

Sixty-fifth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1026

Introduced by

Legislative Management

(Economic Impact Committee)

1 A BILL for an Act to create and enact section 49-23-04.1 of the North Dakota Century Code,
2 relating to survey of areas having underground facilities; to amend and reenact sections
3 49-23-01, 49-23-03, 49-23-04, 49-23-05, and 49-23-06 of the North Dakota Century Code,
4 relating to location of underground facilities before excavation; and to provide a penalty.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Section 49-23-01 of the North Dakota Century Code is
7 amended and reenacted as follows:

8 **49-23-01. Definitions.**

9 As used in this chapter, unless the context otherwise requires:

- 10 1. "Abandoned" means no longer in service and physically disconnected from a portion
11 of the facility or from any other facility that is in use or still carries services.
- 12 2. "Board" means the board of directors of the nonprofit corporation governing the
13 notification center under section 49-23-03.
- 14 3. "Careful and prudent manner" means:
- 15 a. Manually excavating within twenty-four inches [60.96 centimeters] of the outer
16 edges of ~~many~~ underground facility on a horizontal plane as located ~~manually~~
17 and marked by the owner or operator ~~by stakes, paint, or other customary~~
18 ~~manner;~~ and supporting
- 19 b. Supporting and protecting the uncovered facility.
- 20 4. "Damage" means:
- 21 a. Substantial weakening of structural or lateral support of an underground facility;
- 22 b. Penetration, impairment, or destruction of any underground protective coating,
23 housing, or other protective device; or

- 1 c. Impact with or the partial or complete severance of an underground facility to the
2 extent that the facility operator determines that repairs are required.
- 3 5. "Emergency" means a sudden, unexpected occurrence, involving a clear and
4 imminent danger, and demanding immediate action to prevent or mitigate loss of, or
5 damage to, life, health, property, or essential public services.
- 6 6. "Emergency responder" means a fire department, a law enforcement officer, or other
7 emergency rescue service.
- 8 7. "Excavation" means any operation in which earth, rock, or other materials in or below
9 the ground is moved or otherwise displaced by means of hand or power tools, power
10 equipment, or explosives and includes grading, trenching, digging, ditching, drilling,
11 augering, tunneling, boring, scraping, and cable or pipe plowing and driving. The term
12 does not include:
- 13 a. Opening a grave in a cemetery.
- 14 b. Plowing, cultivating, planting, harvesting, and similar operations in connection
15 with agricultural activities, unless any of these activities disturbs the soil to a
16 depth of eighteen inches [45.72 centimeters] or more.
- 17 c. Gardening and landscaping unless it disturbs the soil to a depth of twelve inches
18 [30.48 centimeters] or more.
- 19 d. Normal maintenance of roads and streets if the maintenance does not change
20 the original grade and does not involve the road ditch.
- 21 e. Normal repair and maintenance of track and track bed by a railroad on its own
22 right of way.
- 23 8. "Excavator" means a person who conducts excavation.
- 24 9. "Holiday" means New Year's Day, Martin Luther King Day, Presidents' Day, Good
25 Friday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day,
26 Thanksgiving Day, and Christmas Day. When a holiday falls on a Saturday, it is
27 observed on the preceding Friday as if the Friday were the actual holiday, and when a
28 holiday falls on a Sunday, it is observed on the following Monday as if the Monday
29 were the actual holiday.
- 30 10. "Local governmental unit" means a county, township, or city.

- 1 11. "Locate" means an operator's markings of an underground facility showing the
2 approximate horizontal location, including all lines, line direction, intersections, tees,
3 and lateral facilities.
- 4 12. "Locate period" means the later of:
5 a. The forty-eight hour period beginning at 12:01 a.m. of the day after the location
6 request was submitted to the notification center; excluding any Saturday, Sunday,
7 or holiday; and any twenty-four hour extension provided through the notification
8 center; or
9 b. The period between the submission of a location request to the notification center
10 and the noted date and time of excavation.
- 11 13. "Nonprofit corporation" means a corporation established under chapter 10-33.
- 12 ~~13-14.~~ "Notification center" means a center that receives notice from an excavator of planned
13 excavation or any other request for location and transmits this notice to a participating
14 operator.
- 15 ~~14-15.~~ "Operator" means a person who owns or operates an underground facility, including a
16 master meter operator with underground facilities, or a state or local governmental
17 entity. The department of transportation is considered an operator for the department's
18 facilities buried on the department's rights of way. A person is not considered an
19 operator solely because the person is an owner or tenant of real property where
20 underground facilities are located if the underground facilities are used exclusively to
21 furnish services or commodities on that property.
- 22 16. "Positive response" means notification by the operator to the notification center that
23 underground facilities within the area covered by a location request have been marked
24 or cleared.
- 25 ~~15-17.~~ "Tangible marking materials" means any material perceptible by touch used to mark
26 the location of an underground facility, including flags, stakes, poles, or other materials
27 inserted into or affixed to the ground. The term does not include paint, chalk, or other
28 liquid ink-based materials applied to the ground.
- 29 ~~16-18.~~ "Underground facility" means an underground line, pipeline, cable, facility, system, and
30 its appurtenances used to produce, store, convey, gather, transmit, or distribute
31 communications, data, electricity, power, television signals, heat, gas, oil, petroleum

1 products, carbon dioxide, water, steam, sewage, hazardous liquids, and other similar
2 substances. Privately owned and operated underground facilities which do not extend
3 beyond the boundary of the private property are excluded.

4 ~~17-19.~~ "Unexpected occurrence" includes a fire, flood, earthquake or other soil or geologic
5 movement, riot, accident, damage to a subsurface installation requiring immediate
6 repair, or sabotage.

7 ~~18-20.~~ "Water" includes potable water, wastewater, and storm water.

8 **SECTION 2. AMENDMENT.** Section 49-23-03 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **49-23-03. Notification center - Participation - Establishment.**

11 1. An operator shall participate in and share in the costs of the statewide notification
12 center operated by a vendor selected under this section.

13 2. ~~A~~ A person doing business as an excavator licensed or operator under this chapter
14 shall participate in and share in the costs of a statewide notification center on a
15 per-call basis. An operator, installing the operator's own facilities, may not be charged
16 as an excavator.

17 3. An operator shall participate in and share the costs of the one-call excavation notice
18 system by:

19 a. Submitting the information required by the notification center to allow the center
20 to notify the operator of excavation activity;

21 b. Updating the information provided to the notification center on a timely basis;

22 c. Installing and paying for equipment reasonably requested by the notification
23 center to facilitate receipt of notice of excavation from the center;

24 d. Paying the costs charged by the notification center on a timely basis; and

25 e. Receiving and responding to excavation notices, including emergency notices.

26 4. A nonprofit corporation, North Dakota one-call, incorporated, shall govern the
27 notification center. ~~The initial incorporators of the corporation may solicit bids for any~~
28 ~~services provided for the operation of the center. The corporation shall provide~~
29 ~~advance notice of the first organizational meeting by publication in qualified legal~~
30 ~~newspapers and in appropriate trade journals and by written notice to all appropriate~~
31 ~~trade associations.~~

1 a. ~~The nonprofit corporation must be incorporated by seventeen initial incorporators,~~
2 ~~with one member representing the house of representatives and one member~~
3 ~~representing the senate appointed by the legislative management, one member~~
4 ~~representing telecommunications companies offering local exchange service to~~
5 ~~fewer than fifty thousand subscribers, one member representing~~
6 ~~telecommunications companies offering local exchange service to fifty thousand~~
7 ~~or more subscribers, one member representing rural water systems, one member~~
8 ~~representing rural electric cooperatives, one member representing~~
9 ~~investor owned electric utilities, one member representing investor owned natural~~
10 ~~gas utilities, one member representing cable television systems, one member~~
11 ~~representing cities with a population of fewer than five thousand, one member~~
12 ~~representing cities with a population of at least five thousand, one member~~
13 ~~representing counties, one member representing underground interstate carriers~~
14 ~~of gas, one member representing interstate carriers of petroleum, one member~~
15 ~~representing interstate carriers of telecommunications services, one member~~
16 ~~representing contractors who perform excavation services, and one member~~
17 ~~representing the production sector of the American petroleum institute. The initial~~
18 ~~incorporators must represent and be designated by operators, excavators, and~~
19 ~~other persons eligible to participate in the center. The legislative members are~~
20 ~~entitled to the same compensation and expenses as provided for members of~~
21 ~~committees of the legislative management. The legislative council shall pay the~~
22 ~~compensation for the legislative members.~~

23 b. ~~The initial incorporators shall establish, before August 1, 1996, a~~The board of
24 ~~directors of the nonprofit corporation which consists~~North Dakota one-call,
25 ~~incorporated must consist~~ of eight~~nine~~ members representing the participants in
26 the center. The members of the board of directors must be chosen and serve for
27 terms as provided in the bylaws of the corporation. One member of the board of
28 directors must be chosen by representatives of each of the following participant
29 groups:

30 (1) Telecommunications service providers.

31 (2) Gas distribution lines operators.

1 (3) Oil or gas transmission or gathering lines operators.

2 (4) Electrical transmission and distribution operators.

3 (5) Rural water systems.

4 (6) Cities of five thousand or more population.

5 (7) Cities of fewer than five thousand population.

6 (8) Cable television service providers.

7 (9) Excavators.

8 b. The board shall establish a competitive bidding procedure to select a vendor to
9 provide the notification service, establish a procedure by which members of the
10 center share the costs of the center on a fair, reasonable, and nondiscriminatory
11 basis, and do all other things necessary to implement the purpose of the center.
12 Any agreement between the center and a vendor for the notification service may
13 be modified from time to time by the board, and any agreement shall be reviewed
14 by the board at least once every three years, with an opportunity to receive new
15 bids, if desired, by the board. An operator may submit a bid and be selected to
16 contract to provide the notification center service.

17 c. Members of the board and any of its agents are immune from any liability of any
18 kind based on any acts or omissions in the course of the performance of
19 responsibilities in an official capacity except for bodily injury arising out of
20 accidents caused by or contributed to by the negligence of the board member or
21 agent.

22 d. The board shall aid the state's attorneys of the various counties in the
23 enforcement of this chapter and the prosecution of any violations. The board may
24 institute a civil action for an injunction to enjoin violations of this chapter without
25 proof that anyone suffered actual damages.

26 e. ~~The notification center must be in operation by March 1, 1998.~~

27 **SECTION 3. AMENDMENT.** Section 49-23-04 of the North Dakota Century Code is
28 amended and reenacted as follows:

29 **49-23-04. Excavation.**

30 1. Except in an emergency, an excavator shall contact the notification center and provide
31 an excavation or location notice ~~at least forty-eight hours~~ before beginning any

1 excavation, ~~excluding Saturdays, Sundays, and holidays, unless otherwise agreed to~~
2 ~~between the excavator and operator. If an operator determines more time is necessary~~
3 ~~for location, the operator may request a twenty-four-hour extension of the excavation~~
4 ~~or location notice by notifying the notification center. The notification center shall notify~~
5 ~~the excavator of the extension.~~ An excavation begins the first time excavation occurs
6 in an area that was not previously identified by the excavator in an excavation notice.

7 The notice must contain:

- 8 a. The name, address, and telephone number of the person making the notification;
9 b. The name, address, and telephone number of the excavator;
10 c. The date and time when excavation is scheduled to begin;
11 d. The depth of planned excavation;
12 e. The type and extent of excavation being planned, including whether the
13 excavation involves tunneling or horizontal boring;
14 f. Whether the use of explosives is anticipated and any other information as may be
15 required by the notification center; and
16 g. The location of the excavation by any one or more of the following means:
17 (1) A specific street address;
18 (2) A reference to a platted lot number of record;
19 (3) An identifiable roadway or roadway intersection; or
20 (4) A specific quarter section by section number, range, township, and county.

21 In this case, the location shall be further described by coordinates measured
22 in feet from the nearest one-fourth corner or section corner.

- 23 h. ~~If the location of the excavation is too large or complex to be clearly and~~
24 ~~adequately identified by description in the location request~~

- 25 2. Unless otherwise exempted, the excavator shall provide additional location ticket
26 request must include site identification information by one or more of the following
27 means: white marking, digital white lining, project staking, geographic information
28 system shape file, detailed drawing, map, or other appropriate means agreed upon by
29 the parties to the ticket. ~~An excavator may not be required to provide additional~~
30 ~~location information if the excavator plans a meeting with the affected operators at the~~
31 ~~location of the excavation before beginning any excavation, or if the notice given under~~

1 ~~this section includes a specific street address or reference to a platted lot number of~~
2 ~~record of the location of the excavation.~~ Site identification under this subsection is not
3 required if:

4 a. The precise location of excavation can be clearly and adequately identified on the
5 location notice and is limited to a single street address or a platted lot number of
6 record;

7 b. The precise location of excavation can be clearly and adequately identified on the
8 location notice and the excavation is an emergency excavation; or

9 c. Prior to any excavation, the excavator requests and conducts a meeting with the
10 affected operators at the location of the excavation.

11 ~~i.3.~~ A request for location is limited to ~~the area to be excavated during the twenty-one-day~~
12 ~~period following the location request~~ an area not exceeding three contiguous city
13 blocks within an urban area or an area of four contiguous quarter sections or five
14 linear miles [8.05 kilometers] in a rural area.

15 ~~j.4.~~ An excavator may begin excavation in a location if ~~the location period has passed~~
16 ~~without notification of a requested extension or prior to the expiration of the location~~
17 ~~period~~ if when the excavator has received notice that all facilities have been located or
18 cleared or at the expiration of the location period or extension of the location period.

19 ~~2-5.~~ The notification center shall:

20 a. Provide a toll-free telephone number and assign an inquiry identification number
21 to each excavation notice and retain a record of all excavation notices received
22 for at least six years.

23 b. Immediately transmit the information contained in an excavation notice to every
24 operator that has an underground facility in the area of the proposed excavation.

25 c. Inform the persons giving notice of an intent to engage in an excavation activity
26 the names of participating operators of underground facilities to whom the notice
27 will be given.

28 d. Establish procedures for assuring positive response from the affected operator in
29 all emergency excavation notices.

- 1 e. Establish procedures to receive from operators and convey to ticket holders
2 positive response when operators have located or cleared underground facilities
3 identified within the area of a location request.
- 4 3-6. a. ~~An operator, within forty-eight hours, or any extension of that period, after~~
5 ~~receiving an excavation notice from the center, excluding Saturdays, Sundays,~~
6 ~~and holidays, unless otherwise agreed to between the excavator and operator,~~
7 ~~shall locate and mark or otherwise provide the approximate horizontal location of~~
8 ~~the underground facilities of the operator~~ with underground facilities within the
9 area of a location request shall locate and mark or otherwise provide the
10 approximate horizontal location of the underground facilities of the operator within
11 the location period or as agreed by the parties.
- 12 b. For purposes of this section, the approximate horizontal location of the
13 underground facilities is a strip of land two feet [60.96 centimeters] on either side
14 of the underground facilities. An operator of a facility required to be locatable is
15 responsible for the costs of location. If an excavator is unable to locate a facility
16 within two feet on either side of the operator's facility location markings and
17 requests assistance from the operator to locate the facility, but the operator fails
18 to provide the requested assistance within a reasonable time, the operator is
19 responsible for the excavator's reasonable costs incurred to locate the facility.
20 This subdivision does not apply to an underground facility to convey water
21 installed before August 1, 2013.
- 22 c. When an operator cannot establish the exact location of the underground facility
23 to convey water, the operator shall mark the location as accurately as possible
24 and the excavator may proceed with caution. When excavation operations
25 approach the estimated location of the underground facility to convey water, the
26 exact location of the facility must be determined by safe and acceptable means.
27 The uncovered facility must be supported and protected to prevent damage.
- 28 d. Markers used to designate the approximate location of underground facilities
29 must follow the current color code standard used by the American public works
30 association.

- 1 e. If the operator cannot complete marking of the excavation area before the
2 excavation commencement time stated in the excavation notice, the operator
3 shall promptly contact the excavator.
- 4 f. After facilities are located by an operator, an excavator shall notify the notification
5 center if:
- 6 (1) The excavator postpones the excavation commencement time stated in the
7 excavation notice by more than forty-eight hours, or any extension of that
8 period, or cancels the excavation;
- 9 (2) The markings have been obliterated or obscured;
- 10 (3) Weather conditions have impeded visibility of the markings;
- 11 (4) The site shows evidence of recent excavation; or
- 12 (5) The excavator has other reason to believe the markings are incorrect or
13 missing.
- 14 g. An excavator may not use a location more than twenty-one days, or any
15 extension of that period, after the planned excavation date unless the excavator
16 has made previous arrangements with the operators affected.
- 17 h. If excavation has not occurred within the initial twenty-one days of the locate, the
18 excavator shall request that the facility be relocated before excavating unless
19 other arrangements have been made with the underground facility owner. Upon
20 the third locate request at the same excavation site where no excavation has
21 occurred after the initial two locates, the excavator is responsible for reasonable
22 costs associated with relocating facilities in that location. If the issue of whether
23 excavation has occurred is disputed for purposes of this section, the excavator
24 bears the burden of proof that excavation has occurred.
- 25 i. If a relocate request is made for an area which includes areas where excavation
26 has been completed, a request for relocate must be modified from the original
27 locate request to reflect only the area to be excavated during each subsequent
28 twenty-one-day period, otherwise the excavator is responsible for reasonable
29 costs associated with relocating facilities in the location.
- 30 j. An excavator that makes repeated location requests within the area of a
31 previously made location request due to the excavator's failure to reasonably

1 maintain and remove markings under subsection 3 of section 49-23-05 or failure
2 to follow prudent and careful digging practices required by subsection 5 of
3 section 49-23-05 is responsible for reasonable costs of location and removal if
4 the public service commission determines the additional location request was
5 caused by the excavator's failure described in this subdivision.

6 k. If in the course of excavation the excavator is unable to locate the underground
7 facility or discovers that the operator of the underground facility has incorrectly
8 located the underground facility, the excavator shall promptly notify the operator
9 or, if unknown, the one-call notification center.

10 k.l. A facility owner, excavator, or other person may not present or presume that an
11 underground facility is abandoned, or treat an underground facility as abandoned,
12 unless the facility has been verified as abandoned by reference to installation
13 records or by testing. The notification center shall establish a method of providing
14 personnel from a facility owner qualified to safely inspect and verify whether a
15 facility is abandoned or inactive if necessary. An inactive facility must be
16 considered active for purposes of this section.

17 l.m. An underground facility owner shall make all new facilities locatable.

18 n. An operator that has completed marking of the excavation area or has
19 determined there are no facilities in the area identified in the ticket shall provide
20 positive response to the notification center in compliance with the notification
21 center's procedures established under subsection 5 for assuring positive
22 response from operators.

23 4.7. If an excavation is being made in a time of emergency, all reasonable precautions
24 must be taken to protect the underground facilities. In an emergency, the excavator
25 shall give notification in compliance with this chapter, as soon as practical, that an
26 emergency exists. As soon as practical, each operator shall provide all location
27 information that is reasonably available to the excavator.

28 **SECTION 4.** Section 49-23-04.1 of the North Dakota Century Code is created and enacted
29 as follows:

1 **49-23-04.1. Survey.**

2 1. An individual making a request for location for information, design, or purposes other
3 than excavation shall contact the notification center for a survey location. The survey
4 notice must contain:

5 a. The name, address, and telephone number of the person making the notification;

6 b. The name, address, and telephone number of the surveyor;

7 c. The date and time information will be captured;

8 d. The depth of any planned future excavation;

9 e. The type and extent of any planned future excavation, including whether it
10 involves tunneling or horizontal boring;

11 f. Whether the use of explosives is anticipated;

12 g. Any other information the notification center requires;

13 h. The location of the area to be surveyed by one of the following means:

14 (1) A specific street address;

15 (2) A reference to a platted lot number of record;

16 (3) An identifiable roadway or roadway intersection; or

17 (4) A specific quarter section by section number, range, township, and county.

18 In this case, the location must be further described by coordinates

19 measured in feet from the nearest quarter section corner or section corner.

20 2. Unless otherwise exempted, the ticket request must include site identification
21 information by one or more of the following means: white marking, digital white lining,
22 project staking, geographic information system shape file, detailed drawing, map, or
23 other means agreed upon by the parties to the ticket. Site identification under this
24 subsection is not required if:

25 a. The precise location of planned future excavation can be clearly and adequately
26 identified on the location notice and is limited to a single street address or a
27 platted lot number of record; or

28 b. Prior to any survey, the excavator requests and conducts a meeting with the
29 affected operators at the location of the survey.

30 3. The notification center shall:

- 1 a. Immediately transmit the information contained in a survey notice to every
- 2 operator that has an underground facility in the survey area; and
- 3 b. Inform the individual who made the survey location request of the names of
- 4 participating operators of underground facilities to whom the notice will be given.
- 5 4. Within five days; excluding Saturdays, Sundays, and holidays; an operator with a
- 6 facility within the survey area shall locate or mark the facilities physically, provide
- 7 location information electronically, or meet with the ticket holder.
- 8 5. Meetings may be held at the discretion of the ticket holder.
- 9 6. Electronic information may be exchanged at the discretion of the operator.
- 10 7. The survey ticket holder shall assume ownership of materials used to mark the facility,
- 11 use reasonable efforts to maintain markings until the survey information has been
- 12 captured, and remove all tangible marking materials used to mark the facility and the
- 13 site area upon completion of the capture.
- 14 8. The survey ticket holder is responsible for the reasonable costs of any relocate after a
- 15 survey location has been properly located and marked.

16 **SECTION 5. AMENDMENT.** Section 49-23-05 of the North Dakota Century Code is
17 amended and reenacted as follows:

18 **49-23-05. Precautions to avoid damage.**

19 To avoid damage to and minimize interference with underground facilities in and near the
20 ~~construction~~excavation area, ~~an excavator~~a ticket holder shall:

- 21 1. Maintain a clearance between an underground facility and the cutting edge or point of
- 22 any mechanized equipment, considering the known limit of control of the cutting edge
- 23 or point to avoid damage to the facility.
- 24 2. Provide support in a manner approved by the operator for underground facilities in and
- 25 near the construction area, including backfill operations to protect the facilities. Backfill
- 26 must be of a material equal to or better in both quality and quantity to the existing
- 27 backfill.
- 28 3. Assume ownership of materials used to mark the facility, use reasonable efforts to
- 29 maintain markings during excavation, and remove all tangible marking materials used
- 30 to mark the underground facility and site area upon completion of the excavation.

1 4. Assume the cost of excavation to expose the facility unless otherwise indicated by
2 owner of facility.

3 5. Conduct the excavation in a careful and prudent manner.

4 6. Properly manage spoil material to prevent shifting or falling material that could
5 damage belowground facilities.

6 **SECTION 6. AMENDMENT.** Section 49-23-06 of the North Dakota Century Code is
7 amended and reenacted as follows:

8 **49-23-06. Damage to facilities - Penalty.**

- 9 1. a. If any damage occurs to an underground facility or its protective covering, the
10 excavator shall notify the operator as soon as reasonably possible. When the
11 operator receives a damage notice, the operator shall dispatch, as soon as
12 reasonably possible, personnel to the damage area to investigate. If the damage
13 endangers life, health, or property, the excavator responsible for the work shall
14 take immediate action to protect the public and property and to minimize the
15 hazard until arrival of the operator's personnel or until emergency responders
16 have arrived and taken charge of the damaged area.
- 17 b. An excavator shall delay backfilling in the immediate area of the damaged
18 underground facilities until the damage has been investigated by the operator,
19 unless the operator authorizes otherwise. The repair of damage must be
20 performed by the operator or by qualified personnel authorized by the operator.
- 21 c. An excavator ~~who knowingly is guilty of a class A misdemeanor if the excavator~~
22 damages an underground facility or its protective covering and knew or
23 reasonably should have known the damage occurred and who;
- 24 (1) The excavator does not notify the operator as soon as reasonably possible;
25 or ~~who~~
- 26 (2) The excavator backfills in violation of subdivision b ~~is guilty of a class A~~
27 misdemeanor.
- 28 2. a. If an excavator fails to comply with this chapter or damages an underground
29 facility, the excavator is liable for all damages caused by the failure to comply
30 with this chapter and for all damages to the facilities and must reimburse the
31 operator for the cost of location, repair and restoration, loss of product, and

- 1 interruption of service occurring because of the damage or injury to the facilities,
2 together with reasonable costs and expenses of suit, including reasonable
3 attorney's fees.
- 4 b. Reimbursement to the operator under this subsection is not required if the
5 damage to the underground facility was caused by the sole negligence of the
6 operator or the operator failed to comply with sections 49-23-03 and 49-23-04.