

Rural Water Update

Insights and Developments in the Law

Winter 2005

Water Districts Prevail In Encroachment Actions. 7 U.S.C. § 1926(b)

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Pittsburg County Rural Water District #7 (Pitt-7) recently settled its federal suit against the City of McAlester, Oklahoma. The suit claimed McAlester was making unlawful water sales in violation of 7 U.S.C. § 1926(b) inside of the district's boundaries. McAlester agreed to pay Pitt-7 \$175,000, deliver 355 million gallons of water to Pitt-7 free of charge (valued at over \$700,000) and sell Pitt-7 water (after the free water is used) under a long term contract.

Rural Water Districts have suffered significant losses over the years due to encroachment by municipalities.

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Employee Policy and Procedures Manual - Yes or No?

By Holly Bobo
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Attorneys and human resource professionals agree that there is no right or wrong answer to this frequently asked question. Each water district must decide this issue based on their own unique circumstances. Experts caution that an Employee Policy and Procedures Manual (Employee Handbook) is a "two edge sword" if not well written. It is better to do without than have an Employee Handbook which causes more problems than it solves. When considering adopting a Handbook or Policy Manual there are a few "cardinal rules" that should always be followed.

Rule One: Include at least two separate but identical disclaimers in the Employee Handbook which state: (1) the handbook does NOT constitute an employment contract, (2) the handbook is NOT binding but merely a guideline of employment procedures and policies and (3) the handbook is subject to change at any time. The disclaimers should be in bold, underlined print placed at the beginning of the handbook and again at the end.

Rule Two: Oklahoma is an employment at will state. The Handbook must make clear that an employee can be terminated at any time and for any reason (or without a

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Claims for Damage to Underground Facilities

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Has the water district damaged an underground telephone line lately (or gas line, TV cable, sewer line...)? Whether a rural water district is liable for damage to the underground lines and facilities of others can be a complex issue. Simply because the district damaged another's underground cable or pipe does not automatically mean the district must pay for it. In Oklahoma, rural water districts must comply with the Oklahoma Underground Facilities Damage Prevention Act (OUFDPA) and the Oklahoma Explosives and Blasting Regulation Act (OEBRA) – before excavating. The word "Excavate" is defined by statute. It includes digging, compressing, boring, trenching, or removing earth, rocks etc. However it does not mean digging with hand tools (non-mechanized digging).

Owners of underground facilities (telephone company etc.) must locate and mark or otherwise provide the approximate location of their lines after receiving notice of a proposed excavation. "Approximate" means two feet on either side of the line.

If an emergency exists, (a condition that threatens life, health or property) the district can begin excavation "immediately" (without providing advance notice) - "but must take "reasonable precautions to protect the underground facilities of others"". What is an emergency and what constitutes "reasonable precautions" would of course depend on each unique circumstance. There are no hard and fast rules which defines either term.

Section 142.9a of the OUFDPA mandates that lines installed after 9/1/92 contain materials capable of being detected so that the line can be accurately located. Asking the "claimant" whose underground line/cable/pipe has been damaged, to identify when the line was installed and whether the line material complied with the statute (if installed after 9/1/92) would be a good idea. Failure to use proper sub-surface materials may negate liability.

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Claims for Damages

continuation

OUFDDPA's Section 142.9a (A) does not appear to apply to water districts because it begins with the phrase "Any excavator, except for a public agency...". By statute, water districts are deemed to be an "agency" of the State of Oklahoma. Section 142.9a (B) has no such "exception" clause, and imposes liability if the district *negligently* failed to comply with the OUFDDPA or *negligently* failed to take measures for the protection of the underground lines of others. Section 142.9a (B) indicates something more than failing to comply with the OUFDDPA is required before the district is liable. The non-compliance must rise to the level of negligence – and not merely be a technical violation.

The OUFDDPA does not end the discussion of "who pays". Water districts, being public agencies, are protected by the Oklahoma Tort Claims Act. (OTCA). Under certain circumstances, the OTCA "bars" claims entirely. For example, section 155 (29) of the OTCA states the district shall not be liable if a loss or claim results from "acts or omissions done in conformance with then recognized standards". If the district can show that its actions or failure to take action (despite causing damage to another's underground lines) was in accord with "recognized standards" – this may serve as a complete defense for a damage claim.

The OTCA requires that a claim be presented to the district within one year after the loss occurs. If a claimant fails to present a proper claim within one year – the claim is barred. If a claim is timely presented and denied by the district, suit must be filed within 180 days, otherwise the claim is barred. If the district elects to deny a claim, the denial should be by formal board action and a written notice sent to the claimant. If nothing is done by the district after a claim has been

presented the claim is deemed denied after 90 days. In that instance, the 180 days begins to run, following the end of 90 days.

The first step a district should take when it learns it has damaged an underground facility, is notify the district's insurance carrier. However, many districts maintain deductible limits that may be greater than most claims. As such, the insurance carrier will have little interest in exploring whether the district is liable since the carrier will charge back to the district the full amount of the deductible in settling the claim.

Close analysis of claims may avoid the needless payment of district resources for a claim that should be denied.

Oklahoma requires districts that operate underground water distribution lines participate in the state-wide "one call" notification center. 63 Ok. St. Sec. 142.3. Water districts having fewer than 1,100 meters are exempt from fees charged by the notification center. 63 Ok. St. § 142.4.

Open Records Act – How Wide Open Is It?

By Phyllis Peck

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Oklahoma water districts must comply with the Open Records Act (ORA) and the Records Management Act (RMA) because of their legal status as an "agency" of the State of Oklahoma. These Acts compel the district to maintain and make available to the public nearly every document in the possession of the district – with some important exceptions. Those exceptions include withholding privileged or legal work product data, personal financial information, personnel records, credit reports, minutes of closed executive session, documents deemed confidential under applicable federal and state statutes, etc.

Great care must be taken to maintain district records in compliance with the RMA, and to disclose records (within the limits imposed by statute) upon receipt of a "proper request".

Requests for public records must be in writing. The description of documents sought must have a reasonable degree of certainty so that the district can respond appropriately.

Obtaining copies of records is not a free service. The City of Tulsa charges twenty cents (20¢) per page for copying and one dollar (\$1.00) for certifying a document. For computer generated records/reports Tulsa charges twenty-five cents (.25¢) per page plus any directly incurred costs. Video recordings (VCR) are \$7.50 per T120. For 8½ X 14 or smaller, the copying fee may not exceed twenty-five cents (.25¢) per page and the maximum fee for a certified copy is \$1.00 per page. These charges are consistent with what the ORA allows. The district may recover the actual reasonable direct costs of copying or mechanical reproduction. Special restrictions apply for commercial use of data, and where the request is unduly burdensome.

What is a public record? Any document (not always paper - could be a video, computerized records, recordings, photographic material, etc.) that was created by, received by, or under the control or possession of the district, constitutes a public record. The RMA states that these records must not be destroyed, removed, altered or otherwise damaged.

The risk for the district each time a request is made is disclosing too much or too little. Except for the most routine document requests, conferring with legal counsel will reduce the district's exposure to a claim that it failed to comply with the ORA or RMA.

If you would like to obtain a copy of the rate schedule used by the City of Tulsa, please contact me by e-mail.

Line Extensions In The County Right-of-Way

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Oklahoma water districts are empowered to use the streets, roads, alleys and highways of the state or any political subdivision in connection with the acquisition, construction, improvement, operation or maintenance of its lines. The definition of a political subdivision includes the “county”. 82 Ok. St. § 1324.10(8) requires the district comply with the written specifications for location of lines and facilities as set forth by the county for property within its jurisdiction. But what if the county does not have any written specifications for the location of district water lines that the district wants to place in the right-of-way? No problem. The law mandates that the county *shall concur* with the proposed water district plans for the location of the line (horizontal and vertical placement) or provide the water district with an alternative plan. There is no third option here. The county is not permitted to deny access to the district.

There are times when laying district lines within the county’s right of way is more economical than acquiring private easements. However, situations may arise where the county will demand that the district relocate its lines in connection with a specific county project (such as widening a county road). Who pays for the relocation of the district’s water lines in connection with the county project, the water district or the county?

In *Board of County Commissioners of Creek County, State of Oklahoma vs. Creek County Rural Water District No. 2*, Okla.App. Div. 1, 888 P.2d 540 (1994) Creek County was constructing a new bridge. The project by necessity was going to require that the water district’s existing line (a large diameter transite water main) be moved. Construction activity would have certainly damaged the sensitive transite line. The expense involved in running a new line would have been approximately \$100,000. The county demanded that the water district pay for all expense associated with the relocation. The county sued the district to compel it to move its line and pay all expenses. Although losing before the district court in Creek County – the district ultimately prevailed before the Oklahoma Court of Appeals. The district successfully argued that Oklahoma statutes do not authorize a county to require a water district to move its lines at the district’s expense.

The county claimed the district was a public utility and therefore, under the statutes governing a utility, the water district would be liable for the relocation of its lines. The Court determined that a water district is not a utility (as contemplated by the statute) and therefore, the district was not responsible for the costs associated with the relocation of its line.

The Appellate Court observed in its opinion that the county had admitted that Oklahoma statutory authority was silent on who pays the costs of water line relocation when a county is constructing a county bridge or road and a rural water district owns the water line, which conflicts with the project.

The lesson learned here was that a water district need not yield so quickly to the collective forces of county government, ODOT (which was not a party to the litigation but sided with the county) or even the district court. By standing its ground, and remaining confident in its own reading of the law (for which the Court of Appeals ultimately concurred) the water district and its members were spared the \$100,000 cost to re-locate the district’s line. *[Doyle Davis Harris & Haughey represented the water district in this litigation].*

Encroachment continuation

A municipality will typically run water lines into a district’s territory and provide service to customers that should be served by the district. Such actions by a municipality deprives the district of much needed revenues which would otherwise be available to the district to help pay operating costs and to make system improvements.

However, a federally indebted water district is entitled to certain protections against such action by 7 U.S.C. §1926(b), which forbids municipalities and others from providing water service to customers within the district’s protected territory.

There have been many success stories where a water district has

obtained a judgment or reached a beneficial settlement that resulted in return of customers to the district and/or significant compensation.

Settlements have been made on behalf of other Oklahoma water districts with municipalities, including Creek County RWD #2 (settlement with the cities of Tulsa, Glenpool and Jenks); Sequoyah County RWD #7 (settlement with the Town of Muldrow); Payne County RWD #3 (settlement with the Town of Perkins); Pushmataha County RWD #2 (settlement with the Town of Talihina); Murray County RWD #1 (settlement with the Town of Sulphur). Settlements for water districts in other states have also been concluded with the cities of Las Cruces, New Mexico; Benton, Arkansas and Bryant,

Arkansas.

The ability of rural water districts to prevail in enforcement of §1926(b) and/or to negotiate beneficial settlements has been greatly enhanced in recent years by federal and state appellate court decisions holding that §1926(b) must be construed broadly in favor of the water district and that “any doubt” concerning whether the water district has protection must be resolved in favor of water district.

The firm of Doyle Harris Davis & Haughey served as legal counsel for all of the water districts in each of the settlements described in this article. For more information on 7 U.S.C. §1926(b) go to: http://www.nrwa.org/publicweb/rel_eases/1926b.htm

Executive Session – Dark Side of the Sunshine Law

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Under the Oklahoma Open Meeting Act (OMA) (commonly called the “Sunshine Law”), all meetings of public bodies (which includes rural water districts) must be open to the public. However, there are circumstances in which the district may conduct executive sessions (meetings which are closed to the public) to discuss certain matters.

Section 307(B) of the OMA outlines the limited circumstances in which a district may conduct an executive session. Those circumstances include, among other things, the discussion of employment related matters, negotiations concerning employees and representatives of employee groups, purchase or appraisal of real property, attorney/client communications relating to potential claims, any matter where disclosure of information would violate confidentiality requirements of state or federal law, etc.

To properly go into executive session, the water district board must follow specific procedures, including (1) giving at least 24 hours notice in accordance with Section 311(A)(9) of the OMA, and (2) setting forth in the agenda a provision for conducting the executive session with sufficient information for the public to determine that an executive session will be proposed by the district. The notice should identify the items of business and purposes for the executive session, stating the specific part of Section 307 of the OMA authorizing the executive session. The board must authorize the executive session by a publicly recorded majority vote of a quorum of the members present.

Once the Board has entered executive session, it must ensure that written minutes of the executive session are kept and recorded and that no votes are taken while in executive session. Any voting on an item of business discussed in an executive session must be taken in a public meeting with the vote of each member publicly cast and recorded.

Any records and tape recordings of the executive session are usually considered confidential and are exempt from disclosure under the Oklahoma Open Records Act; however, if a water district board willfully fails to follow the required procedures for going into executive session, all minutes and recordings of the executive session will be made public and each board member can be subject to criminal penalties including fines, imprisonment or both.

Employee Policy and Procedures ... continuation

reason), except for the protected “public policy” areas of the law (age, race, religion, sex etc. discrimination, retaliatory termination, etc.) or unless working under a collective bargaining agreement (i.e. union contract).

Rule Three: State in a conspicuous manner (at the beginning of the Handbook) that (1) the district is an Equal Opportunity Employer and does not discriminate on the basis of race, color, religion, national origin, sex, age, disability, pregnancy, or veteran’s status, and (2) harassment based on any of these areas will not be tolerated in the workplace. This statement should be followed with specific, clear and concise procedures for reporting such acts of harassment to the district.

Rule Four: Always have the employee sign an acknowledgment that he or she has received a copy of the Handbook, has read the Handbook and understands its contents.

Most Handbooks set out benefits such as vacation, sick leave, holidays, insurance and COBRA rights. It is essential to spell out in detail who qualifies for each benefit and when. The employer should explain in unambiguous language what the cost of insurance is to the employee, if any.

The Handbook should explain governmental acts that apply to the district (as an employer) such as the Americans With Disabilities Act (ADA), the Family Leave Act (FMLA), the Occupational Safety and Health Act (OSHA), the Uniformed Service Employment and Reemployment Rights Act (USERRA), Worker’s Compensation and any other Acts which may be applicable. Any drug testing policy implemented by the district must be in writing and acknowledged by the employee. The policy (if one is adopted) should be included in the Handbook.

Experts emphasize that district managers and supervisors should be trained to follow the procedures in the Handbook effectively and professionally, while at the same time, not giving the employee the impression that the Handbook is a guarantee of continued employment. A carefully crafted Handbook can be invaluable to the district and its employees.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.