

September 30, 1992

Mr. Mike Wetherell
HYDE, WETHERELL, BRAY & HAFF
Owyhee Plaza, Suite 500
1109 West Main Street
Boise, ID 83702

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Wetherell:

You recently requested an opinion from this office regarding the Underground Facilities Damage Prevention Act which was enacted by the Idaho Legislature in 1990, chap. 22, title 55, Idaho Code. The act is designed so that a centralized "one-number locator service" can be made available to simplify the process of locating all underground facilities. You represent a company that provides "one-number locator service" to excavators. According to your letter, some underground facility owners are not willing to cooperate with the one-number locator and provide the necessary information that would enable the locator to properly identify the location of all underground facilities in the relevant area. This unwillingness to cooperate with the one-number locator service is frustrating your client's efforts to provide complete information to excavators. In light of this situation, you question what remedies are available to force cooperation by underground facility owners.

Idaho Code § 55-2201 cogently states the legislature's intent in enacting the Underground Facilities Damage Prevention Act:

It is the intent of the legislature in enacting this chapter to assign responsibilities for locating and keeping accurate records of underground facility locations, for protecting and repairing damage to existing underground facilities, and for protecting the public health and safety from interruption in services caused by damage to existing underground facilities.

To this end, the act establishes a procedure requiring excavators to notify underground facility owners of intended excavations in order to obtain the location of all underground facilities. The act also provides for the creation of a centralized "one-number locator service" to simplify the notification process.

Once established, participation by underground facility owners in the one-number service is mandatory. For instance, before commencing excavation, the excavator shall:

(b) Provide notice of the scheduled commencement of excavation to all owners of underground facilities through a one-number locator service. If no one-number locator service is available, notice shall be provided individually to those owners of underground facilities known to have or suspected of having underground facilities within the area of proposed excavation. The notice shall be communicated to the owners of underground facilities not less than two (2) business days nor more than ten (10) business days before the scheduled date for commencement of excavation, unless otherwise agreed by the parties.

The structure of this paragraph clearly indicates that the one-number locator service was intended to be the primary source of information for excavators. I.C. § 55-2204 is even more certain in its terms:

Two (2) or more persons who own or operate underground facilities in a county may voluntarily establish or contract with a third person to provide a one-number locator service to maintain information concerning underground facilities within a county. Upon the establishment of the first such one-number service, all others operating and maintaining underground facilities within said county shall participate and cooperate with the service, and no duplicative service shall be established pursuant to this chapter. The activities of the one-number locator service shall be funded by all of the underground facility owners/operators required by the provisions of this section to participate in and cooperate with the service.

(Emphasis added.)

Finally, the legislative history of this act shows that the legislature intended mandatory participation by all underground facility owners in one-number locator services when service is available:

The legislation would require all owners of underground facilities to participate in one-call systems if at least two owners agree to establish such systems within a county.

Statement of Purpose, HB 887, RS 24276 (1990 Session, Idaho Legislature). Thus, there is no room for doubt. An underground facility owner must participate in a one-number system if available.

Even though the act is absolutely clear that all underground facility owners must participate in one-number locator services, the question remains as to the remedies available for one-number locators to ensure compliance with the act. Unfortunately, there are no provisions in the act that specifically address non-compliance by underground facility owners in relation to the one-number locator service. The act does allocate damages generally against parties who refuse to comply with the terms of the act when such refusal causes damage to another. For example, Idaho Code § 55-2203(2)(a) provides:

(a) Excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this section.

Similarly, Idaho Code § 55-2203(4) provides:

(4) If the excavator, while performing the excavation, discovers underground facilities which are not identified, the excavator shall cease excavating in the vicinity of the facility and immediately notify the owner or operator of such facilities, or the one-number locator service. The state, county, city or highway district public road agency shall have the right to receive compensation from the underground facility owner for standby cost (based on standby rates made publicly available) incurred as a result of waiting for the owner to arrive at the work site to identify facilities discovered after the owner has identified all known facilities

Thus, an underground facility owner could be liable to the excavator for damages caused by refusing to cooperate with a one-number locator service.

We note that the statutory remedies for excavators do not directly assist one-number locator services in forcing compliance by resistant underground facility owners. The last sentence in Idaho Code § 55-2204 does provide that the one-number locator service shall be funded by the underground facility owners. Although not expressly stated, a one-number locator service provider could probably bring an action against a non-cooperating underground facility owner for the cost incurred in obtaining the necessary information from other sources. A court could reasonably imply from Idaho Code § 55-2204 and the mandatory language in the act that the extraordinary efforts of a one-number locator service for its clients was compensable and that the non-complying underground facility owner should bear the extra costs.

Finally, it should be stated that Idaho Code § 55-2209(1) does provide a civil penalty for non-compliance:

Any person who violates any provision of this chapter, and which violation results in damage to underground facilities, is subject to a civil penalty of not more than one thousand dollars (\$1,000) for each violation. All penalties recovered in such actions shall be deposited in the state general account.

At a minimum, non-complying facility owners should be made aware of this provision and the risks run by refusing to cooperate with a one-number locator service.

If I may be of further assistance to you in this matter, please do not hesitate to contact me.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General