Legally Relevant

by Gary Hanson, JD
Stumbo, Hanson & Hendricks, LLP

Damage to pipelines located in easements (Part I)

Almost all rural water districts and cities in Kansas have, at one time or another, dealt with the problem of contractors hitting water lines. For some districts, line damage caused by contractors has become a recurring issue if not a way of life.

Rural water districts usually locate their lines in easements located on privately owned land, and most of those easements are on forms provided by the USDA (or similar form). Most cities' water and wastewater lines are located on land owned by the city (although just to confuse matters, these city owned lands are often called "utility easements"). Cities may have some lines located on easements similar to water districts, usually limited to lines that access facilities located outside the city like wells or wastewater treatment plants. The rules concerning rights and liabilities in easements are considerably different from those of city-owned streets and utility easements. This article will be devoted to lines located in easements, with the next installment of this series devoted to those on city-owned utility easements and streets.

It is not unusual for district boards of directors to take a position regarding damage to water lines that goes something like this: "We have a right-of-way easement that allows us to have a water line in that easement. Other utilities and companies need to stay out of that easement or, if they do go into our easement, they need to keep from hitting our line. If you do go into our easement and hit our line, you're liable for any damages." When somebody does damage a district line, the district then calls its lawyer. When that happens, what is the lawyer likely to tell the district? In this article I'll address that question.

Some issues that arise when a water line is damaged include the following:

1) Do rural water districts have the right to keep others out of the area covered by their easements?
2) Who is liable for the damages caused to the district's line?
3) Does it make a difference whether the district has voluntarily joined the state's "One Call" system?
4) If the district hasn't joined the system, does it matter whether the district has marked its lines when requested to do so by the contractor?

Let's take a look at what the law provides regarding these issues.

Exclusive and non-exclusive easements

Under Kansas law, when a landowner grants an easement to a rural water district or other utility, the easement does not give the utility the exclusive right to use area covered by the easement unless the easement specifically states that the easement is exclusive. If the easement does not say that it is exclusive, the landowner is free to grant other persons easements in the same area. In such cases, though, the landowner and any other persons obtaining a later easement from the landowner, must not unreasonably interfere with the original utility's use of its easement. What constitutes unreasonable interference is determined by courts on a case-by-case basis.

As a practical matter, very few RWD easements are exclusive. Thus, as to most RWD easements, other utilities are generally free to also obtain easements in the same areas as RWD pipelines and use those easements for their own utilities – so long as they don't unreasonably interfere with the RWD pipelines. Likewise, landowners in such cases are generally allowed to use the surface area covered by an easement so long as they don't unreasonably interfere with the easement. In a very recent case, the Kansas Court of Appeals held that building a garage that was 41 inches from a natural gas pipeline, did not constitute unreasonable interference under the circumstances. In an earlier case, the Court found that placing hog buildings on a gas pipeline did materially interfere and ordered their removal.

The Sedgwick County Rural Water District No. 3 water line, marked with blue flags, lies between power poles and a private fence. A communications line either parallels or crosses the water line at the light green can in the center of the picture. The district's water line took numerous hits during a project to relocate power and telephone utility for road widening. Because of legal considerations the district was not able to move the line before other utilities started construction.

In 2006 a two-lane to four-lane road project south of Wichita caused the city utility easement to shift on top of the private easement previously secured by the water district. The district had to abandon the line and acquire new easements further away from the road and install a new line. Wichita eventually paid for the district's costs from funds in the overall project budget.
(See "East-West road goes south" in the March 2006 Kansas Lifeline.

Given the above, it's pretty clear that unless its easements are exclusive, RWDs must live with the fact that other utilities will likely have the right to construct and operate other lines and facilities near RWD lines. But what if one of those utilities, or a contractor hired by one of those utilities, damages a district pipeline? Who is responsible for the resulting damages?

"One Call" and damage liability issues

In Kansas, rural water districts and other water and wastewater facilities are not required to join the state's One Call system. There was a recent attempt by some Kansas legislators to require water suppliers to become a part of the system, but the bill, which was opposed by KRWA, among others,

failed to pass. If the bill had passed, contractors' liability for damaging water lines would have been reduced in some instances and this article would likely have become obsolete.

Since the bill didn't pass, though, where does that leave rural water districts? Some districts have voluntarily joined the Kansas "One Call" system even though they aren't required to do so. Such districts receive calls from the state One Call center and mark their lines in accordance with the One Call statutes. As currently written, those statutes limit contractors' liability in certain instances, for damages caused to pipelines that are subject to the One Call statutes. But water lines and wastewater utilities aren't subject to those statutes. As a result, the liability of contractors isn't limited if they damage water lines, even if the owner of the lines has voluntarily joined the One Call system.

So in Kansas, there aren't any statutes that change the general rules relating to liability when someone damages an underground pipeline that is located on an easement. But what are those general rules that haven't been changed by the statutes? Reported court cases in Kansas indicate that a negligence standard will determine who will be liable when someone damages an underground pipeline. Courts have defined negligence as the lack of "ordinary care." Negligence exists if a person does something an ordinary person would not do or if a person does not do something an ordinary person would do under the existing circumstances. If a lawsuit is filed, the judge, (or the jury, if the plaintiff asks for a jury trial), will determine which parties were negligent. The judge or jury will also determine what percentage of fault is attributable to each party.

Let's take a look at how these rules might be applied by a judge or jury in a pipeline damage case. Suppose that a contractor is hired to install a telecommunications cable in a right-of-way easement granted to a cable television company. A rural water district already has a water line about 10 feet from the location where the contractor wants to lay the cable. The contractor calls the One Call center and informs the center of its intent to lay the cable. Because the district is not a member of One Call, however, the district receives no notice that the contractor has called the One Call center. Thus, the contractor receives no notice of the district's line. Even though the contractor knows there is a water line in the area, it fails to call the district, proceeds to excavate and hits the district's line.

Is the contractor negligent under these facts? Again, a judge or jury would be left to decide whether the contractor failed to act with ordinary care. The district will argue that because the contractor knew there was a water line in the area, he did not use ordinary care, (and was therefore negligent), because he didn't call the district in an attempt to locate the line. The more "ordinary care" a contractor takes, the less likely it is that he will be found negligent. Acts evidencing such care might include calling the district to determine the line location, reviewing district drawings regarding line location, asking the district to flag its lines, etc.

Assume that the district believes the contractor was negligent in damaging the district's line and decides to sue the contractor to recover damages, even though there will be considerable expense involved in doing so. If the district proves in court that the contractor was negligent, will the district be able to recover damages from the contractor? The answer depends on whether the district was also negligent. Kansas statutes provide that one cannot recover damages against another for negligence if he himself was 50% or more at fault in causing the damages. The statutes also provide that even if the party filing the lawsuit was less than 50% at fault, his damages will be reduced by the percentage he was at fault.

Let's take a look at how this might play out in a lawsuit by a district against a contractor in a pipeline damage case. Assume that the total damages incurred by the district when a contractor hit the district's line is $10,000. If a judge or jury finds that the contractor was 60% at fault and the district was 40% at fault, the district can still recover damages because it was less than 50% at fault. The district will not be awarded the full $10,000 in damages, however, because it was 40% at fault. Its damages will be reduced by the percentage that it was at fault. Here, that

reduction would be $4,000 (that is, 40% x $10,000). Thus, the district would be awarded $6,000.

In the above example, we assumed that the district was 40% at fault in causing damage to its own line. This means that in addition to the contractor, the district also failed to use ordinary care and was negligent. What kinds of actions by the district could be deemed to constitute a lack of ordinary care? If the contractor asked the district to mark its lines and the district failed to do so, a judge or jury might find that such failure is a lack of ordinary care. Likewise, if the district incorrectly flagged the location of its lines, that could be deemed a lack of ordinary care. In other words, for RWDs to say that "we have an easement so stay out," just isn't enough.

One question that rural water districts may ask is whether they can charge a "locating fee" to those asking the utility to locate lines. Under the One Call system, the answer is clearly "no" (in fact, the utility pays a small fee to One Call whenever One Call requests a locate). For those that are not part of One Call, there is nothing to indicate that a reasonable fee can not be charged. But, if the contractor refuses to pay and hits the line, you can bet he will raise the reasonableness of charging that fee as a defense to the district's claim for damages. And do you think word of such fees being charged by a utility might be used by the legislature as further reason why municipalities need to be made to join the One Call system?

Conclusion

Like it or not, RWDs must live with the fact that other utilities are usually allowed to have lines or other facilities near RWD water lines. That does not mean, however, that the other utilities and their contractors can unreasonably interfere with or negligently damage district lines without being responsible under the law. If others negligently damage a district's lines and the district files suit to recover damages, its recovery may be limited if it did not use ordinary care to prevent the damage.