Information Relating to the May 15th Work Session on SB 926A

Several topics came up during the May 15th work session with legislative counsel. Here's more info about the status of the 2020 Labor Day Fires cases, interest, insurance, dividends, and taxes that might be helpful to members of the Committee.

1) <u>What's Happening Today in the Fires Case?</u>

There are a few thousand people in the case against PacifiCorp for the 2020 Labor Day Fires. The judge is letting about 10 people go to trial each month. At the current pace, it will take more than two decades for everyone to go to trial.

PacifiCorp's lawyers told the judge at a hearing on May 9th that it would violate PacifiCorp's due process rights to increase the number of trials. PacifiCorp has complained many times about its "due process" rights. To give that some perspective, in the nearly five years since PacifiCorp started the fires, several dozen victims have died without getting to court. Many others are seniors or have health issues that make it unlikely they will get to court in their lifetime. Many more are living in poverty, have no insurance, and have unstable housing.

PacifiCorp hasn't paid any of the people who've gone to trial against it. Instead, PacifiCorp is appealing. The appeals delay the date it has to pay. Each appeal will take somewhere between 2 and 6 years to get through the appellate courts. Nothing in SB 926A prevents PacifiCorp from continuing to appeal.

2) <u>How Does Interest Work in Lawsuits?</u>

The thousands of people who are waiting for trials don't get interest on what they're owed until they have their own trial and a judgment. Because there's no interest running for more than 95% of the fire victims, this is a big incentive for PacifiCorp to delay. It doesn't cost them anything to wait people out and see if they give up or die.

Under Oregon law, it's common for people to get interest before they go to trial—what's called prejudgment interest. Prejudgment interest isn't limited to breach of contract cases or cases about a debt. It's also available in tort cases, including in cases about negligence. The test for whether a person can recover prejudgment interest is whether the amount owed to them can be calculated.

In the fire case, we can calculate what a person's home and possessions that were destroyed were worth. We can also calculate what they spent on things like living in motels or buying new clothes. They should be allowed to get interest on all this. Each person who goes to trial has to prove what all this cost. They have to spend thousands of dollars to hire professional appraisers to meet their burden of proof. The cost of paying for appraisals isn't one that fire victims can get back from PacifiCorp. Prejudgment interest should be something that's owed to fire victims.

There's also what's called post-judgment interest. The law says that once a person goes to trial and has a judgment, interest starts running on the judgment at 9%. This applies to all kinds of cases, including negligence, trespass, and nuisance cases like the fires case.

However, the problem in the fires case is that fewer than 5% of the fire victims have gone to trial. That means more than 95% don't have any interest running on what they're owed.

3) **Insurance, Subrogation, and Offset**

After the fires, most people who had insurance made claims to their insurance company. A significant percentage of fire victims had no insurance and most others were underinsured, often by large amounts. The total amount the insurance companies paid fire victims appears to be at least in the high hundreds of millions of dollars, if not in the billions.

Like in most man-made disasters, the insurance companies wanted PacifiCorp to repay them for the payments that the insurance companies made to fire victims. So, the insurance companies filed what are called subrogation lawsuits against PacifiCorp.

PacifiCorp settled all those lawsuits for $55 million. Berkshire Hathaway, which owns PacifiCorp, also owns several insurance and reinsurance businesses. That might explain why the settlement was so low.

When a fire victim who had insurance goes to trial and is awarded money, PacifiCorp is subtracting the entire amount that the fire victim received from insurance from the amount PacifiCorp owes the fire victim. This is unfair for several reasons.

First, it's a disincentive from having insurance. A person without insurance would get to keep more of what the jury awarded than a person with insurance. It's incorrect to assume a person without insurance and a person with insurance will end up with the same amount at the end of the day. You would need to account for how insurance affects taxes, interest, and what it cost each person to rebuild. You also need to account for the fact that the insurance company might try to get back from the fire victim what it paid them.

Second, fire victims might have to pay federal income taxes on at least some of the money they receive. They should get to keep every dollar PacifiCorp owes to help offset what it costs to go to trial against PacifiCorp and to pay taxes.

Third, PacifiCorp only paid $55 million to the insurance companies to settle hundreds of millions or billions of dollars in insurance claims. PacifiCorp, however, is getting to subtract much more than $55 million from what juries say it owes fire victims. PacifiCorp is getting to subtract the entire amount insurance companies paid fire victims. In other words, PacifiCorp at the end of the day is paying much less than the cost of the damage it caused. This is not how it ordinarily works under Oregon law.

Fourth, ordinarily, a person can collect money from the insurance company and from the tortfeasor. If the person's insurance company wants to come after the person to get back what the insurance company paid them, the insurance company can try to do that. If the insurance companies do that in the fires case, there could be people who end up keeping nothing of what PacifiCorp owes them, after the insurance company takes back what it paid the fire victims.

Fifth, Oregon law limits the economic damages that a person can recover for damage to their home in a fire case. The person gets *the lesser* of what it costs to restore the home *or* the difference in fair market value immediately before and after the fire. Most of the time, it costs much more to rebuild the home, but the person gets the lesser amount—the difference in fair market value. This means that the person can't afford to rebuild. It also means that when PacifiCorp subtracts insurance payments from what it owes a fire victim, the subtracted amount can be more than the maximum amount that the law allows a jury to award a fire victim.

Sixth, sometimes people have insurance for lost job income or lost business income. Even if they can't recover from PacifiCorp for these losses, PacifiCorp still is subtracting these insurance payments from what it owes fire victims.

4) <u>Dividends--How Berkshire Hathaway Makes Money from PacifiCorp</u>

The longer the cases go on, the more risk to fire victims that Berkshire Hathaway takes money out of PacifiCorp by paying itself dividends or using other financial tools to lower PacifiCorp's value. PacifiCorp has cash and other assets today to pay fire victims. It shouldn't get away with not paying fire victims when the cases are over by taking money out of PacifiCorp now, while victims wait. This is why it's important to keep PacifiCorp capitalized.

Berkshire Hathaway owns PacifiCorp. It knew there were risks to its investment when it bought PacifiCorp. It also knew that instead of investing in PacifiCorp to make it safer, Berkshire Hathaway chose to pay itself billions of dollars from PacifiCorp.

Also, PacifiCorp has threatened bankruptcy. That threat appears to be made up, but PacifiCorp has used it. For example, PacifiCorp told a jury that a big award could bankrupt it.

Credible or not, fire victims take the threat seriously. PacifiCorp should be accountable for making it. Accountability means not allowing Berkshire Hathaway to draw down PacifiCorp's value by paying dividends and making PacifiCorp insolvent or even bankrupting it.

Importantly, PacifiCorp isn't owned by individual investors. It's owned by Berkshire Hathaway. So, when PacifiCorp pays dividends, they go to Berkshire Hathaway, not to mom and pop investors.

5) **Taxes**

Whether a fire victim will owe taxes on what they receive, or on some of it, is complicated. Historically, people have not had to pay taxes on personal injury cases. In the fire case though, victims are not allowed to tell the jury about getting injured. There have been people who were burned, but the jury wasn't allowed to hear about it. It's unclear if the IRS would say this means these aren't personal injury cases.

The tax question is even more complicated because there's a federal law that says some disaster victims don't owe federal income taxes on what they receive. This law expires at the end of 2025.

There's also a state law in Oregon that should mean most fire victims won't have to pay state income taxes on the amount they recover. That state law doesn't have the same expiration problem as the federal law.

Right now, it's safest for every 2020 Labor Day Fire victim to assume that they will owe federal income tax on what they receive.