Aux Fan RPM Warning
53.1.11.3	TMon Environmentals	2020-09-08 05:30:46	2020-09-08 07:35:46	DPS	High Aux Fan RPM
53.1.12.1	TMon Environmentals	2020-09-08 05:30:47	2020-09-08 07:35:46	DPS	Low Linux Disk Space Warning
53.1.12.3	TMon Environmentals	2020-09-08 05:30:47	2020-09-08 07:35:47	DPS	High Linux Disk Space
53.1.13.1	TMon Environmentals	2020-09-08 05:30:47	2020-09-08 07:35:47	DPS	Low Linux Memory Avail Warning
53.1.13.3	TMon Environmentals	2020-09-08 05:30:48	2020-09-08 07:35:47	DPS	High Linux Memory Avail
162.1.36.1.1	MW SLTR TO HCMP	2020-09-08 05:41:51	2020-09-08 07:35:47	DPS	AC FAIL
162.1.36.1.2	MW SLTR TO HCMP	2020-09-08 05:41:54	2020-09-08 07:35:47	DPS	GEN RUN
162.1.36.1.3	MW SLTR TO HCMP	2020-09-08 05:41:58	2020-09-08 07:35:47	DPS	CHARGER FAIL
162.1.36.1.3	MW SLTR TO HCMP	2020-09-08 05:41:58	2020-09-08 07:35:47	DPS	CHARGER FAIL
162.1.20.1.1	MW SLTR TO FTJN	2020-09-08 07:11:40	2020-09-08 07:35:47	DPS	GEN FAIL

Provider:
Siskiyou Telephone
Date:
9/30/20
Time:
1011
Subject: Siskiyou Telephone Fail Alarm Log for Slater Butte Equipment, 9/8/20

United States Department of Agriculture
Forest Service

Photograph Exhibit 6

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

BTSSENSOR-862-4 Slater_butte 28-1700 critical BTS Relay Contact Alarm 20-09-08 05:41:33 "Equipment Malfunction" "Relay Open" "Commercial Power Failure"

BTSSENSOR-862-20 Slater_butte 28-1700 major BTS Relay Contact Alarm 20-09-08 05:41:43 "Equipment Malfunction" "Relay Open" "Generator Running"

The information provided in these two entries is typical for when we lose power at a cell site. The first entry notified us of the commercial power failure. The alert flagged an "Equipment Malfunction" simply because the system had lost power, which caused the relay to open, and was therefore in an abnormal state. There was no actual malfunction of any of the equipment at the site.

The second entry notified us that the generator had begun to run, 10 seconds after the loss of commercial power. The alert continued to include the "Equipment Malfunction" flag because the automatic transfer equipment initiated the generator on-site to operate, opening the relay, which was then read as being in an abnormal state. Again, there was no actual malfunction of any of the equipment at the site.

Please feel free to contact me at b6 & b7C if you have any further questions about our cell site or the information in these system readouts.

Best regards,

b6 & b7C
Northern & Central California
Northern Nevada

Provider:
Verizon Wireless
Date:
10/2/20
Time:
1548
Subject: Correspondence from b6 & b7C of Verizon Wireless detailing "Commercial Power Failure" for Slater Butte Equipment, 9/8/20

09-08-2020 05:41:57 Slater_1 Comm_Pwr [TS] Fail critical Bistate_27 0 NVA North Valley Slater 1
09-08-2020 05:41:57 Slater_1 MC01_AC_F [TS] Alarm critical Bistate_21 0 NVA North Valley Slater 1
09-08-2020 05:41:57 Slater_1 Gen [TS] Generator Running critical Bistate_29 0 NVA North Valley Slater 1

b6 & b7C
CalOES / Public Safety Communications
Sacramento Microwave Center
b6 & b7C

Provider:
CalOES
Date:
10/2/20
Time:
1612
Subject: Correspondence from b6 & b7C of CalOES detailing power failure log for equipment on Slater Butte, 9/8/20

United States Department of Agriculture
Forest Service

Exhibit 7

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

USDA Forest Service
Law Enforcement & Investigations

MEMORANDUM OF INTERVIEW

(Reference FSH 5309.11)
Form 5300-19 (Rev 03/2011)

1. CASE INCIDENT NUMBER
20-05-MBBK0WI

2. NATURE OF INVESTIGATION
Wildland Fire

3. NAME OF PERSON INTERVIEWED (Last, First, Middle)	4. SOCIAL SEC. NO.	5. DOB	6. SEX
b6 & b7C		b6 & b7C	M
7. HOME ADDRESS (St., City, State, ZIP Code)	**8. DRIVER'S LIC. NO.**	**9. PHONE (Inc. Area Code)**	
b6 & b7C		b6 & b7C	
10. EMPLOYMENT (Occupation and Location)		**11. PHONE (Bus. Area Code)**	
Grey Eagle Mine			

12. LOCATION OF INTERVIEW	13. NAME OF OFFICER CONDUCTING INTERVIEW
Telephone	b6 & b7C

14. OTHERS PRESENT	15. STARTED		ENDED	
	Date	Time	Date	Time
	9-8-20	1430		

16. REMARKS

b6 & b7C reports that he was arriving at the Grey Eagle Mine located off Indian Creek Road at 1000 Luther Gulch Rd outside Happy Camp that morning. b6 & b7C at the mine.

b6 & b7C stated that when he got out to open the gate, he could see smoke above the mine, back in the area of Thompson Creek. A second employee called b6 & b7C and informed him he could see flames on the hill side above the mine.

b6 & b7C contacted dispatch to report the fire and advise that access to the fire would be through the mine. YICC dispatch records indicate b6 & b7C called at 07:03 hours. b6 & b7C then began to prepare the mine water treatment plant for the approaching flames.

At approximately 0815 b6 & b7C stated that an employee of Pacific Power b6 & b7C arrived at the mine in order to access the power lines that went through the property. b6 & b7C is friends with b6 & b7C and said that b6 & b7C removed the fuses from the power line and disabled the power to the area.

b6 & b7C eventually abandoned the mine water treatment plant and joined the Happy Camp Fire Department as it provided structure protection in Indian Creek.

17. OFFICER'S SIGNATURE	18. WITNESS SIGNATURE (If Applicable)
b6 & b7C	

United States Department of Agriculture
Forest Service

Exhibit 8

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

Mon Sep 7 2020

.DISCUSSION...It will be hot and dry with poor to moderate humidity recoveries into Wednesday. An upper trough now moving into the intermountain states will produce gusty north winds and very dry humidities east of the Cascades. As the trough continues south, winds will shift to the east, and a significant offshore wind event will begin tonight, lasting into Wednesday morning. Dry and windy conditions are expected across the entire region with poor overnight recoveries, creating critical fire weather conditions into Wednesday. Winds will weaken Wednesday, but humidities will remain very low, and critical fire weather conditions will persist over much of the area through Wednesday afternoon. Hot and dry conditions will continue through the rest of the week, but winds will be lighter.

ECC002-081100-
Western Klamath NF...Scott and Shasta Valleys 15 and westward-
331 PM PDT Mon Sep 7 2020

...RED FLAG WARNING IN EFFECT UNTIL 5 PM PDT WEDNESDAY...

.Tonight...Clear. Lows 50-60. Maximum humidity 30-45 percent. Windy. North winds 10 to 20 mph...shifting to the northeast 15 to 30 mph after midnight. Lightning activity level 1. Chance of wetting rain 0 percent.
.TUESDAY...Sunny. Highs 85-95 valleys and highs 70-75 ridges. Minimum humidity 5-10 percent. Windy. East winds 20 to 30 mph. Lightning activity level 1. Chance of wetting rain 0 percent.
.TUESDAY NIGHT...Clear. Lows 55-60. Maximum humidity 15-25 percent. Windy. East winds 10 to 20 mph increasing to 15 to 30 mph after midnight. Lightning activity level 1. Chance of wetting rain 0 percent.
.WEDNESDAY...Sunny. Highs 90-95 valleys and highs 75-80 ridges. Minimum humidity 5-10 percent. East winds 10 to 20 mph. Lightning activity level 1. Chance of wetting rain 0 percent.

.EXTENDED...
.WEDNESDAY NIGHT...Clear. Lows 55 to 60. Light winds.
.THURSDAY...Clear. Highs 85 to 95. Light winds.
.FRIDAY THROUGH SATURDAY...Clear. Lows 55 to 60. Highs 80 to 90. Light winds.
.SUNDAY...Clear. Lows 55 to 60. Highs 80 to 90.
.MONDAY...Mostly clear. Lows 55 to 60. Highs 80 to 90.

Date: 9/7/20

Subject: Fire Weather Forecast received by Yreka Interagency Communications Center from National Weather Service.

United States Department of Agriculture
Forest Service

Exhibit 9

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

United States Department of Agriculture | Forest Service

SPECIAL USE PERMIT

Act of June 4, 1897, or February 15, 1901
This permit is revocable and nontransferable

NAME OF PERMITTEE	USE CODE
Pacific Power & Light Co.	Power
DATE OF PERMIT	**FILE CODE**
DEC 29 1970	2750

REGION	STATE	FOREST	RANGER DISTRICT
5	California	Klamath	Happy Camp

Permission is hereby granted to Pacific Power & Light Company

of 920 S.W. Sixth Avenue, Portland, Oregon 97204, hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements:

Right-of-way Twenty (20) feet in width and Seventeen Thousand Six Hundred Sixty-four (17,664) feet in length across lands of the United States within the Klamath National Forest in portions of Sections 1, 3, 10, 11, 14, 15, 16, and 21, T. 16 N., R. 7 E., and Sections 7, 8, 13, 16, 26, and 35, T. 17 N., R. 7 E., M. D. B. & M.

It is more particularly shown on Map Drawing No. PE-25554, (consisting of two sheets entitled: "Pacific Power & Light Company, application for consolidation of special use permits in the Happy Camp Ranger District, Distribution Line Across Lands under jurisdiction of the Klamath National Forest") which is attached hereto and is hereby made a part of this permit.

This permit covers 8.108 acres and/or 3.358 miles and is issued for the purpose of construction, operating and maintaining thereon single phase distribution lines of various voltages of not to exceed 12.5 K.V. The lines will be of standard construction in accordance with G.O. #95 of the California Public Utilities Commission, using treated fir and cedar poles, together with necessary cross-arms, pins, insulators, guys, anchors, transformers and conductors.

Service supply will be from the interconnected transmission system of Pacific Power & Light Company.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of Eighty Dollars ($ 80.00) for the period from January 1 19 71, to December 31, 19 71, and thereafter annually on January 1 Eighty Dollars ($ 80.00).

Provided, however, Charges for this use may be made or readjusted whenever necessary to conform charges on a basis commensurate with the value of use authorized by this permit.

2340-4 (Rev. 3-69)

United States Department of Agriculture
Forest Service

Exhibit 9

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

2. Construction or occupancy and use under this permit shall begin within _____ months, and construction, if any, shall be completed within _____ months, from the date of the permit. This use shall be actually exercised at least 365 days each year, unless otherwise authorized in writing.

3. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraised value; *provided* that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal or restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to such improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor, but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provisions thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

17. This permit is accepted subject to the conditions set forth above and to conditions 1-3, 6-34 attached hereto and made a part of this permit.

*constructed under Special Use Permits, cases dated 1/3/50, 9/11/50, 10/27/50, 6/23/52, and 9/6/55.

DATE	SIGNATURE OF ISSUING OFFICER	TITLE

United States Department of Agriculture
Forest Service
Exhibit 9

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

SUPPLEMENTAL CONDITIONS

1901 POWER PERMIT (Under 33 KV)

18. The permittee shall pay the United States for any damage resulting from this use.

19. This permit confers no rights upon the permittee to use this right-of-way for purposes other than for the constructing, maintaining and operating of a transmission line thereon.

20. Unless sooner terminated or revoked by the Chief, Forest Service, or his authorized representative, this permit shall expire and become void at the expiration of Fifty (50) years from the date of its issuance (date of signing by issuing officer), but a new permit to occupy and use the same National Forest land may be granted, provided the permittee will comply with the then existing laws and regulations governing the occupancy and use of National Forest lands for power purposes, and shall have notified the Regional Forester not less than two (2) years prior to said date that such new permit is desired.

21. The transmission line or lines authorized by this permit or any part thereof, whether constructed or unconstructed, may be abandoned or surrendered by the permittee upon written approval of the Forest Officer issuing this permit, his successor, or his authorized representative after a finding by the Forest Officer that such abandonment or surrender will not be contrary to the public interest, and after the fulfillment by the permittee of all requirements of the issuing officer and the terms and conditions of this permit in respect to rental payment or otherwise, existing at the time of such approval.

22. Violation of any of the conditions of this permit shall be sufficient cause for its revocation; Provided, however, that this permit will not be deemed to be terminated except upon formal revocation thereby by the Chief, Forest Service, or his authorized representative, and not until the permittee shall have had a reasonable time--not to exceed ninety (90) days--within which to show cause why such revocation should not be made.

R-5 2700-22
Issued 9-65
(3C use only)

United States Department of Agriculture
Forest Service

Exhibit 9

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

23. The permittee shall provide, whenever requested by the Forest Officer, a way across the land covered by this permit for the free ingress or egress of Forest Officers and for users of National Forest land and purchasers of National Forest products.

24. The permittee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties, and shall allow the Forest Service, without charge, to construct, or permit to be constructed, in, through and across the said project, railroads, chutes, roads, trails, conduits and other means of transportation not inconsistent with the enjoyment of said project by the permittee for the purpose herein set forth.

25. The permittee shall clear designated portions of the power line right-of-way, and keep them clear as required by the Forest Officer in charge; shall trim all branches of trees in contact or near contact with the line, and on or adjacent to the right-of-way shall remove all dead snags and all trees leaning toward the line, which are deemed hazardous or might fall in contact with the line; and shall observe such other precautions against fire as may be required by the Forest Officer in charge; all waste material shall be burned or otherwise disposed of to the satisfaction of the Forest Officer in charge. The clearing width shall be restricted to that necessary for safe transmission unless the specific permission of the Forest Supervisor for a greater clearing width is obtained.

26. A fire prevention and control plan adequate in the judgment of the Forest Supervisor to the risks and hazards of this use shall be prepared and placed in effect by the permittee. This plan shall provide for necessary "standby" fire control equipment, and for the current disposal of trash. The permittee shall do everything reasonably within its power and shall require its employees, contractors and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the Forest Service, or other agents of the United States, to prevent and suppress fires on or near the lands to be occupied under this permit. The permittee shall pay the United States the suppression costs and damages resulting from any fires caused by the construction, operation or maintenance of the transmission line authorized by this permit.

R-5 2700-22
Issued 9-65
(RO use only)

United States Department of Agriculture
Forest Service

Exhibit 9

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

27. The transmission line shall be designed and constructed in accordance with the accepted standards and specifications for transmission lines of similar voltages, capacity and purpose as set forth in the Rules and Regulations of the California Public Utilities Commission, its General Order No. 95 or subsequent orders it may issue before construction takes place. The permittee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its power line and telegraph, telephone, signal or other power lines heretofore constructed and not owned by the permittee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic or endangering life on highways and roads, in a manner satisfactory to the Forest Service.

28. The permittee agrees that no substantial change or alteration shall be made in the design, location, construction, voltage, or capacity of this line until application for such change shall have been submitted to and approved by the Forest Officer issuing this permit, his successor, or his authorized representative.

29. The scenic and aesthetic values of the right-of-way and adjacent land shall be protected as far as possible consistent with the authorized use, during construction, operation and maintenance of the line.

30. The permittee shall make provision, or shall bear the reasonable cost (as determined by the Regional Forester) of making provision, for avoiding inductive interference between any project transmission line or other project work constructed, operated, or maintained under this permit, and any radio installation, telephone line, or other communication facility installed or constructed before construction of such project transmission line or other project work, and owned, operated or used by the Forest Service in administering the National Forests and land under its jurisdiction. The foregoing provisions of this article shall also relate to any radio installation, telephone line, or other communication facility installed or constructed by the United States after construction of such project transmission line or other project work. None of the provisions of this article are intended to relieve the permittee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

R-5 2700-22
Issued 9-65
(RO use only)

United States Department of Agriculture
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31. That the line or lines to be constructed, maintained and operated under the permit are not and will not be owned, leased, trusteed, possessed or controlled by any device or in any manner so that they form, or will form part of, or in any way effect, any combination in the form of an unlawful trust, and are not, and will not be in unlawful restraint of trade with foreign nations or between two or more States, or within any one State, in the transmission of electric power.

32. That in respect to the regulation by any competent public authority of the service to be rendered by the permittee, or of the price to be charged therefor, and in respect to any purchase or taking over of the properties or business of the permittee, or any part thereof, by the United States or by any State within which such properties are situated or business carried on in whole or in part, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the permit, or for the occupancy or use of National Forest lands granted thereunder, nor shall the permit of such occupancy and use ever be estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

33. During the performance of this permit the permittee agrees:

a. In connection with the performance of work under this permit, including construction, maintenance and operation of the facility the permittee shall not discriminate against any employee or applicant for employment because of race, color, creed, or national origin.

b. The permittee and his employees shall not discriminate by segregation or otherwise against any person on the basis of race, color, creed, or national origin by curtailing or refusing to furnish accommodations, facilities, services, or use privileges offered to the public generally.

c. The permittee shall include and require compliance with the above non-discrimination provisions in any sub-contract made with respect to the operations under this permit.

d. Signs setting forth this policy of non-discrimination to be furnished by the Forest Service will be conspicuously displayed at the public entrances to the premises, and at other exterior or interior locations as directed by the Forest Service.

R-5 2700-22
Issued 9-65
(RO use only)

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34. This permit shall have no force and effect until the permittee has signified its acceptance of its provisions and conditions by signing below and returning the duplicate copy to the Regional Forester U. S. Forest Service, 630 Sansome Street, San Francisco, California 94111

UNITED STATES FOREST SERVICE

By [signature]

Dec 29 1970
(Date)

Acting Regional Forester
(Title)

****

We have read the foregoing permit and Pacific Power & Light Company agrees to accept and abide by its terms and conditions

PACIFIC POWER & LIGHT COMPANY

By [signature]

VICE-PRESIDENT

DATED:
Jan. 15 1971

ATTEST:
[signature]

ASSISTANT SECRETARY
(title)

United States Department of Agriculture
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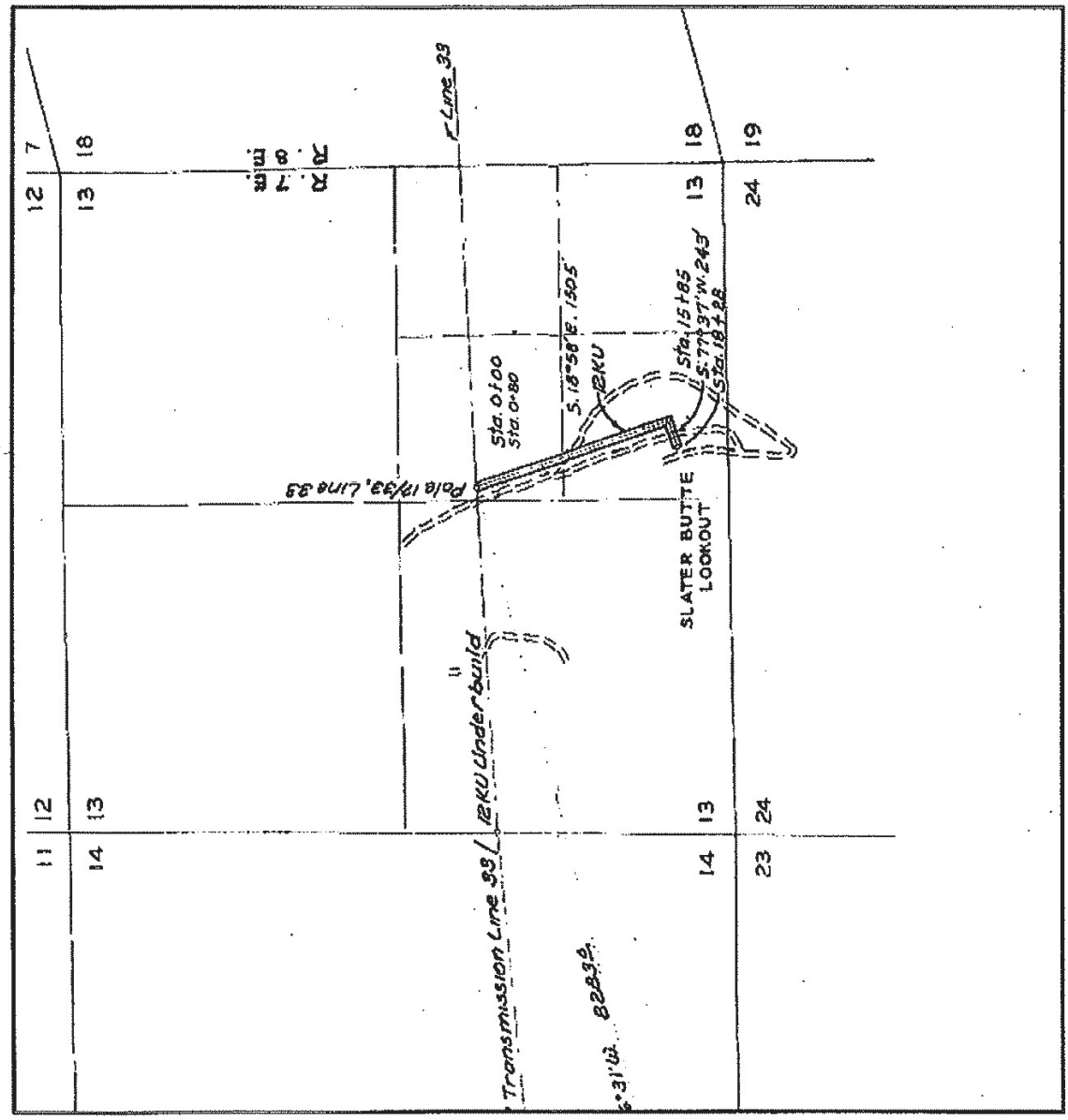

United States Department of Agriculture
Forest Service

Exhibit 10

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

PP&L REF: 3-CO-81
R5-2700-4518/911

USDA - Forest Service	Holder No.	Issue Date	Expir. Date
SPECIAL USE PERMIT for Electric Powerlines	4029-01	12/ 28/ 92	12/31/12
	Type Site	Authority	Auth. Type
[Ref: FSH 2709.11]	643	675	20
Federal Land Policy and Management Act of October 21, 1976	Region	Forest	District
	05	05	51,52,55
	State	County	Cong.Dist.
This permit is revocable and nontransferable	06	093	14

PACIFIC POWER AND LIGHT COMPANY, 920 S. W. Sixth Avenue, Portland, OR 97204, (hereafter called the Holder) is hereby authorized to use National Forest lands, for the construction, operation and maintenance of a 69 kV powerline (with some 12 Kv underbuilds and extensions) within the Klamath National Forest, subject to the general provisions, items 1 to 21 on pages 2 to 4; and to the special provisions, items 22 to 31 on pages 4 to 7, attached hereto and made a part of this permit. The location of this use is shown on Exhibits A and B, attached to and made part of this permit.

29.61 217.67

Length in: 29.91 miles or 157,923 feet x variable width = 217.21 acres.

Construction or occupancy under this permit shall begin within ___ months and construction shall be completed within ___ months.

The holder shall pay annually in advance a sum determined by the Forest Service to be the fair market value of the use granted by this authorization. The initial payment is set at $3,806.14 for the ~~remainder of the~~ 1993 calendar year. Annual payments for each subsequent calendar year may be adjusted using the Implicit Price Deflator-Gross National Product index (IPD-GNP), or other factor selected by the Forest Service, to reflect more nearly the current fair market value of the use. The annual fee may also be adjusted annually to reflect the increase or decrease of acreage of National Forest land authorized under this permit. At intervals to be determined by certain changes in the indexes used to establish the linear rights-of-way fee schedule, the fee shall be reviewed and adjusted as necessary to assure that it is commensurate with the value of the rights and privileges authorized. Failure of the holder to make the annual payment, late payment charge, and any other charges when due shall cause this authorization to terminate.

Pursuant to the Federal Claims Collection Act of 1966, as amended, 31 USC 3717, et seq., and regulations at 4 CFR 102.13, an interest charge shall be assessed on any payment not made by the payment due date.

Interest shall be assessed using the most current rate prescribed by the United States Department of Treasury Financial Requirements Manual (TFRM-6-8020.20). Interest shall accrue from the date the fee payment was due. In addition, the cost of processing and handling the overdue payment shall be added to the amount due.

PACIFIC POWER & LIGHT COMPANY
PORTLAND OFFICE
COPY

PROP. MGMT. DEPT.
REAL ESTATE SECTION
MAILED
NAME
STR
CITY
STATE
ZIP CODE

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A penalty of 6 percent per year shall be assessed on any fee amount overdue in excess of 90 days from the due date of the first billing.

Payments will be credited on the date received by the designated collection officer or deposit location. If the due date for any of the above payments or fee calculation statements fall on a nonworkday, the interest and penalty charges shall not apply until the close of business of the next workday.

GENERAL PROVISIONS

1. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the Forest Supervisor.

2. No timber shall be cut or destroyed during construction of the powerline without first obtaining permission from the Forest Service. The holder shall clear only the minimum area required for safe powerline use. All timber cut, destroyed or injured shall be paid for at current stumpage rates applicable to the sale by the Forest Service of similar timber in the National Forest.

3. The holder shall keep the area beneath the powerlines cleared and shall trim all branches in contact or near contact with the line. All trees, live or dead, deemed by the holder to be hazardous or which might fall in contact with the line, whether on or adjacent to the right-of-way, shall be removed by the holder; Provided, however, that permission to do so must first be obtained from the Forest Service.

4. All waste material from constructing or maintaining the line shall be burned or otherwise disposed of as directed by the Forest Service. However, no material shall be disposed of by burning during any closed season established by law or regulation without a written permit from the Forest Service.

5. The holder shall protect the scenic and esthetic values of the right-of-way and the adjacent land as far as possible consistent with the authorized use, during the construction, operation, and maintenance of the facility.

6. The holder shall be responsible for prevention and control of soil erosion and gullying on Government lands covered by this permit and lands adjacent thereto resulting from construction or maintenance of the powerlines; and shall revegetate with grass or herbaceous plants all ground where the soil has been exposed; and shall construct and maintain such preventive works to accomplish this result as prescribed in the erosion control plan attached, and made a part of this permit.

7. The powerlines shall be designed and constructed in accordance with accepted State standards and specifications for powerlines of similar voltage, capacity, and purpose. The holder shall place and maintain suitable structures and devices to reduce to a reasonable degree the likelihood of contact between its powerlines and telegraph, telephone, signal, or other powerlines heretofore constructed and not owned by the holder, and shall also place and maintain such powerlines and devices underground, unless clearly shown to be impractical, in a manner satisfactory to the Forest Service.

8. The holder shall make provision, or pay the reasonable cost of making provision for avoiding inductive or conductive interference between any power facility or other works constructed, operated, or maintained by it and authorized under the permit, and any radio installation, telephone line, or other communication facilities existing when the permit is authorized or any such installation, line or facility thereafter constructed or operated by the United States or any agency thereof. This provision shall not relieve the holder from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive or conductive interference.

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9. The holder shall protect all Government and other telephone, telegraph, and power lines at crossings of and at all places in proximity to the holder's powerlines or lines; and shall maintain said powerlines or lines in such a manner as not to menace life or property.

10. The holder shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the Forest Service

11. The holder, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

12. The holder shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of the Forest Service, to prevent and suppress fires on the lands to be occupied under this permit.

13. The temporary use and occupancy of the premises and improvements herein described may be sublet by the holder to third parties only with the prior written approval of the Forest Supervisor, but the holder shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

14. This permit is subject to all valid claims.

15. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

16. Upon abandonment, termination, revocation, or cancellation of this permit, the holder shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the holder fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the holder of liability for the cost of their removal and restoration of the site.

17. This permit is not transferable. If the holder through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in other manner provided is qualified as a holder and is willing that future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, continued occupancy of the premises by said person may be authorized if, in the opinion of the issuing officer or issuing officer's successor, issuance of a permit is desirable and in the public interest.

18. This permit may be terminated upon breach of any of the conditions herein by the issuing officer or at the discretion of the Regional Forester or the Chief, Forest Service; provided, the holder shall have had a reasonable time – not to exceed ninety [90] days – within which to show cause why such termination should not be made.

19. This permit confers no rights upon the holder to use this National Forest land for purposes other than constructing, maintaining, and operating powerlines and appurtenant access roads thereon.

20. The holder shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties and shall allow the Forest Service, without charge, to construct or permit to be constructed in, through, and across the said

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project, railroads, chutes, roads, trails, conduits, and other means of transportation not inconsistent with the enjoyment of said project by the holder for the purpose herein set forth.

21. Appeal of any provisions of this authorization or any requirements thereof shall be subject to the appeal regulations at 36 CFR 251, or revisions thereto.

SPECIAL PROVISIONS

22. During the performance of this permit, the holder agrees:

a. In connection with the performance of work under this permit, including construction, maintenance, and operation of the facility, the holder shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age or handicap. [Ref. Title VII of the Civil Rights Act of 1964 as amended].

b. The holder and its employees shall not discriminate by segregation or otherwise against any person on the basis of race, color, religion, sex, national origin, age or handicap, by curtailing or refusing to furnish accommodations, facilities, services, or use privileges offered to the public generally. [Ref. Title VI of the Civil Rights Act of 1964 as amended, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments, and the Age Discrimination Act of 1975].

c. The holder shall include and require compliance with the above nondiscrimination provisions in any subcontract made with respect to the operations under this permit.

d. Signs setting forth this policy of nondiscrimination to be furnished by the Forest Service will be conspicuously displayed at the public entrance to the premises, and at other exterior or interior locations as directed by the Forest Service.

e. That the Forest Service shall have the right to enforce the foregoing nondiscrimination provisions by suit for specific performance or by any other available remedy under the laws of the United States or the State in which the breach or violation occurs.

23. The holder shall indemnify the United States against any liability for damage to life or property arising from the occupancy or use of National Forest lands under this permit.

24. Avalanches, rising waters, high winds, falling limbs or trees, and other hazards are natural phenomena in the Forest that present risks which the holder assumes. The holder has responsibility of inspecting the site, lot, right-of-way and immediate adjoining area for dangerous trees, hanging limbs, and other evidence of hazardous conditions and, after securing permission from the Forest Service, of removing such hazards.

25. The holder shall protect, in place, all public land survey monuments, private property corners, and Forest boundary markers. In the event that any such land markers or monuments are destroyed in the exercise of the privileges authorized by this permit, depending on the type of monument destroyed, the holder shall see that they are reestablished or referenced in accordance with [1] the procedures outlined in the 'Manual of Instructions for the Survey of the Public Land of the United States,' [2] the specifications of the county surveyor, or [3] the specifications of the Forest Service.

Further, the holder shall cause such official survey records as are affected to be amended as provided by law. Nothing in this clause shall relieve the holder's liability for the willful destruction or modification of any Government survey marker as provided at 18 U.S.C. 1858.

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26. Pesticides may not be used to control undesirable woody and herbaceous vegetation, aquatic plants, insects, rodents, trash fish, etc., without the prior written approval of the Forest Service. A request for approval of planned uses of pesticides will be submitted annually by the holder on the due date established by the authorized officer. The report will cover a 12-month period of planned use beginning 3 months after the reporting date. Information essential for review will be provided in the form specified. Exceptions to this schedule may be allowed, subject to emergency request and approval, only when unexpected outbreaks of pests require control measures which were not anticipated at the time an annual report was submitted.

Only those materials registered by the U.S. Environmental Protection Agency for the specific purpose planned will be considered for use on National Forest System lands. Label instructions will be strictly followed in the application of pesticides and disposal of excess materials and containers.

27. With respect to each overhead powerline or overhead segment of powerline authorized, the holder shall be held liable for all injury, loss, or damage, including fire suppression costs, directly or indirectly resulting from or caused by the holder's use and occupancy of the area covered by permit, regardless of whether the holder is negligent or otherwise at fault, provided that the maximum liability without fault shall not exceed $1,000,000 for any one occurrence and provided further that the holder shall not be liable without fault when such injury, loss, or damage results wholly, or in part, from a negligent act of the United States, or an act of a third party not involving the facilities of the holder.

Liability for injury, loss, or damage, including fire suppression costs, in excess of the specified maximum, shall be determined by the laws governing ordinary negligence.

Modification of this clause to remove holder liability for criminal acts of third parties is anticipated. When and if approval for such modification is authorized by the Chief, Forest Service, this permit, upon request of the holder, will be modified accordingly.

The holder does not, by executing this permit, waive any rights which it might otherwise have to contest the validity or legal enforceability of the regulations, or any portions thereof, pursuant to which the right-of-way herein is granted.

28. With respect to each underground line or segment of underground line authorized, the holder shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the National Forest by the holder, or by any agents or employees of the holder acting within the scope of their agency or employment.

29. If, prior to or during excavation work, items of archaeological, paleontological, or historic value are reported or discovered, or an unknown deposit of such items is disturbed, the holder will immediately cease excavation in the area so affected. Holder will then notify the Forest Service and will not resume excavation until written approval is given by the authorized officer.

If it is deemed necessary or desirable, the Forest Service may require the holder to have performed recovery, excavation, and preservation of the site and its artifacts at the holder's expense. At the option of the Forest Service, this authorization may be terminated at no liability by the United States when such termination is deemed necessary or desirable to preserve or protect archaeological, paleontological, or historic sites and artifacts.

30. This permit is granted with the express understanding that should future location of Government improvements, road rights-of-way or utilization of National Forest resources require the relocation of the holder's improvements, such relocation will be done by, and at the expense of the holder within a reasonable time as specified by the authorized officer.

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31. This permit shall not be exclusive; that is, the Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose, provided such use does not interfere with the rights and privileges hereby authorized.

32. This authorization is issued for a period of twenty years ending on **December 31, 2012** .

If the right-of-way project or facility is still being used, operated, and maintained in accordance with the purpose of the authorization, and renewal is allowed under then existing law, and is consistent with the then existing resource management plans for the affected land, the authorized officer will renew the authorization for a term he deems to be reasonable under the circumstances.

33. Any lands described in this permit which have been withdrawn for waterpower purposes under the act of March 3, 1879, or act of June 25, 1910 [or are embraced in an application or license under the Federal Power Act of June 10, 1920], or have been withdrawn under the Reclamation Act of June 17, 1902, are subject at any time to use in connection with the development of waterpower or for reclamation purposes. This permit, therefore, is issued with the specific understanding that [1] its use shall not interfere with such waterpower or reclamation development and that [2] the permit may be, if necessary, terminated upon ninety [90] days notice when in the judgment of the Federal Energy Regulatory Commission or of the Bureau of Reclamation the lands occupied are needed for use in connection with the generation of hydroelectric power, reclamation developments, or other purposes contemplated by the act or acts under which the lands have been withdrawn. No claim shall be made against the United States or power licensees for or on account of prospective profits or for any injury or damage to properties, improvements, or operations due to such development. The holder will be allowed ninety [90] days in which to remove his improvements.

34. The holder agrees that no substantial change or alteration shall be made in the design, location, construction, voltage, or capacity of this line until application for such change shall have been submitted to and approved by the Forest officer issuing this permit, successor, or authorized representative.

35. Use of explosives:

a. Only electronic detonators shall be used for blasting.

b. In the use of explosives, the holder shall exercise the utmost care not to endanger life or property and shall comply with the requirements of the Forest Service. The holder shall be responsible for any and all damages resulting from the use of explosives and shall adopt precautions that will prevent damage to surrounding objects. The holder shall furnish and erect special signs to warn the public of blasting operations. Such signs shall be placed and maintained so as to be clearly evident to the public during all critical periods of the blasting operations, and shall include a warning statement to have radio transmitters turned off.

c. All storage places for explosives shall be marked "DANGEROUS-EXPLOSIVES." The method of storing and handling explosives shall conform to recommended procedures contained in the "Blasters Handbook," published by E. I. du Pont de Nemours and Company, and in all Federal, State, and local laws and regulations.

d. When using explosives, the holder shall adopt precautions which will prevent damage to landscape features and other surrounding objects. When directed by the Forest officer in charge, trees within an area designated to be cleared shall be left as a protective screen for surrounding vegetation during blasting operations. Trees so left shall be removed and disposed of after blasting has been completed. When necessary, and at any point of special danger, the holder shall use suitable mats or some other approved method to smother blasts.

36. The holder agrees to permit the free and unrestricted access to and upon the premises at all times for all lawful and proper purposes not inconsistent with the intent of the permit or with the reasonable exercise and enjoyment by the holder of the privileges thereof.

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37. This permit supersedes special-use permits designated: Pacific Power and Light Company, Powerline, 4/17/42, 3/18/52, and 9/27/56.

This permit is accepted subject to all of its terms and conditions.

PACIFICORP, dba
PACIFIC POWER AND LIGHT COMPANY

By _____ 11/10/92
Lee D. Weislogel - Vice President — Date
[Title]

USDA - FOREST SERVICE
Klamath National Forest

By _____ 12/28/92
For BARBARA HOLDER — Date
Forest Supervisor

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EXHIBIT "A"

Schedule of Public Lands, under the jurisdiction of the Klamath National Forest, crossed by the centerline of Pacific Power & Light Company's 69kV Line No. 33, WITH SOME 12Kv UNDERBUILD AND EXTENSIONS, which were previously covered by Special Use Permits dated April 17, 1942, March 18, 1952 and September 27, 1956, and are now consolidated into this one Special Use Permit.

Special Use Permit Dated April 17, 1942, With Amendments 1 thru 13
Right-of-Way width is 40', being 20' each side of centerline, unless otherwise noted.

TOWNSHIP 44 NORTH, RANGE 9 WEST, MDM, SISKIYOU COUNTY

SECTION 02: SW¼,SW¼(447'); NW¼SW¼(280'); SW¼NW¼(1024');

TOWNSHIP 45 NORTH, RANGE 9 WEST, MDM, SISKIYOU COUNTY

SECTION 34: SW¼SE¼(1347'); SE¼SW¼(190'); NE¼SW¼(1569'); SW¼NW¼(945'); NW¼NW¼(1440');

SECTION 28: SE¼NW¼(160'); SW¼NW¼(1473');

SECTION 20: SW¼SW¼(1788'); NW¼SW¼(215');

SECTION 18: SW¼SW¼(1002');

TOWNSHIP 45 NORTH, RANGE 10 WEST, MDM, SISKIYOU COUNTY

SECTION 14: SE¼SE¼(1286'); SW¼SE¼(1286');

SECTION 16: SE¼SE¼(261'); SW¼SE¼(319'); NW¼SE¼(245'); NE¼SW¼(205'); SE¼NW¼(939'); SW¼NW¼(160'); NW¼NW¼(1669');

SECTION 17: NE¼NE¼(120');

SECTION 08: SE¼SE¼(1495'); NE¼SE¼(1165'); NW¼SE¼(375'X 40' & 690'X100'); SE¼NW¼(746'X 100'); NE¼NW¼(195'X 40' & 660'X 50'); NW¼NW¼ (408'): ALSO NE¼SE¼(320'X 40' for a 12kV extn from Amendment # 6);

SECTION 05: SW¼SW¼(147'x 40' & 670'x 50');

SECTION 06: SE¼SE¼(150'X 50'); SW¼SE¼(40'X 50'); NW¼SE¼(520'X 40' & 400'X 50'); E½NW¼(1276'); W½NW¼(125');

Area originally permitted
Now privately owned

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TOWNSHIP 46 NORTH, RANGE 11 WEST, MDM, SISKIYOU COUNTY

SECTION 36: SE¼SE¼(1322'); NW¼SW¼(77'X 80'); SW¼NW¼(15'X 80')

SECTION 35: SE¼NE¼(1768'X 80' & 292'X 40'); SW¼NE¼(55'); NW¼NE¼(1423') ALSO NE¼SE¼ 437'X 40'for 2.4kV from Amend. # 5 AND 521'X 20' AND 1066'X 40' from Amend. # 7:

SECTION 26: SW¼SE¼(738'); SE¼SW¼(1432'); SW¼SW¼(1103'); NW¼SW¼(1265'):

SECTION 27: NE¼SE¼(320'); SE¼NE¼(1335'); SW¼NE¼(1320'); SE¼NW¼(1459'); SW¼NW¼(415'); NW¼NW¼(1265'):

SECTION 28: NE¼NE¼(801'):

SECTION 21: SE¼SE¼(950'); SW¼SE¼(780'); NE¼SW¼(1270'); SE¼NW¼(475'); SW¼NW¼(1310'); NW¼NW¼(1360'):

SECTION 20: NE¼NE¼(118'):

SECTION 17: SE¼SE¼(477'X 40' & 1132'X 100'); SW¼SE¼(486'X 40' & 367'X 100'); NW¼SE¼(560'); NE¼SW¼(1360'); NW¼SW¼(1215'):

SECTION 18: NE¼SE¼(598'); SW¼NE¼(1339'):

TOWNSHIP 46 NORTH, RANGE 12 WEST, MDM, SISKIYOU COUNTY

SECTION 13: NW¼NE¼(118'X 40' & 1314'X 100' ALSO 91'X 40' 12kV From Amend #4); SW¼NE¼(615'X 100'):

SECTION 11: NW¼SW¼(1280'):

SECTION 10: NE¼SE¼(1465'); NW¼SE¼(870'); SW¼NE¼(914'); SE¼NW¼(920'); NE¼NW¼(1308'); NW¼NW¼(305'):

SECTION 03: SW¼SW¼(1186'); NW¼SW¼(901'):

SECTION 04: NE¼SE¼(1515'); NW¼SE¼(160'); S½NE¼(1295'); E½NW¼(1365'):

TOWNSHIP 47 NORTH, RANGE 12 WEST, MDM, SISKIYOU COUNTY

SECTION 32: SE¼SE¼(1760'); SW¼SE¼(1325'); SE¼SW¼(985'); SW¼SW¼(710'):

SECTION 31: S½S½N½(7568'):

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TOWNSHIP 17 NORTH, RANGE 8 EAST, MM, SISKIYOU COUNTY

SECTION 16: S½S½N½(2884');

SECTION 17: SE¼NE¼(250');

Special Use Permit dated March 18, 1952, With Amendments 1 thru 5:
Right-of-Way Width is 40', being 20' each side of centerline.

TOWNSHIP 17 NORTH, RANGE 8 EAST, MM, SISKIYOU COUNTY

SECTION 17: SE¼NE¼(1076'); SW¼NE¼(1329'); SE¼NW¼(595');
NE¼SW¼(743'); NW¼SW¼(1327');

SECTION 18: NE¼SE¼(1258'); NW¼SE¼(1705'); NE¼SW¼(1410');
NW¼SW¼(1263');

TOWNSHIP 17 NORTH, RANGE 7 EAST, MM, SISKIYOU COUNTY

SECTION 13: NE¼SE¼(1250'); NW¼SE¼(1250'); NE¼SW¼(1250');
NW¼SW¼(1250');

SECTION 14: NE¼SE¼(798'); NE¼SW¼(190'); NW¼SW¼(1380');

SECTION 15: NE¼SE¼(190'); SE¼SE¼(1314'); SW¼SE¼(755');

Special Use Permit Dated September 27, 1955, with Amendments # 1 & # 2:
Right-of-Way Width is 100', being 50' each side of centerline, unless otherwise noted.

TOWNSHIP 17 NORTH, RANGE 7 EAST, MM, SISKIYOU COUNTY

SECTION 15: SW¼SW¼(110'); NW¼SW¼(1676');

SECTION 16: NE¼SE¼(190'); SE¼NE¼(973');

SECTION 08: SE¼NE¼(1053');

SECTION 05: NE¼SW¼(1321'); SE¼NW¼(1314'); NE¼NW¼(415');
NW¼NW¼(1108');

TOWNSHIP 18 NORTH, RANGE 7 EAST, MM, SISKIYOU COUNTY

SECTION 32: SW¼SW¼(390');

SECTION 31: NE¼SE¼(305'); SE¼NE¼(375'); SW¼NE¼(817');
NW¼NE¼(660'); NE¼NW¼(1387'); NW¼NW¼(1241');

SECTION 30: SW¼SW¼(150');

United States Department of Agriculture
Forest Service

Exhibit 10

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

EXHIBIT "A" PAGE 4

TOWNSHIP 18 NORTH, RANGE 6 EAST, MM, SISKIYOU COUNTY

SECTION 25: SE¼SE¼(1372'); SW¼SE¼(861' ~~ALSO 354' X 40' For 12½'~~ ~~EXCL. FROM ABOVE~~); NW¼SE¼(55'); NE¼SW¼(1666'); SE¼NW¼(894'); SW¼NW¼(600'); W½NW¼(1780'):

SECTION 24: SW¼SW¼(509'): Line Removed

SECTION 23: SE¼SE¼(1637'); NE¼SE¼(1418'); SE¼NE¼(1317'); SW¼NE¼(165); NW¼NE¼(1435'); NE¼NW¼(751'):

SECTION 14: SE¼SW¼(863'); SW¼SW¼(1217'); NW¼SW¼(417'):

SECTION 15: NE¼SE¼(1540'); NW¼SE¼(1274'); NE¼SW¼(760'); SE¼NW¼(512'); SW¼NW¼(1290):

SECTION 16: SE¼NE¼(635'); NE¼SE¼(852'); NW¼SE¼(213'); SW¼NE¼(1584'); SE¼NW¼(202'); NE¼NW¼(1397'):

SECTION 09: SE¼SW¼(1037'); SW¼SW¼(1173'); NW¼SW¼(1007'):

SECTION 08: NE¼SE¼(400'); SE¼NE¼(1461'); SW¼NE¼(395'):

TOTALS FOR SPECIAL USE PERMIT DATED 04/17/1942 WITH 13 AMENDMENTS:

81,917' X 40' = 75.2222 acres
~~1,920' X 50' = 2.2038 acres~~ 1730' X 50' = 1.9858 acres
1,860' X 80' = 3.4159 acres
4,864' X 100' = 11.1662 acres
621' X 20' = 0.2392 acres

TOTAL ACRES FOR THIS SECTION = ~~92.2473~~ 92.0293

TOTALS FOR SPECIAL US PERMIT DATED 03/18/1952 WITH 5 AMENDMENTS:

20,323' X 40' = 18.6620 acres

TOTAL ACRES FOR THIS SECTION = 18.6620

TOTALS FOR SPECIAL USE PERMIT DATED 09/27/1956 WITH 2 AMENDMENTS:

46,164' X 100' = 105.9779 acres
~~354' X 40' = 0.3250 acres~~

TOTAL ACRES FOR THIS SECTION = ~~106.3029~~ 105.9779

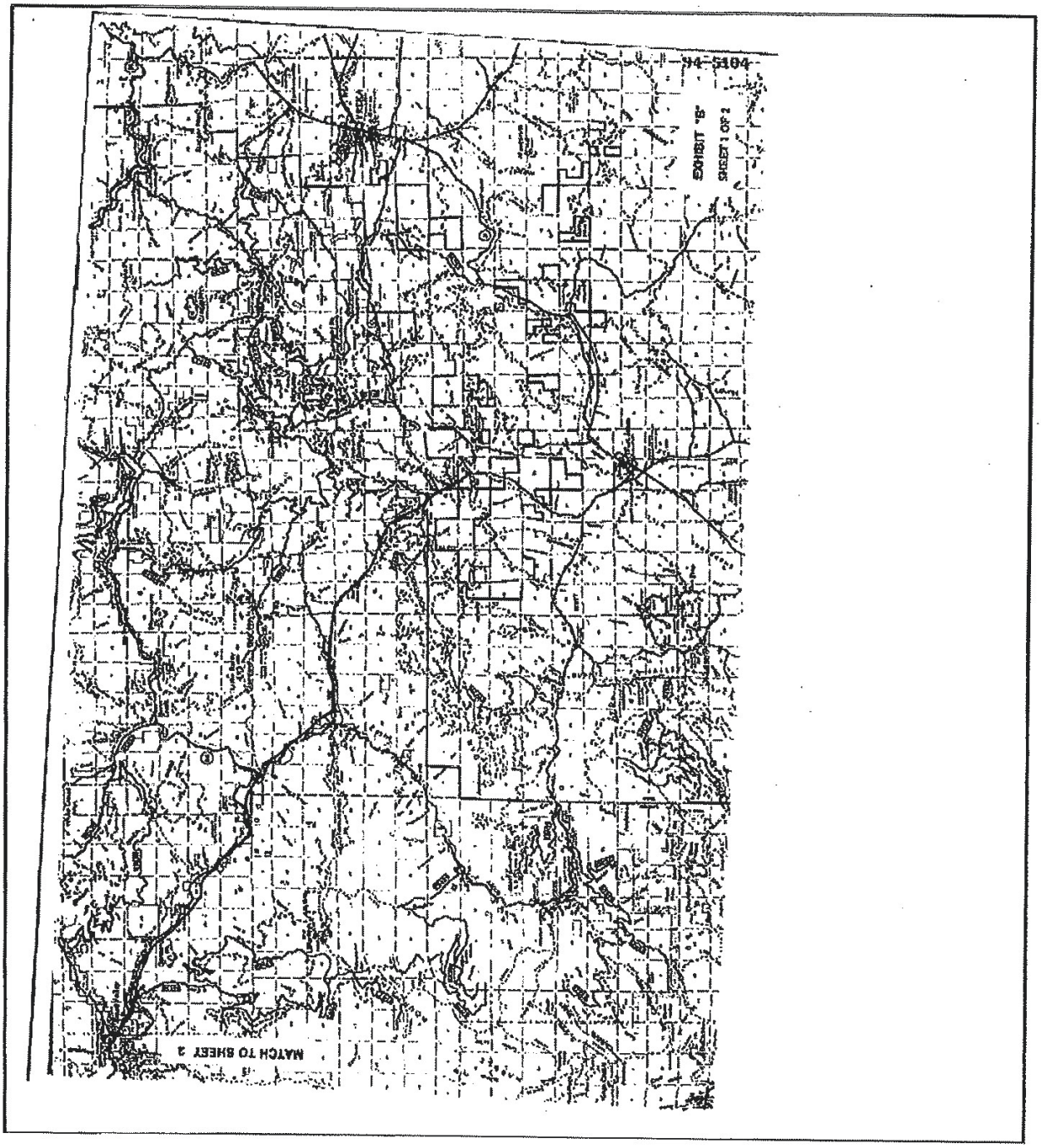
TOTAL ACREAGE FOR THIS COMBINED EXHIBIT = ~~217.2182~~ 216.6692

94.5104

United States Department of Agriculture
Forest Service

Exhibit 10

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



United States Department of Agriculture
Forest Service

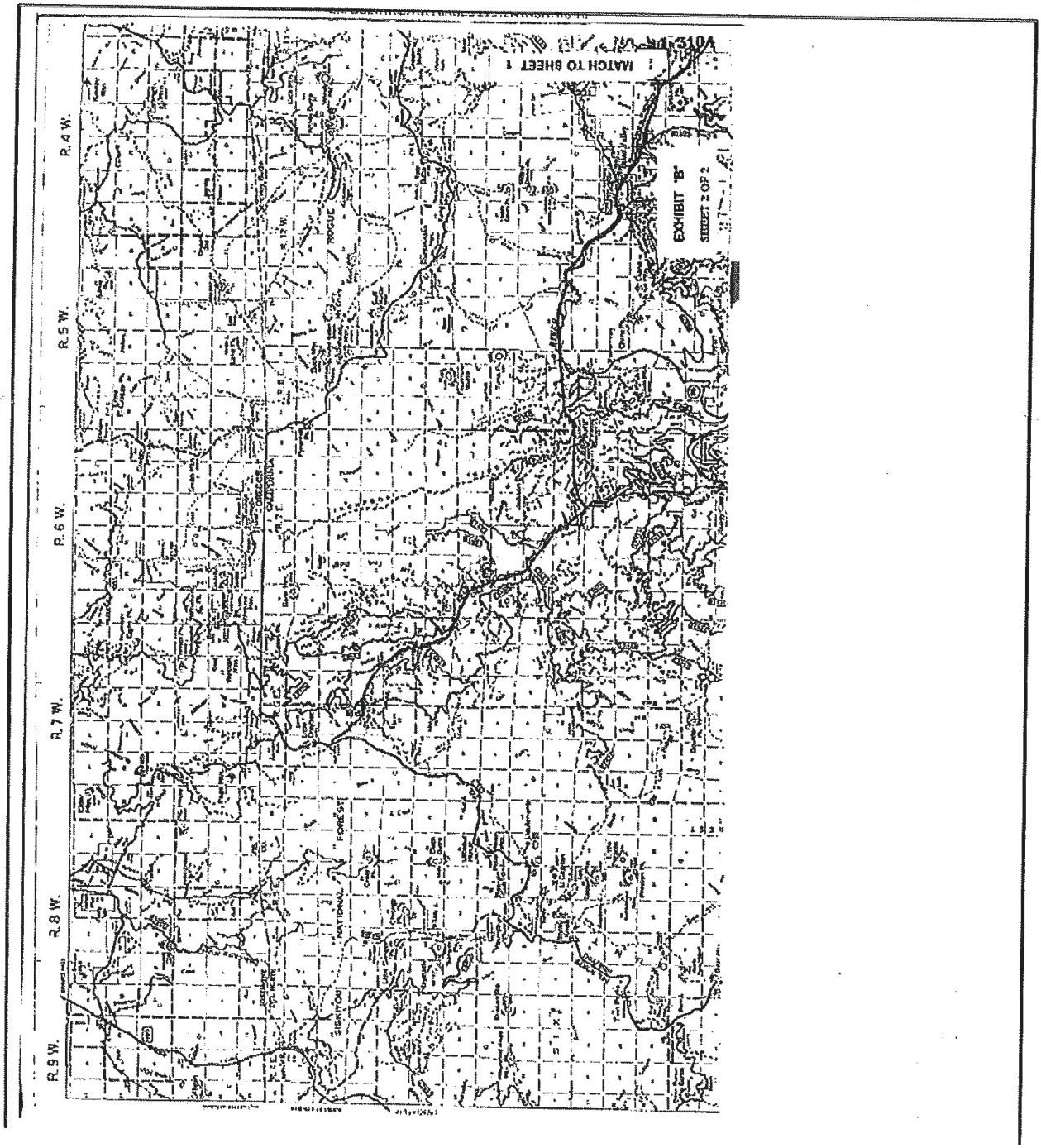
Exhibit 10

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

United States Department of Agriculture
Forest Service

Exhibit 10

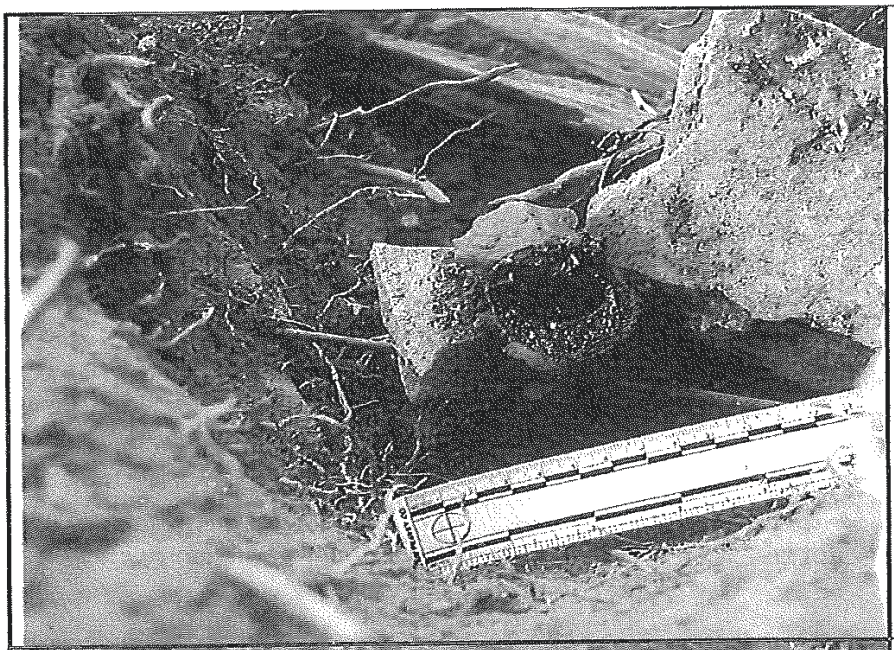
Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



United States Department of Agriculture
Forest Service

Exhibit 11

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020



Photograph Number:
38 Indicators and fulgurite
Date:
9/13/20
Time:
1337
Photographer:
b6 & b7C
Subject:
Solid copper wire fused to fulgurite below ground

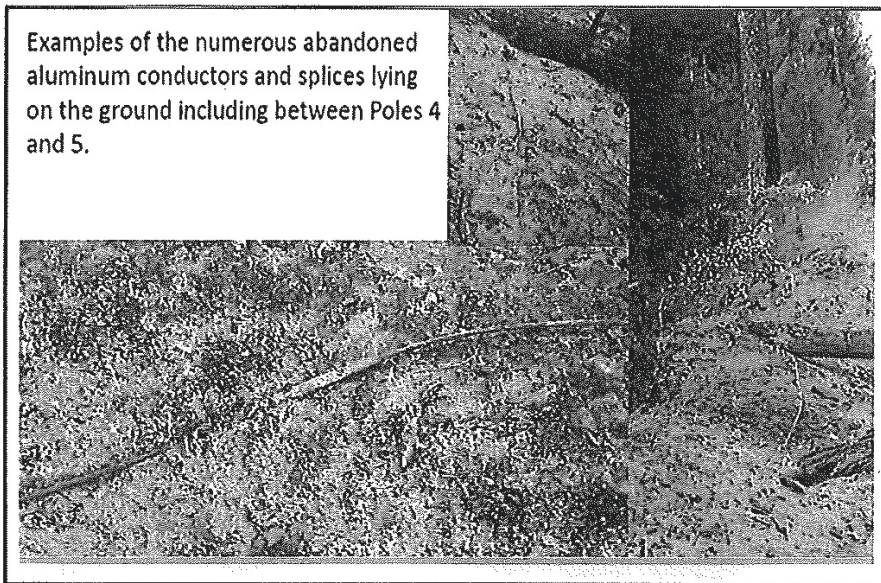
Photograph Number:
39 Indicators and fulgurite
Date:
9/13/20
Time:
1338
Photographer:
b6 & b7C
Subject:
Base of fulgurite with discarded cooper wire from above.

United States Department of Agriculture
Forest Service

Exhibit 11

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

Examples of the numerous abandoned aluminum conductors and splices lying on the ground including between Poles 4 and 5.



Photograph Number:

Date:
8/18/20
Time:

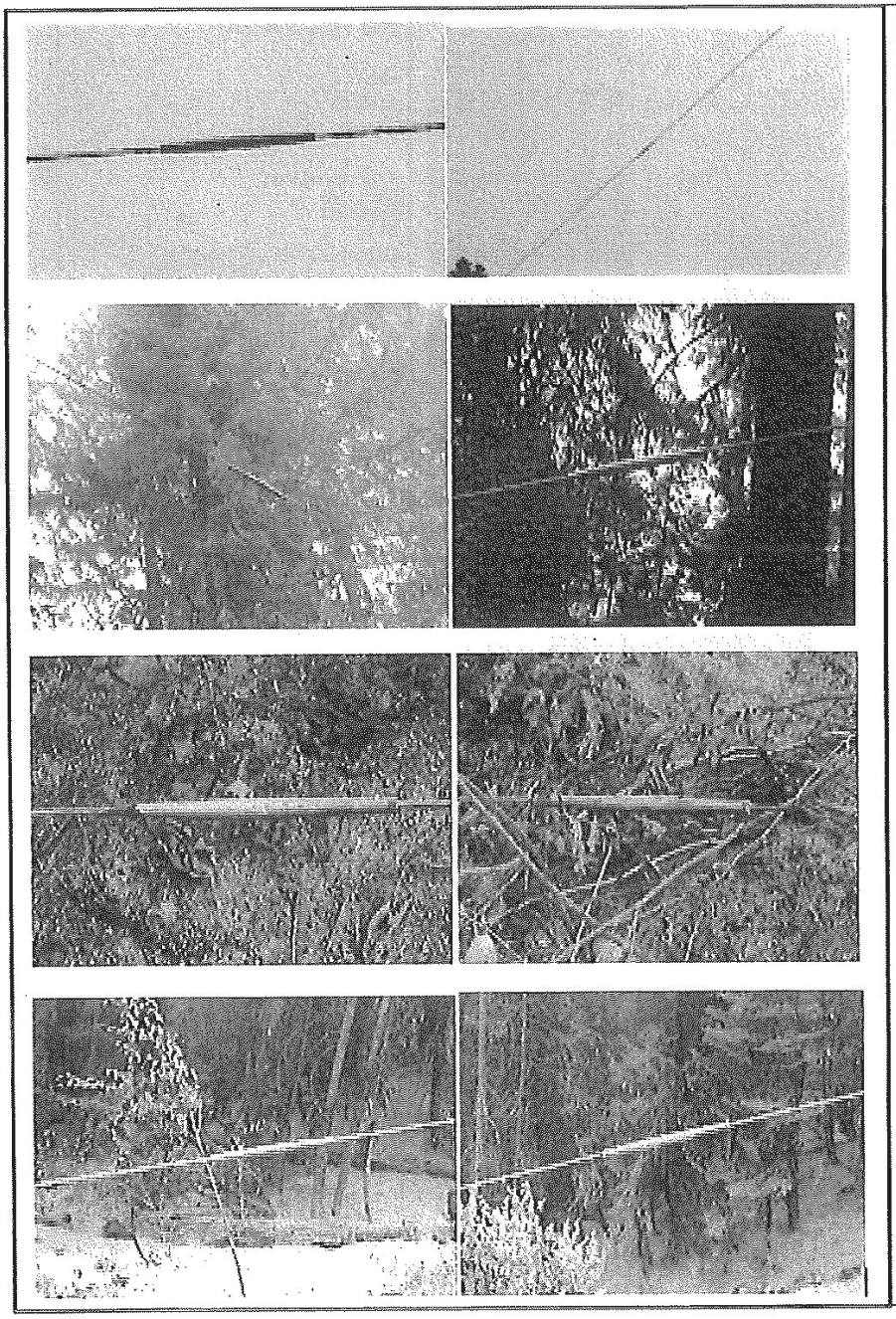
Photographer:
b6 & b7C
Subject:
Example slide of discarded conductors from b6 & b7C Notes

Photograph Number:
b6 & b7C 2020-09-18 15-03-28
Date:
9/18/20
Time:
1506
Photographer:
b6 & b7C
Subject:
Photograph taken by b6 & b7C of discarded cooper conductor.

United States Department of Agriculture
Forest Service

Exhibit 12

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

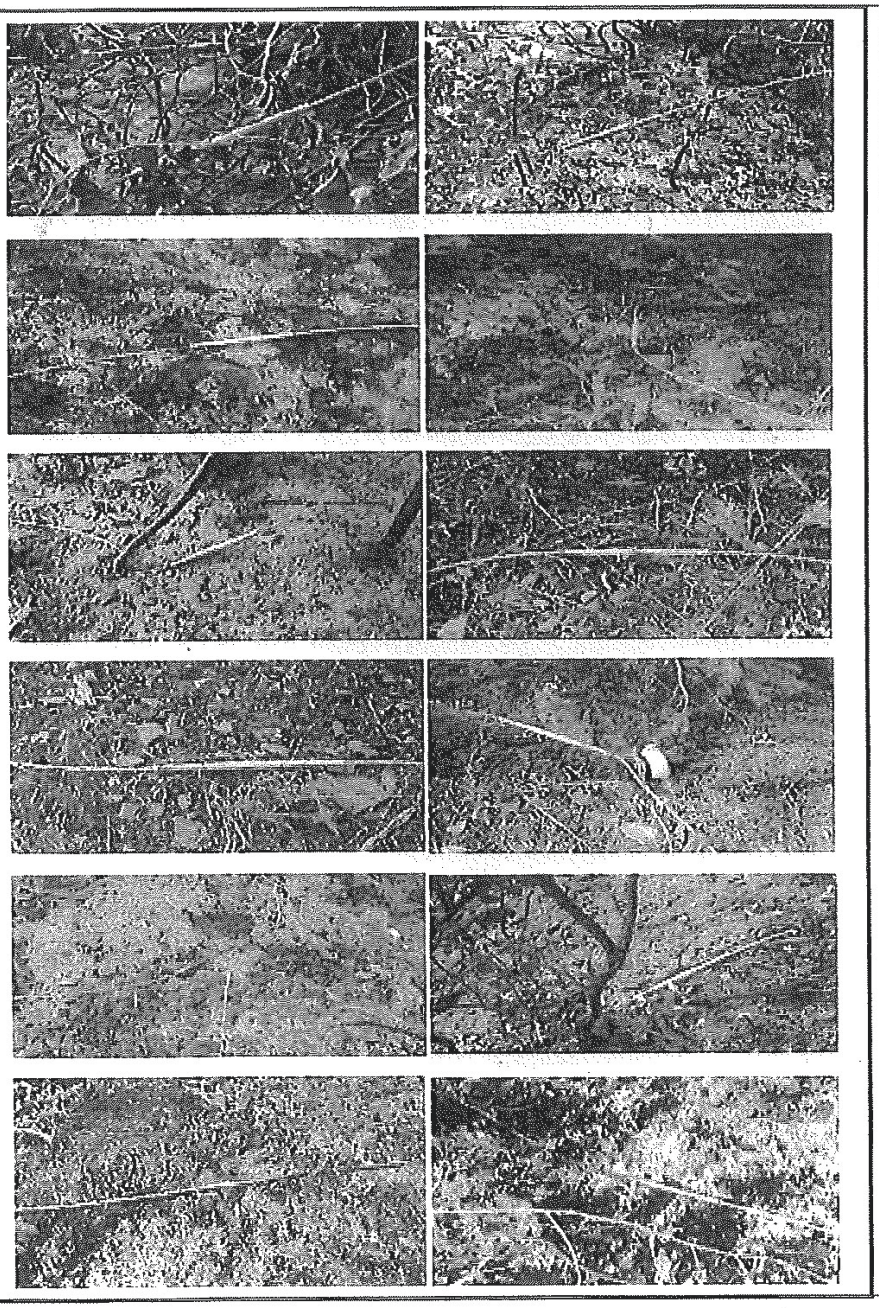


Photograph Number:
23, 30, 35, 37, 40, 41, 46, & 47
Electrical
Date:
9/13/20
Time:
1128 to 1213
Photographer:
b6 & b7C
Subject:
Splices in East Conductor over course of distribution line.

United States Department of Agriculture
Forest Service

Exhibit 12

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

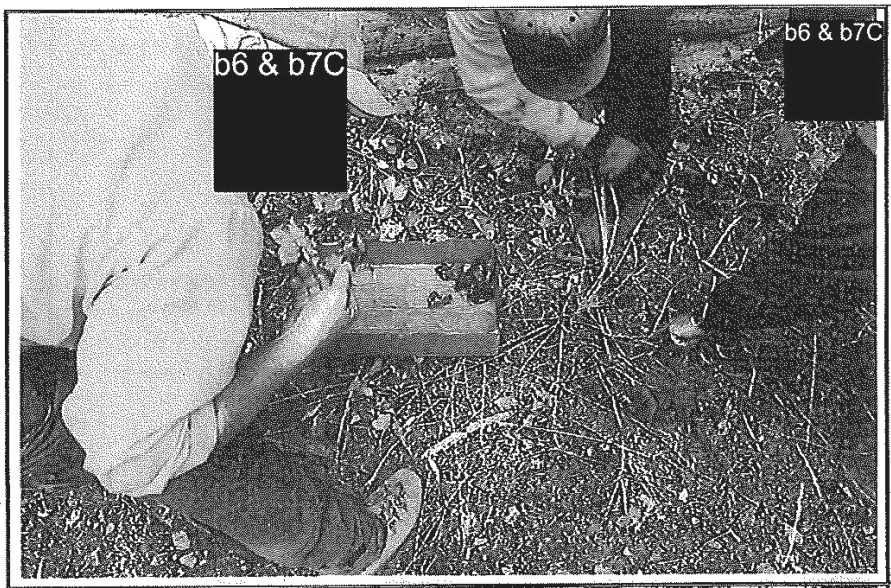


Photograph Number:
28, 29, 33, 34, 36, 42, 43, 44, 45, 48, 49, & 50 Electrical
Date:
9/13/20
Time:
1139 to 1216
Photographer:
b6 & b7C
Subject:
Splices in West Conductor over course of distribution line.

United States Department of Agriculture
Forest Service

Exhibit 13

Case Name	Case/File Number
Slater	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/2020

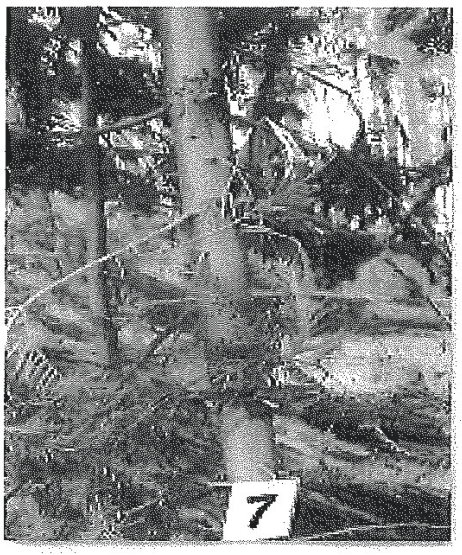


Photograph Number:
b6 & b7C 2020-09-18 15-05-31
Date:
9/18/20
Time:
1508
Photographer:
b6 & b7C
Subject:
Fulgurite collection, created prior to Slater Fire.

Photograph Number:
b6 & b7C 2020-09-18 15-07-02
Date:
9/18/20
Time:
1510
Photographer:
b6 & b7C
Subject:
Fulgurites created prior to Slater Fire

United States Department of Agriculture
Forest Service

Exhibit 14



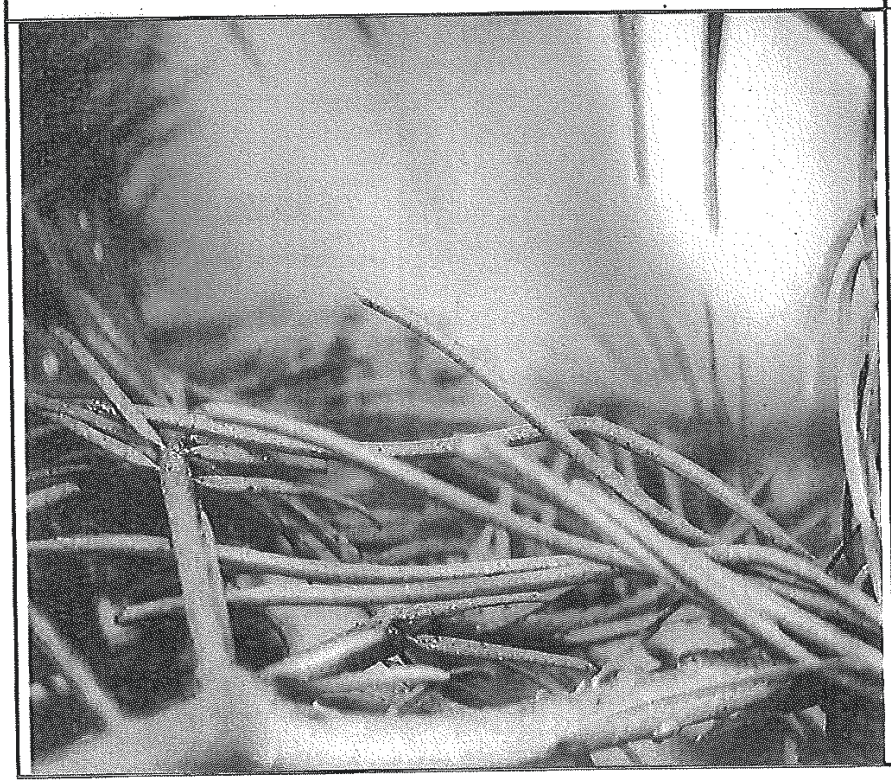
Photograph Number:
25 Electrical
Date:
9/12/2020
Time:
1402
Photographer:
b6 & b7C
Subject:
Charred tree with West Conductor north severed end in branches

Photograph Number:
26 Electrical
Date:
9/12/20
Time:
1403
Photographer:
b6 & b7C
Subject:
West Conductor north severed end

United States Department of Agriculture
Forest Service

Exhibit 14

Photograph Number:
b6 & b7C 2020-09-18 13-27-55
Date:
9/18/20
Time:
1331
Photographer:
b6 & b7C
Subject:
Severed north end of west conductor

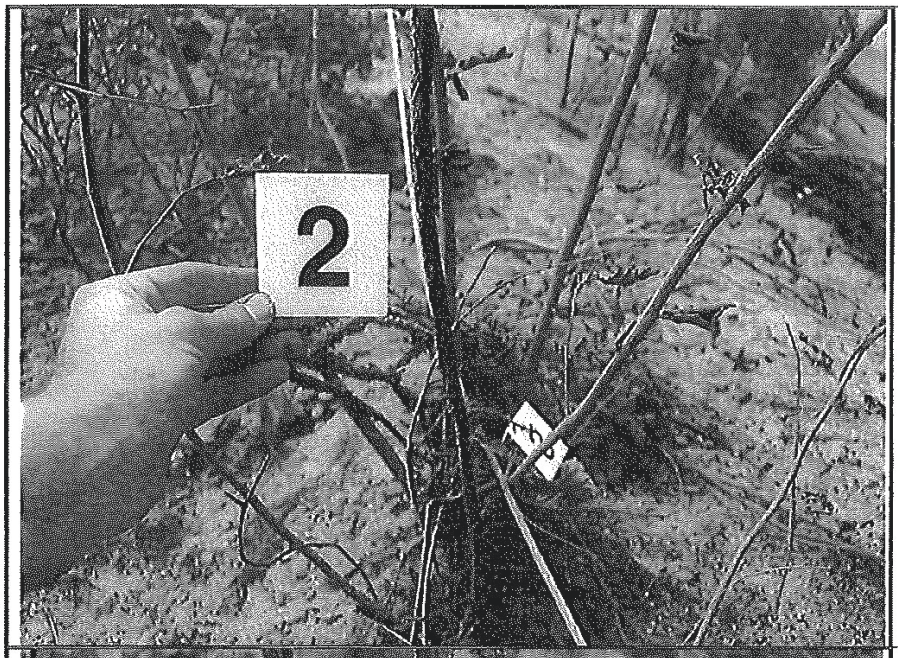


Photograph Number:
b6 & b7C 2020-09-18 13-28-12
Date:
9/18/13
Time:
1331
Photographer:
b6 & b7C
Subject:
Severed north end of west conductor

United States Department of Agriculture
Forest Service

Photograph Exhibit 15

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
20 Electrical
Date:
9/12/20
Time:
1355
Photographer:
b6 & b7C
Subject:
Charred Conductor Struck Vegetation

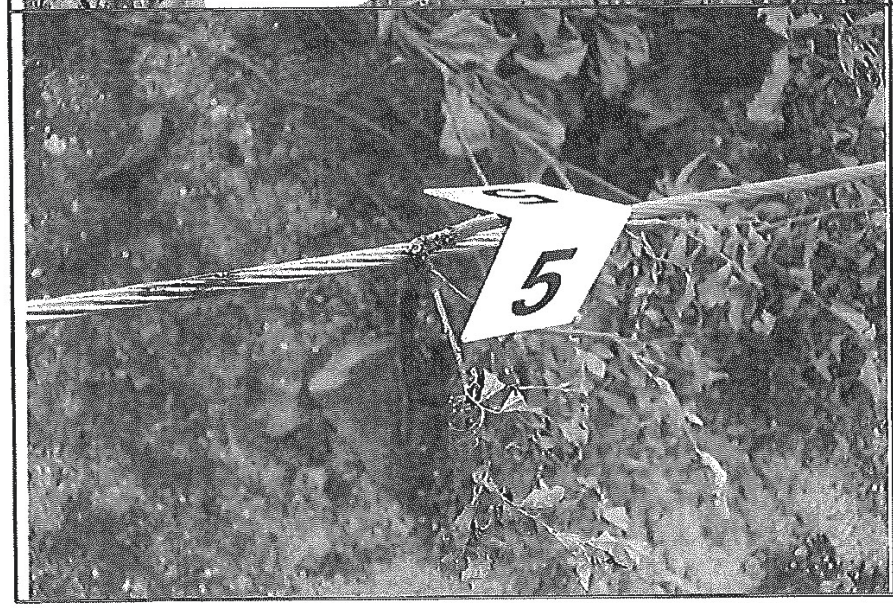
Photograph Number:
21 Electrical
Date:
9/12/20
Time:
1356
Photographer:
b6 & b7C
Subject:
Charred Conductor Struck Vegetation

United States Department of Agriculture
Forest Service

Photograph Exhibit 15

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
22 Elecrical
Date:
9/12/20
Time:
1358
Photographer:
b6 & b7C
Subject:
Charred Conductor Struck Vegetation



Photograph Number:

Date:
Time:
Photographer:

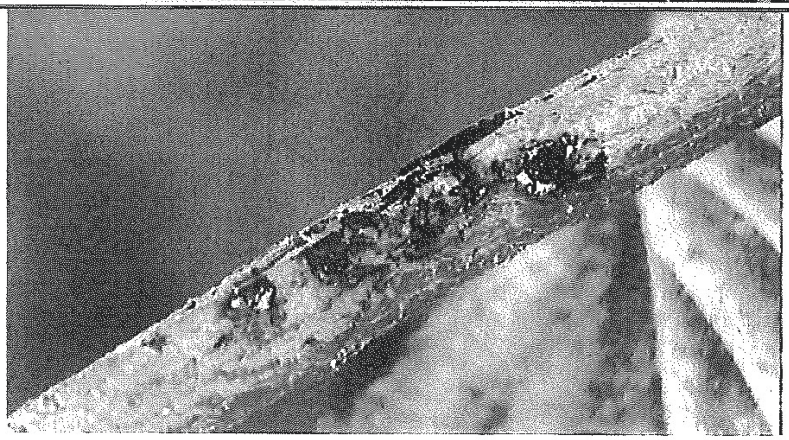
Subject:

United States Department of Agriculture
Forest Service

Photograph Exhibit 15

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
b6 & b7C 2020-09-18 13-32-59
Date:
9/18/20
Time:
1336
Photographer:
b6 & b7C
Subject:
Electrically Charred Conductor Struck Vegetation

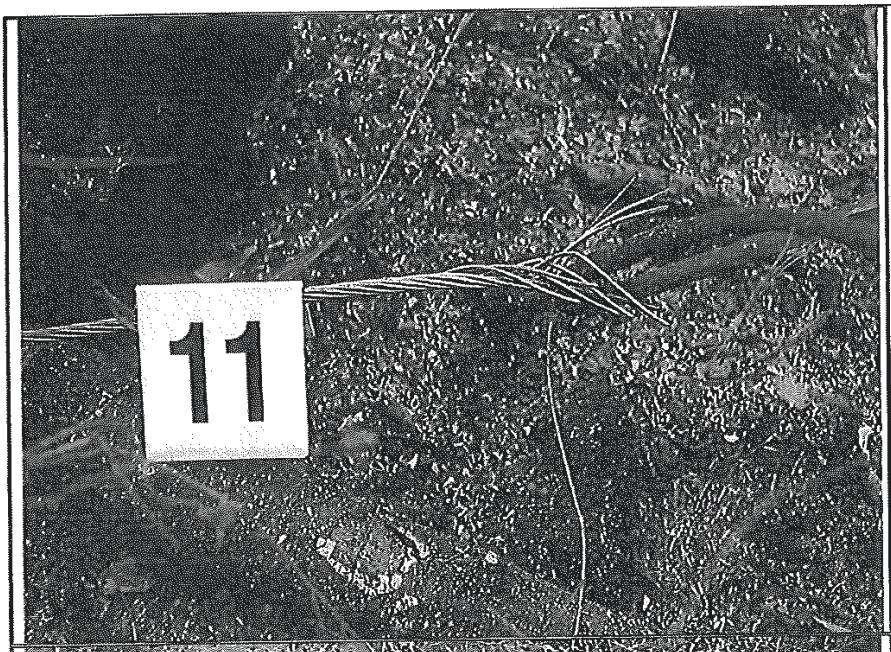


Photograph Number:
b6 & b7C 2020-09-18 13-32-59
Date:
9-18-20
Time:
1336
Photographer:
b6 & b7C
Subject:
Close Up of Electrically Charred Conductor Struck Vegetation

United States Department of Agriculture
Forest Service

Photograph Exhibit 16

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



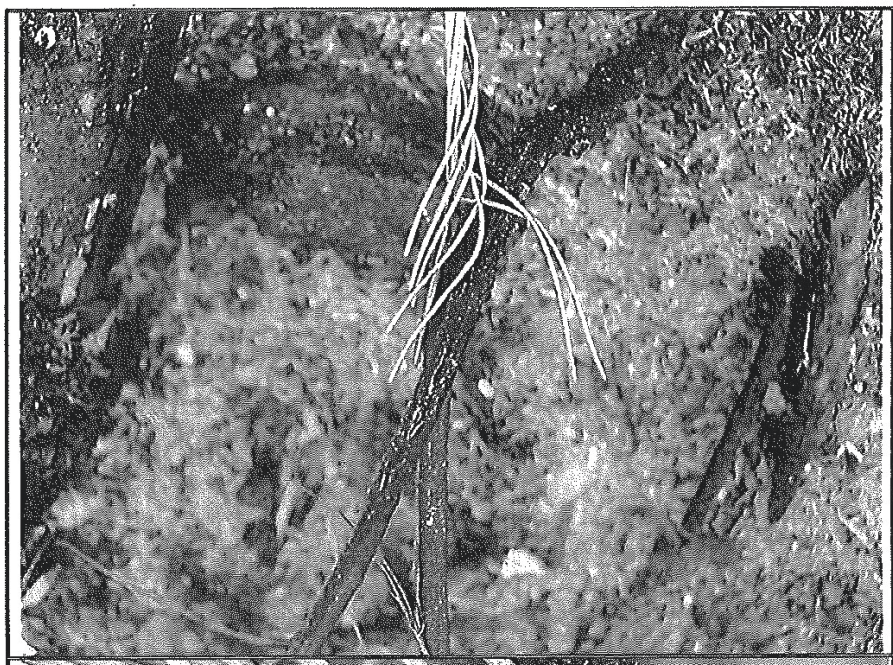
Photograph Number:
29 Electrical
Date:
9/12/20
Time:
1410
Photographer:
b6 & b7C
Subject:
South End of Severed West Conductor

Photograph Number:
b6 & b7C 2020-09-18 13-18-08
Date:
9/18/20
Time:
1321
Photographer:
b6 & b7C
Subject:
South End of Severed West Conductor

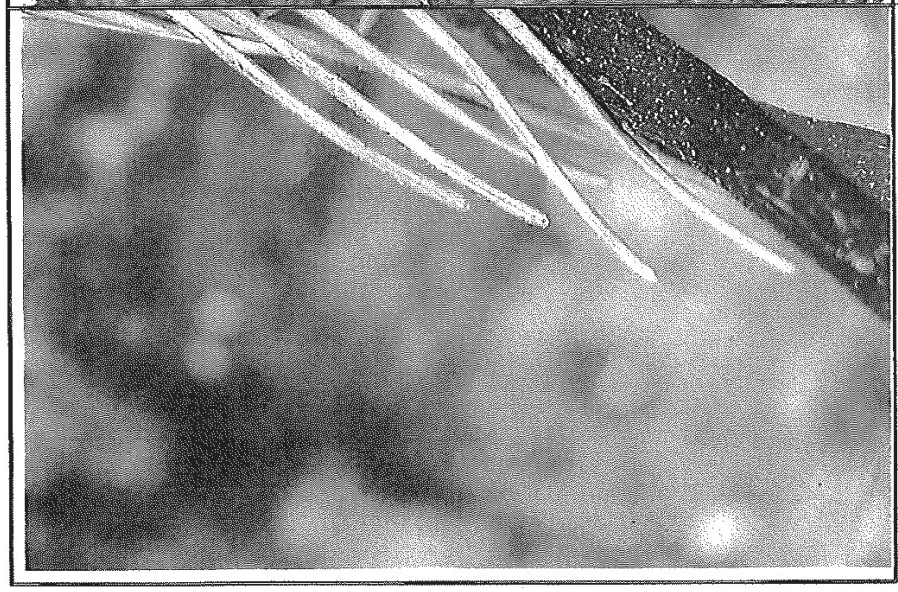
United States Department of Agriculture
Forest Service

Photograph Exhibit 16

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
b6 & b7C 2020-09-18 13-19-25
Date:
9/19/20
Time:
1322
Photographer:
b6 & b7C
Subject:
South end of West Conductor from above



Photograph Number:
b6 & b7C 2020-09-18 13-18-36
Date:
9/18/20
Time:
1322
Photographer:
b6 & b7C
Subject:
Close Up South End of West Conductor Ends

United States Department of Agriculture
Forest Service

Photograph Exhibit 17

Photograph Number:
b6 & b7C 2020-09-18 13-24-37
Date:
09/18/20
Time:
1327
Photographer:
b6 & b7C
Subject:
Heavily burned area at top end of White Fir tree

Photograph Number:
b6 & b7C 2020-09-18 13-37-24
Date:
9/18/20
Time:
1340
Photographer:
b6 & b7C
Subject:
Melted conductor segments in area of White Fir tree top

United States Department of Agriculture
Forest Service

Photograph Exhibit 17

Photograph Number:
[redacted]-2020-09-18 13-38-05
Date:
9/18/20
Time:
1341
Photographer:
[redacted]
Subject:
Melted conductor segments in area of White Fir tree top

Photograph Number:
[redacted]-2020-09-18 13-38-15
Date:
9/18/20
Time:
1341
Photographer:
[redacted]
Subject:
Close Up Melted Conductor Segments near top of White Fir tree

United States Department of Agriculture
Forest Service

Photograph Exhibit 18

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
b6 & b7C 2020-09-18 13-25-35
Date:
9/18/20
Time:
1328
Photographer:
b6 & b7C
Subject:
Tree resting on East Conductor post fire

Photograph Number:
b6 & b7C 2020-09-18 13-25-59
Date:
9/18/20
Time:
1329
Photographer:
b6 & b7C
Subject:
Close up of Contact Point Tree Resting on East Conductor

United States Department of Agriculture
Forest Service

Photograph Exhibit 19

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
28 Indicators & Fulgurite
Date:
9/12/20
Time:
1405
Photographer:
b6 & b7C
Subject:
Sap Like Substance on East Conductor above White Fir Tree

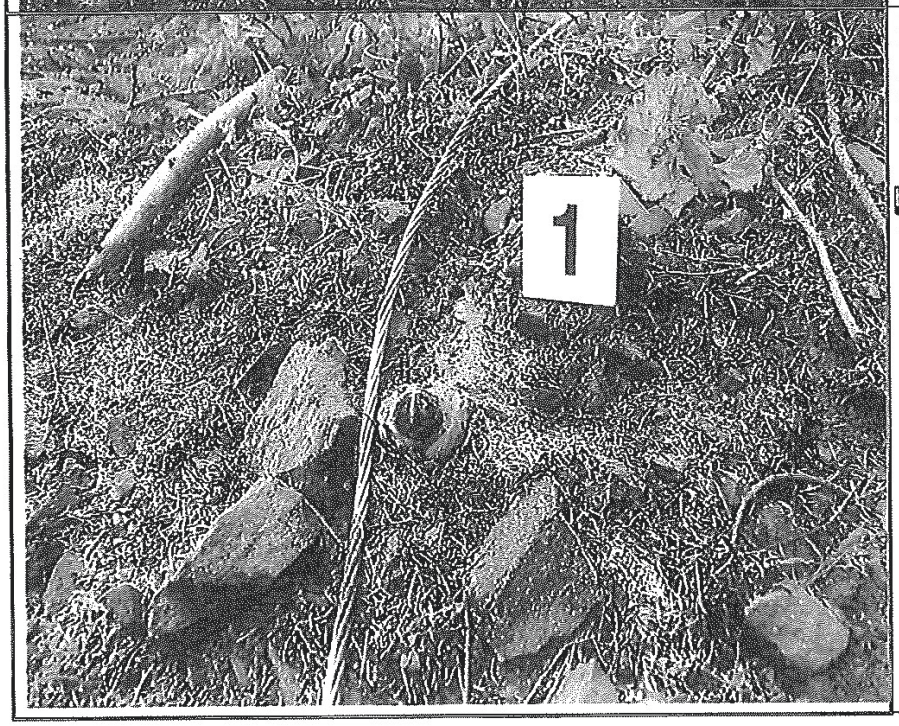
Photograph Number:
27 Indicators & Fulgurite
Date:
9/12/20
Time:
1405
Photographer:
b6 & b7C
Subject:
Debris on East Conductor Above White Fir Tree

United States Department of Agriculture
Forest Service

Photograph Exhibit 20

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
6 Indicators & Fulgurite
Date:
9/12/2020
Time:
1314
Photographer:
b6 & b7C
Subject:
West Conductor at Specific Origin

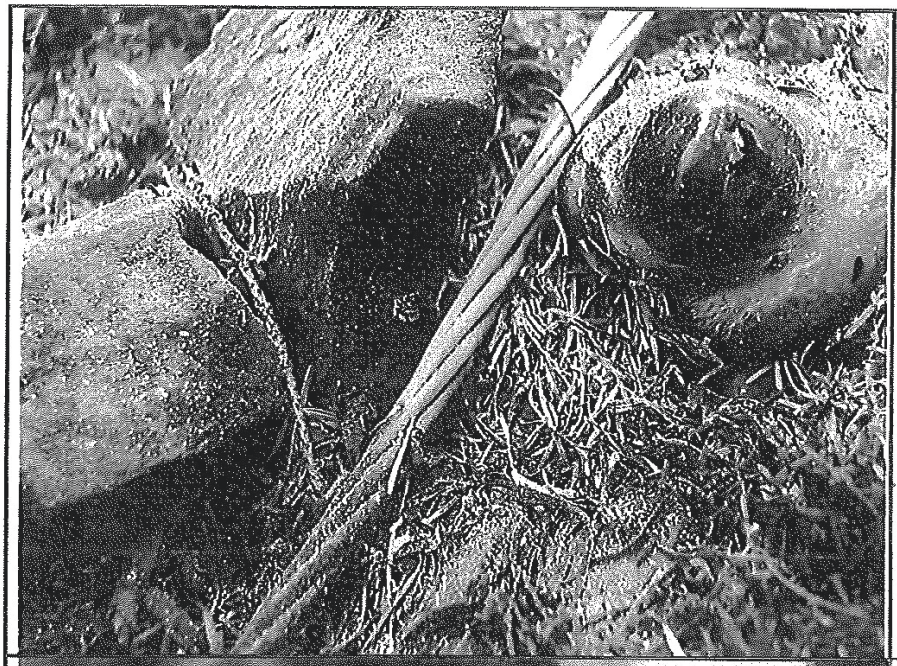


Photograph Number:
7 Indicators & Fulgurite
Date:
9/12/20
Time:
1315
Photographer:
b6 & b7C
Subject:
Fulgurite Located Within Specific Origin

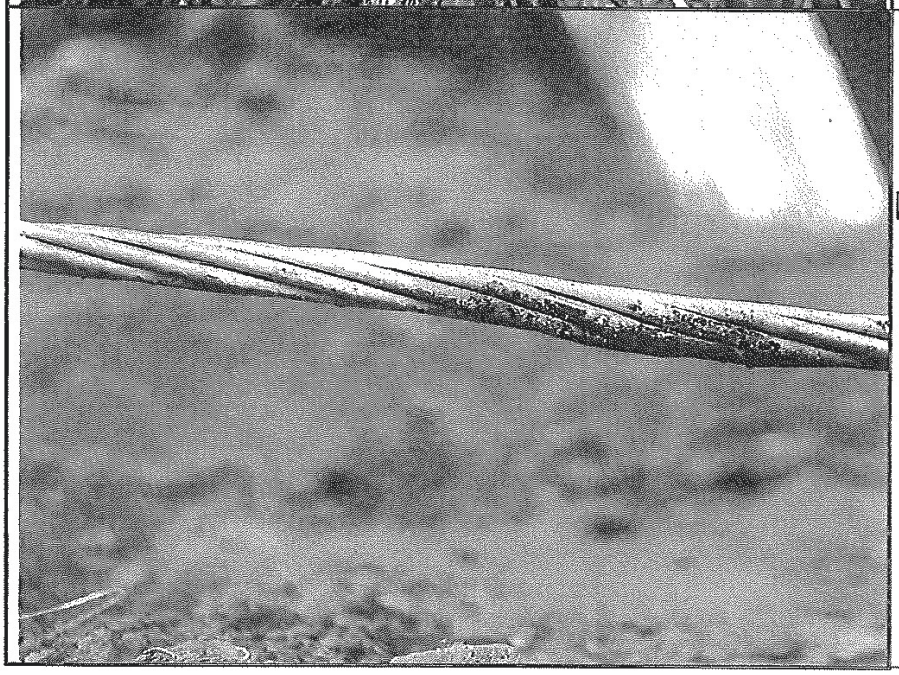
United States Department of Agriculture
Forest Service

Photograph Exhibit 20

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
8 Indicators & Fulgurite
Date:
9/12/18
Time:
1316
Photographer:
b6 & b7C
Subject:
Arcing on West Conductor at Fulgurite



Photograph Number:
35 Indicators & Fulgurite
Date:
9/12/20
Time:
1556
Photographer:
b6 & b7C
Subject:
Arc Erosion on Underside of West Conductor located after fulgurite excavation.

United States Department of Agriculture
Forest Service

Photograph Exhibit 20

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
31 Indicators & Fulgurite
Date:
9/12/20
Time:
1446
Photographer:
b6 & b7C
Subject:
Partially Excavated Parallel Portion of Fulgurite

Photograph Number:
34
Date:
9/12/20
Time:
1517
Photographer:
b6 & b7C
Subject:
Further Excavation of Fulgurite to point where Fulgurite Turns Vertical

United States Department of Agriculture
Forest Service

Photograph Exhibit 20

Case Name	Case/File Number
Slater Fire	20-05-MBBK0W1
Case Type	**Date of Incident**
Wildland Fire	9/8/20

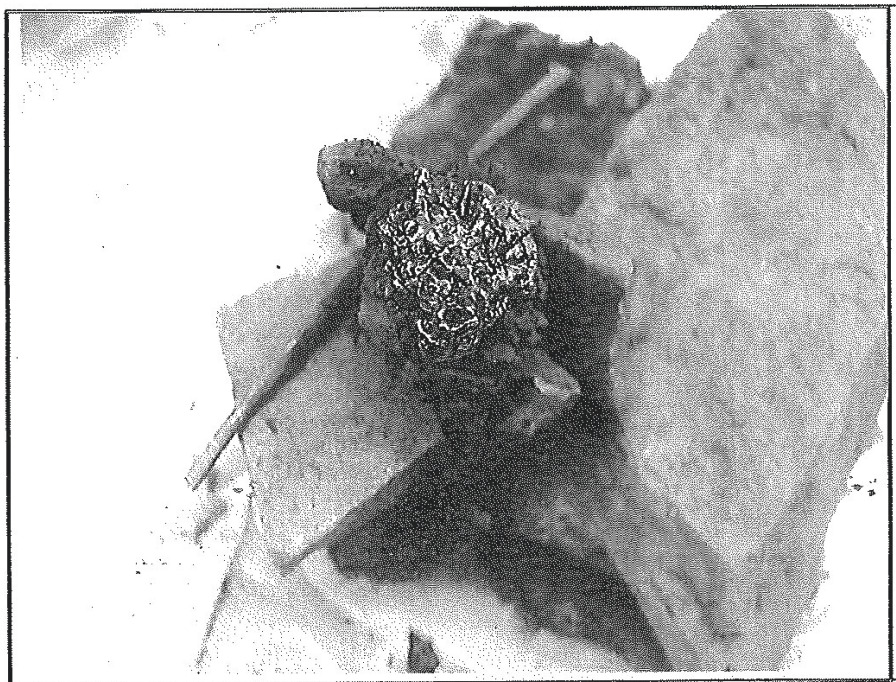
Photograph Number:
39 Indicators and Fulgurites
Date:
9/13/20
Time:
1330
Photographer:
b6 & b7C
Subject:
Vertical Portion of Fulgurite Terminating on Charred Tree Root with Buried Copper Conductor

Photograph Number:
38 Indicators & Fulgurites
Date:
9/13/20
Time:
1337
Photographer:
b6 & b7C
Subject:
Hallow Center of Vertical Portion of Fulgurite with Fused Copper Conductor

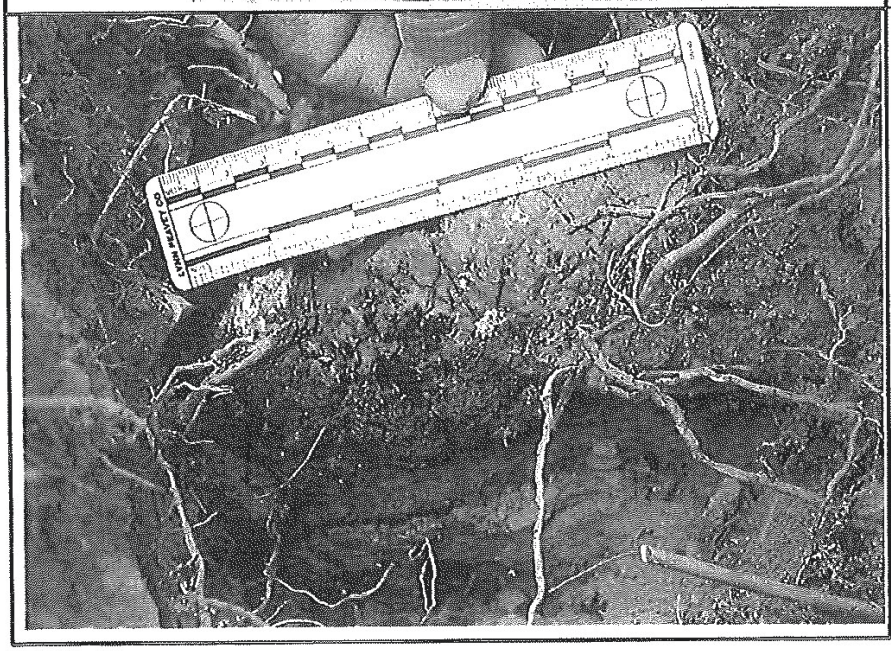
United States Department of Agriculture
Forest Service

Photograph Exhibit 20

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
40 Indicators & Fulgurite
Date:
9/13/20
Time:
1344
Photographer:
b6 & b7C
Subject:
End of Vertical Portion of Fulgurite that Contacted Charred Tree Root

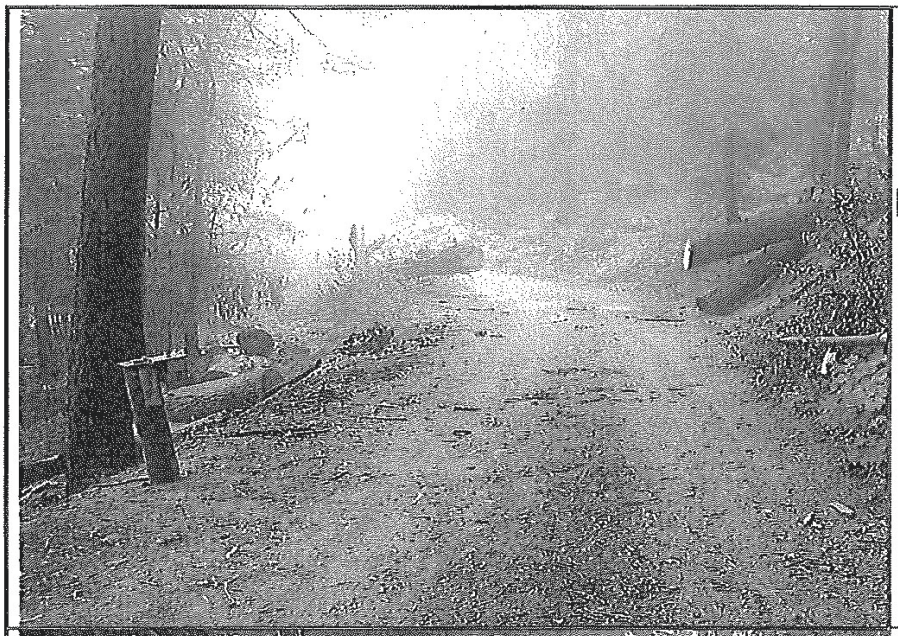


Photograph Number:
42 Indicators & Fulgurite
Date:
9/13/20
Time:
1347
Photographer:
b6 & b7C
Subject:
Point Where Fulgurite Contacted Tree Root

United States Department of Agriculture
Forest Service

Photograph Exhibit 21

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
52 Tree
Date:
9/12/20
Time:
1043
Photographer:
b6 & b7C
Subject:
Lookout Gate and White Fir Tree Looking South

Photograph Number:
14 Tree
Date:
9/12/20
Time:
0951
Photographer:
b6 & b7C
Subject:
White Fir Tree Looking North

United States Department of Agriculture
Forest Service

Photograph Exhibit 21

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

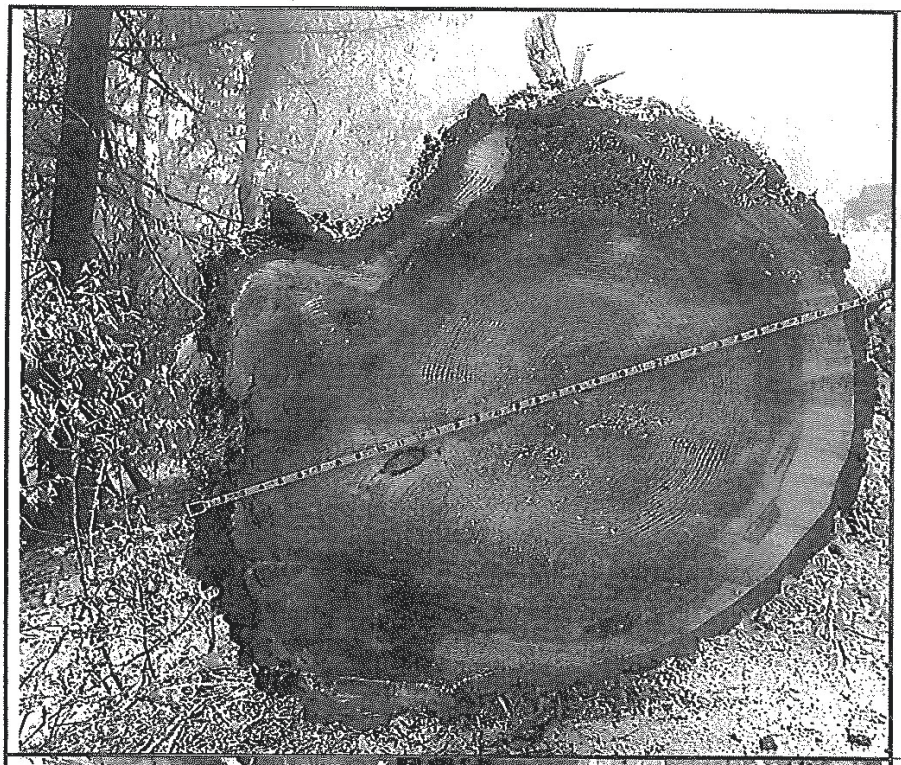
Photograph Number:
15 Tree
Date:
9/12/20
Time:
0952
Photographer:
b6 & b7C
Subject:
Base of White Fir Tree from South Side

Photograph Number:
36 Tree
Date:
9/12/20
Time:
1026
Photographer:
b6 & b7C
Subject:
Base of White Fire Tree from North Side

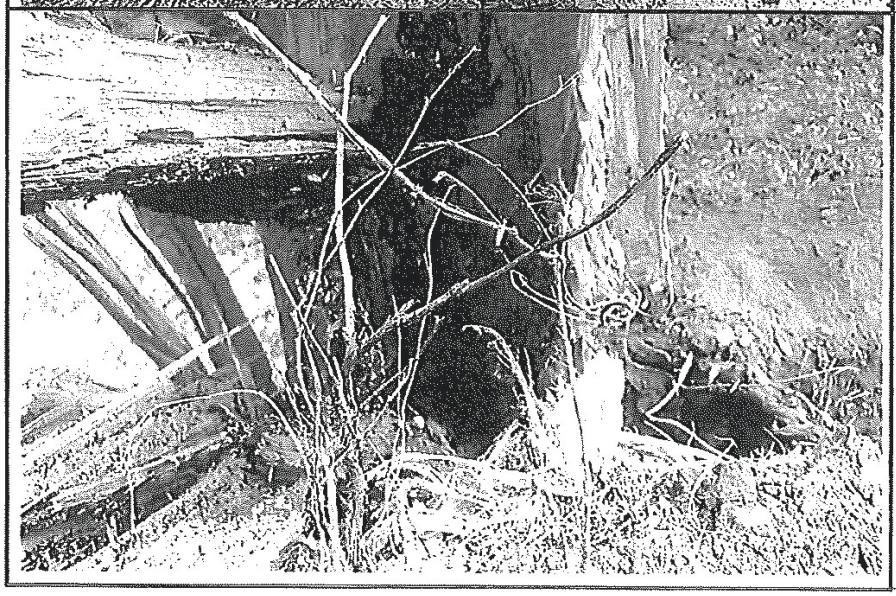
United States Department of Agriculture
Forest Service

Photograph Exhibit 21

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
25 Tree
Date:
9/12/20
Time:
1017
Photographer:
b6 & b7C
Subject:
Diameter of White Fir Tree

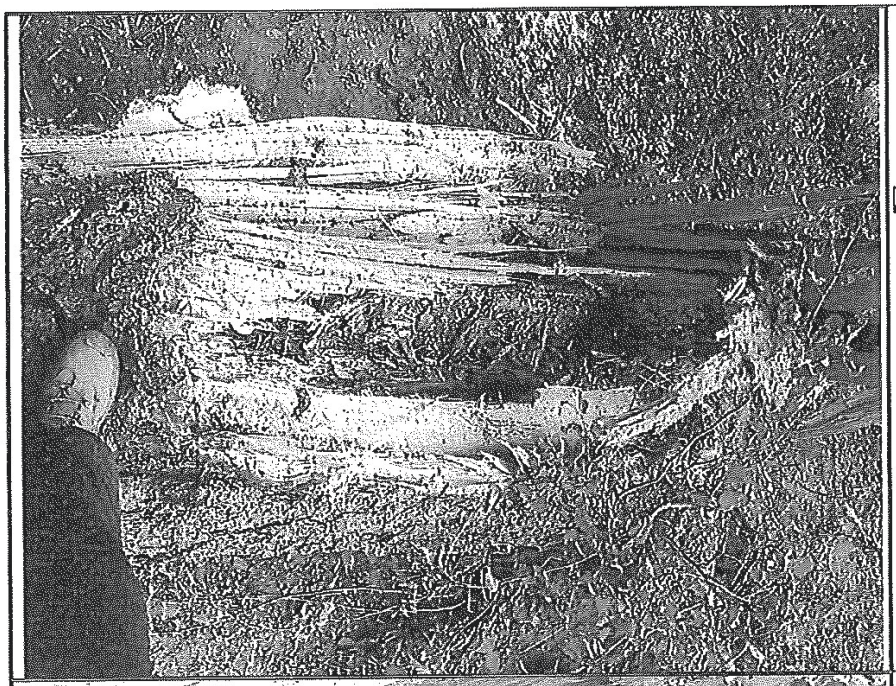


Photograph Number:
23 Tree
Date:
9/12/20
Time:
1014
Photographer:
b6 & b7C
Subject:
Fracture at Ground Level of White Fir Tree

United States Department of Agriculture
Forest Service

Photograph Exhibit 21

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20



Photograph Number:
30
Date:
9/12/20
Time:
1013
Photographer:
b6 & b7C
Subject:
Interior of White Fir Tree Fracture from Above

Photograph Number:
32
Date:
9/12/20
Time:
1024
Photographer:
b6 & b7C
Subject:
Wet, Rotted, White Fir Tree Interior

United States Department of Agriculture
Forest Service

Photograph Exhibit 21

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Photograph Number:
54 Tree
Date:
9/12/20
Time:
1047
Photographer:
b6 & b7C
Subject:
Live Green Needles on White Fir Tree

Photograph Number:
60 Tree
Date:
9/12/20
Time:
1056
Photographer:
b6 & b7C
Subject:
Uppermost Portion of White Fir Tree

United States Department of Agriculture
Forest Service

Photograph Exhibit 22

Case Name	Case/File Number
Slater Fire	20-05-MBBK0WI
Case Type	**Date of Incident**
Wildland Fire	9/8/20

Slater Fire Tree Failure Findings.
b6 & b7C

Subject: Findings of Forest Pathologist b6 & b7C upon examination of White Fir Tree

On September 15th, 2020 b6 & b7C and I were escorted to the site of the tree failure that struck a powerline and presumably initiated the Slater Fire. Special Agent b6 & b7C escorted us to the site near the Slater Butte fire lookout on the Klamath National Forest. Two law enforcement agents accompanied us. We had been contacted previously by agent b6 & b7C who requested our assistance in determining the cause of the tree failure.

The tree that failed was a white fir (*Abies concolor*) with a diameter of approximately 30.5 inches at 7.8 feet from the ground. It was not possible to take a diameter at breast height measurement because that portion of the bole had failed and was split into two sections, one suspended over the road, one remaining anchored in the ground (see Image below).

Findings:

-Heart-rot in the basal portion of the bole extending from below the ground in the roots, extending upward to approximately 6 feet.
-At the ground level the heartwood was decayed, a white-rot was present in the remaining heartwood adjacent to the sapwood.

-Rhizomorphs (melanized mycelial cords) were present on the surface of the decaying wood, and pseudosclerotial plates (melanized mycelial plates) were present in the decaying wood, both of which are signs that indicate infection by *Armillaria* species.

-the remaining intact wood surrounding the decay column was approximately 3.7 - 4 inches at the plane of failure

-There were no external indications of the internal decay present in this tree.