Legally Relevant

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Damage to pipelines located in easements

(Part II)

In the July issue of *The Kansas Lifeline*, we covered the rules that generally apply when damage is caused to a waterline. Most of that discussion concerned the case in which a rural water district owns a waterline located in private easement. The same rules apply to other public utilities, like public wholesale water supply districts (PWWSDs), sewer districts, and occasionally cities, where the city has water or wastewater facilities located in private easements.

What we did not cover in the last installment concerns how all of this works inside most cities, where the water and waste water utilities are located in city owned rights-of-way. This is a very different situation, based on a different type of interest in land that involves a whole added set of considerations from those discussed in the last issue.

More properly, this article might be better titled "Cities Rights-of-Way Management". The reason is that for cities, the topic is much broader than simply "damaged pipelines," and all of those other considerations are so intertwined as to make it difficult to discuss one without the other.

The purpose of this article is to explain legal issues, and not confuse the reader, so let us start with some basic facts and differences between the way cities typically do business compared with rural water districts and other types of water and wastewater utilities.

First, and most importantly, is the relationship between the city and the land where its pipes are located. As a general rule, city water and wastewater facilities are located in "dedicated" streets, rights-of-way or utility easements. These dedications occurred with the recording of the original plat for the town, and were added over time as additional land was platted and added to the city.

Rights-of-way are non-exclusive

Unlike rural water districts and most other utilities which have obtained some limited right in land by a written easement granted by the landowner allowing the utility to install and use pipes and other facilities located in the easement, a city actually owns those dedicated streets, rights-of-way and utility easements. Legal proof of the city's rights to this land is not found in the form of a series of written easements on file at the Register of Deeds' Office, but from recorded plats that consist of drawings that depict the land platted along with notes explaining their intended use.

With that background out of the way, some similarities among cities, rural water districts and other water and wastewater facilities emerge. Just as rural water districts waterline easements

are generally non-exclusive, meaning that the landowner can also grant easements to other utilities over the same land as the rural water district easement, cities' rights-of-way and utility easements are non-exclusive to city water and wastewater pipelines. Other utilities, such as gas, electricity, cable television and others also use the same land for their lines and facilities. This means that cities face the same conflicts that rural water districts do concerning potential for damage to their water and wastewater pipelines by other utilities using the same land for their facilities. In fact, the conflict is often greater in cities because there are more utilities trying to use less land.

The fact of the matter is that for cities, the ability to manage and control the use of city-owned rights-of-way has become far more complicated in the past several years due to the surge in construction of new telecommunications facilities and in federal and state laws intended to regulate and protect those industries. In particular, cities now find themselves not just protecting their pipelines from damage but developing an entire "rights-of-way management" plan designed to regulate excavators' use of city streets, rights-of-way and utility easements in accordance with the federal Telecommunications Act of 1996 and Kansas statutes, K.S.A. 17-1902. Examples include the right to require applications to excavate, charge reasonable fees for their administration and impose reasonable competitively neutral regulations for their use. This article is not about telecommunications, and the details of these state and federal laws are too complicated to go into in any depth here anyway, but as a practical matter what has happened is that many cities have adopted plans for management of their rights-of-way that apply not just to the telecom industry but to excavators generally. Suffice it to say that as a result of these regulations, the manner in which cities manage their rights-of-way and as a result, protect their facilities against potential for damage, is much more complex than anything that rural water districts or other utilities contend with in dealing with their own pipelines and easements.

The photo shows a telecom can in the easement mix. Also located in this stretch of south Wichita easement, besides the rural water line, are power lines, a gas line, both telephone and cable television lines. All these associated utilities jockeying for the same space can cause a real headache.

What constitutes "ordinary care?"

With all of this as background, and despite all of the complexity cities face in regulating use of their rights-of way, the rules that govern liability for damage to cities' pipelines caused by other excavators are not all that different than what was discussed in the last issue involving rural water districts. Like rural water districts, Kansas cities (so far) have not been made to participate in the state's One Call system for their water and wastewater systems. Although cities can participate voluntarily in the system, if they do not they will not receive notification of an excavator's intent to excavate within the city's right-of-way and it is up to the excavator to make separate contact with the city to advise of its plans and arrange for water and wastewater facility locates. The One Call rules, limiting excavators' liability for damage to facilities, do not apply.

As discussed in the last issue, liability for damage to city pipelines is going to be determined by the "ordinary care" standard under the Kansas Comparative Fault Law. That is, if the excavator was more than 50% at fault in causing the damage it will be liable for payment of the damage in an amount equal to the percentage of fault attributed to it. As with rural water districts, the city must exercise ordinary care in locating its facilities and protecting them against damage, and its failure to do so may result in it having no basis for payment from the excavator in the case of damage. At this point there is no defined standard as to what constitutes "ordinary care", but that determination is made on a case-by-case basis under all of the circumstances. Most importantly, just like the rural water districts, there is no absolute liability on the part of an excavator for damage to a city's underground facilities. The city must take reasonable measures to protect those facilities, including locating those facilities to a reasonable degree of accuracy, to be assured that it will be entitled to payment for any damage caused to those facilities by another excavator.

Of course, there are situations where cities have pipelines in private easements very similar to those commonplace with rural water districts. For example, many cities have water supplies located outside the city, and frequently the water transmission lines connecting those supplies to the city are located in private easements that look very much like the easements used by rural water districts. In those instances, the rules governing the use of those easements will be essentially identical to those discussed in the last issue. There are also areas within some cities where the city owned pipelines are located not in dedicated rights-of-way or utility easements, but private easements, in which case those same private easement rules will apply. There are also Kansas cities in which the public water supply within the city is provided by a third party such as a rural water district, or in the case of most of the cities in suburban Kansas City, by WaterOne and the Board of Public Utilities. Some of these water suppliers' pipelines are located in private easements, some in city owned rights-of-way, and for others it may be some combination of the two. What this means is that this article contains general rules, but variations exist, and before trying to apply these rules to a given city you need to be certain of the situation.

Conclusion

Just like the rural water districts, cities share the use of their rights-of-way with a number of other utilities. If anything, the rules governing cities are more complicated than for rural water districts because of the impact of federal and state laws that apply specifically to the telecommunications industry, but tend to be applied generally to the use of these rights-of-ways. However, the bottom line remains the same: cities must use ordinary care in the protection of their facilities from damage by other excavators or they may have no right to reimbursement for damages that occur. To this point, participation in the state's One Call system has not been mandated. There is considerable pressure to require cities and other municipalities to be subject to some uniform rules that govern location of their facilities, whether through the One Call system or otherwise, and as a result these rules may change significantly.

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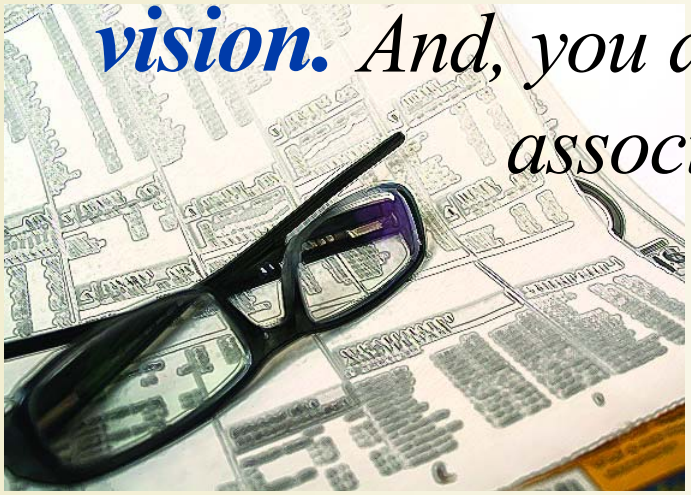

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